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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ATOMIC SAFETY AND LICENSING APPEAL BOARD

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Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

June 13, 1984
(ALAB-773)

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In the Matter of)
)
LONG ISLAND LIGHTING COMPANY)
)
(Shoreham Nuclear Power Station,)
Unit 1))
_____)

Docket No. 50-322 OL-3
(Emergency Planning)

Stewart M. Glass, New York, New York, (with whom George Jett, Spence W. Perry, and Lorri L. Jean, Washington, D.C., were on the brief) for the Federal Emergency Management Agency.

Karla J. Letsche, Washington, D.C. (with whom Martin B. Ashare, Hauppauge, New York, and Herbert H. Brown, Lawrence Coe Lanpher, and Christopher M. McMurray, Washington, D.C., were on the brief) for Suffolk County, New York.

Donald P. Irwin, Richmond, Virginia, (with whom Lee B. Zeugin, Richmond, Virginia, was on the brief) for the Long Island Lighting Company.

Edwin J. Reis (David A. Repka on the brief) for the Nuclear Regulatory Commission staff.

DECISION

Pursuant to 10 CFR § 2.740(b)(1) of the Commission's regulations, parties may generally obtain discovery "regarding any matter, not privileged, which is relevant to the subject matter involved in the proceeding" The Federal Emergency Management Agency (FEMA) appeals from a Licensing Board decision ordering production of various

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documents in connection with the ongoing litigation of emergency planning issues in this operating license proceeding involving Long Island Lighting Company's (LILCO) Shoreham nuclear facility. FEMA opposed intervenor Suffolk County's request for production of the documents on the ground that they are exempt from discovery under the executive or deliberative process privilege. In our view, the privilege is validly invoked here and the County has not made the requisite showing of need for the documents at this stage of the litigation. Accordingly, we reverse the Licensing Board's decision.

BACKGROUND

Under Commission regulations, no full-power operating license for a nuclear power reactor can issue unless the NRC finds that there is reasonable assurance that adequate protective measures both on and off the facility site can and will be taken in the event of a radiological emergency.¹ With regard to the adequacy of offsite emergency measures, the NRC must "base its findings on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans

¹ See 10 CFR § 50.47(a)(1). By virtue of 10 CFR § 50.47(d), the Commission has ruled that a license authorizing fuel loading and low-power testing at Shoreham may be issued in the absence of an approved offsite emergency plan. See CLI-83-17, 17 NRC 1032 (1983).

are adequate and whether there is reasonable assurance that they can be implemented."²

FEMA is an independent agency within the Executive Branch established pursuant to Reorganization Plan No. 3 of 1978.³ Its director is appointed by the President with the advice and consent of the Senate.⁴ In response to the recommendations of the Kemeny Commission on the accident at Three Mile Island, President Carter directed that FEMA

² 10 CFR § 50.47(a)(2). This provision reads, in part, as follows:

The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assessment as to whether the applicant's onsite emergency plans are adequate and whether there is reasonable assurance that they can be implemented. A FEMA finding will primarily be based on a review of the plans. Any other information already available to FEMA may be considered in assessing whether there is reasonable assurance that the plans can be implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability.

³ 43 Fed. Reg. 41,943 (1978). FEMA was activated by Executive Order 12127, 44 Fed. Reg. 19,367 (1979).

⁴ 43 Fed. Reg. 41,943 (1978). See also Executive Order 12148, 44 Fed. Reg. 43,239 (1979).

assume lead responsibility for all offsite nuclear emergency planning and response.⁵

To facilitate coordinated planning, FEMA and the Commission entered into a Memorandum of Understanding in January 1980 delineating the respective responsibilities and undertakings of the two agencies.⁶ That Memorandum was superseded later in 1980.⁷ Under the Memorandum now in effect, FEMA has the responsibility for reviewing emergency plans and agrees to provide the NRC with findings and determinations on the current status of emergency preparedness around particular plant sites for use in NRC licensing proceedings. FEMA also agrees to make expert witnesses available at such proceedings, including related discovery proceedings, to support its findings and determinations. The NRC then reviews the FEMA findings and determinations and makes decisions with regard to the overall state of emergency preparedness in connection with applications for operating licenses.⁸

⁵ See Executive Order 12241, 45 Fed. Reg. 64,879 (1980) and Memorandum of Understanding Between NRC and FEMA To Accomplish a Prompt Improvement in Radiological Emergency Planning and Preparedness, 45 Fed. Reg. 5847, 5848 (1980).

⁶ 45 Fed. Reg. 5847 (1980).

⁷ 45 Fed. Reg. 82,713 (1980).

⁸ The establishment of day-to-day procedures for
(Footnote Continued)

FEMA relies on Regional Assistance Committees (RACs) to review emergency plans and prepare the FEMA findings and determinations. These committees are set up in each region to assist state and local officials in the development of emergency plans, and to review the adequacy of those plans.⁹ They generally consist of representatives from the NRC, the Environmental Protection Agency, the Departments of Health and Human Services, Energy, Transportation, Agriculture, and Commerce, and other Federal departments or agencies as appropriate.¹⁰ Each RAC is chaired by the FEMA Regional Representative.

Pursuant to a request from the NRC, FEMA arranged for a RAC to review the LILCO emergency plan, referred to as the LILCO Transition Plan.¹¹ Representatives from six federal agencies, plus two FEMA consultants, conducted the review of Revisions I and III of the plan. Their individual comments

(Footnote Continued)
carrying out the arrangements in the Memorandum is in the hands of an NRC/FEMA Steering Committee comprised of equal numbers of FEMA and NRC representatives. Steering Committee decisions must be unanimous and, in the event of disagreement, issues are referred to NRC and FEMA management for resolution.

⁹ 44 CFR § 350.6(b).

¹⁰ See 44 CFR § 351.10.

¹¹ See Memorandum in Support of FEMA's Appeal of an Order of the Atomic Safety and Licensing Board and Request for a Stay (May 21, 1984) (affidavit of Louis O. Giuffrida at 2.

evolved into a single plan review document that was the subject of a RAC meeting at the FEMA offices in New York City on January 20, 1984.¹² The final review document was submitted to the NRC on March 15, 1984.¹³

FEMA submitted its findings and determinations in the form of testimony on April 18. It consisted of textual material prepared by four witnesses, including the RAC Chairman, plus several attachments, including the RAC Final Report. Two days later, intervenor Suffolk County served on FEMA a request that it produce various documents. The County requested:

All documents that were produced in connection with, or in any way relate to the FEMA Regional Assistance Committee ("RAC") review of the Lilco Transition Plan for the Shoreham Nuclear Power Station, including, but not limited to . . . [a]ll memoranda, correspondence, questions, comments, reports, evaluations, ratings, summaries, notes, . . . drafts, . . . and transcripts, minutes, summaries or notes of meetings, discussions or conferences including telephone conferences, among RAC members or others relating to the RAC review. . . .¹⁴

On May 8, Suffolk County filed with the Licensing Board a motion to compel a response to its request for the production of documents. Informal discussions led to the

¹² Id. (affidavit of Roger B. Kowieski at 6).

¹³ Id. (affidavit of Louis O. Giuffrida at 2).

¹⁴ See Suffolk County Request for Production of Documents by FEMA (April 20, 1984) at 2.

release of some material but, during a conference among the parties and the Licensing Board on May 9, FEMA indicated that it would assert the executive or deliberative process privilege with respect to thirty-seven documents. This privilege protects from public disclosure governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated.¹⁵

The Licensing Board established a schedule for the filing of a list of the documents, the submission of briefs, and in camera Board examination of the documents themselves. Following the receipt of all materials and inspection of the documents, the Licensing Board, during a telephone conference call on the afternoon of May 18, announced its ruling ordering the release of thirty of the thirty-seven items. The Board followed up its oral ruling with a memorandum and order issued later that day.¹⁶

The Board found, as a threshold matter, that FEMA had made a prima facie showing of executive privilege.¹⁷ In

¹⁵ Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318 (D.D.C. 1966), aff'd, 384 F.2d 979 (D.C. Cir.), cert. denied, 389 U.S. 952 (1967).

¹⁶ Memorandum and Order Ruling on Suffolk County Motion to Compel Production of Documents by FEMA (May 18, 1984) (unpublished) (hereafter Memorandum and Order).

¹⁷ Id. at 6.

this connection, the Board rejected the County's assertion that the material consisted of purely factual matter not subject to the privilege. "[T]he thrust of these documents," the Board found, "is that they contain evaluations, advisory opinions, recommendations and deliberations which fall within 'executive privilege.' We also find that the FEMA findings as adopted from the RAC Report, involve the decision making process of government which is protected by executive privilege."¹⁸

The Board nevertheless determined that the County's need for the documents "is greater than the harm or 'chilling effect' which such release will have on decision making in the future."¹⁹ The Board found it significant that the RAC Report was part of the FEMA findings and determinations to be submitted formally into evidence at the hearing, and determined 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."²⁰ The Board ordered FEMA to turn over the documents by close of business on May 21.

¹⁸ Ibid.

¹⁹ Id. at 7-8.

²⁰ Id. at 8.

On the afternoon of May 21, FEMA filed an appeal from the Licensing Board's order, accompanied by a motion for a stay of the Board's decision. Later that afternoon, we entered an ex parte emergency stay to protect our jurisdiction and, following the submission of written responses to the FEMA motion and oral argument held on May 23, we continued the stay pending expedited consideration of FEMA's appeal on the merits.²¹ Briefs addressing the merits of FEMA's claim were filed on June 1, supplemental briefs were filed on June 5,²² and we heard oral argument on June 7.

ANALYSIS

1. Legal Principles. The legal principles governing the issues under review may be stated simply and, as the Licensing Board observed and both FEMA and Suffolk County acknowledge,²³ are largely uncontroverted. (As we shall

²¹ Memorandum and Order of May 24, 1984 (unpublished).

²² On May 30, we specifically requested that the parties address the permissibility and advisability of one federal agency's ordering the disclosure of documents by another agency. We asked that the issue be addressed generally, and with specific reference to the Memorandum of Understanding establishing procedures for FEMA's participation in NRC licensing proceedings. Order of May 30, 1984 (unpublished). This issue was the subject of the June 5 supplemental briefs. The briefs, prepared under a tight deadline, have been quite helpful. All parties are in agreement that in appropriate circumstances the Licensing Board has authority to order the release of the documents.

²³ Memorandum and Order at 3-4; Suffolk County Brief in
(Footnote Continued)

discuss later, application of these principles to the facts of this case produces the disagreement among the parties.) The deliberative process privilege protects from discovery governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.²⁴ The privilege may be invoked in NRC proceedings.²⁵ It is a qualified privilege, however, which can be overcome by an appropriate showing of need.²⁶ A balancing test must be applied to determine whether a litigant's demonstrated need for the documents outweighs the asserted interest in confidentiality. In this respect, the government agency bears the burden of demonstrating that the

(Footnote Continued)

Opposition to FEMA's Appeal of the May 18 ASLB Order Compelling Production of Documents by FEMA (June 1, 1984) at 13 (hereafter Suffolk County Brief); Memorandum in Support of FEMA's Appeal of an Order of the Atomic Safety and Licensing Board at 7 (hereafter FEMA Brief).

²⁴ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150 (1975); United States v. Leggett & Platt, Inc., 542 F.2d 655, 658-59 (6th Cir. 1976), cert. denied 430 U.S. 945 (1977); Carl Zeiss Stiftung, supra, 40 F.R.D. at 324.

²⁵ Virginia Electric and Power Co. (North Anna Power Station, Units 1 and 2), CLI-74-16, 7 AEC 313 (1974); Consumers Power Co. (Midland Plant, Units No. 1 & 2), ALAB-33, 4 AEC 701 (1971).

²⁶ Carl Zeiss Stiftung, supra, 40 F.R.D. at 327. Suffolk County indicates that the privilege can be overcome "by a showing of compelling need." Suffolk County Brief at 13.

privilege is properly invoked,²⁷ but the party seeking the withheld information has the burden of showing that there is an overriding need for its release.²⁸

2. Weighing and Balancing Competing Interests. Following consideration of supporting affidavits filed by the Director of FEMA and other FEMA officials, and after in camera review of the documents, the Licensing Board found that FEMA had adequately demonstrated that the privilege is properly invoked in this case. We agree. Suffolk County claims that the privilege does not apply because the documents contain technical findings that have nothing to do with FEMA policy making.²⁹ The privilege is not limited to policy making, however. Rather, it may attach to "the deliberative process that precedes most decisions of government agencies."³⁰ The Licensing Board was correct in

²⁷ Smith v. FTC, 403 F.Supp. 1000, 1016 (D. Del. 1975).

²⁸ United States v. American Telephone & Telegraph Co., 86 F.R.D. 603, 610 (D.D.C. 1979).

²⁹ Suffolk County Brief at 16-17.

³⁰ Russell v. Dep't of the Air Force, 682 F.2d 1045, 1047 (D.C. Cir. 1982). Although the Russell case involved a request under the Freedom of Information Act (FOIA), 5 USC § 552, it is relevant to a consideration of the scope of the deliberative privilege because FOIA Exemption 5 incorporates civil discovery privileges. Renegotiation Board v. Grumman Aircraft Engineering Corp., 421 U.S. 168, 184 (1975).

determining that it applies to the decisional process by which FEMA arrives at its findings and conclusions.³¹

We recognize that purely factual material must be segregated and released unless "inextricably intertwined" with privileged communications,³² or the disclosure of such factual material would reveal the agency's decision-making process.³³ The Licensing Board rejected Suffolk County's claim that the documents contained discrete factual information. We have reviewed the documents ourselves and agree that the statements of fact cannot be segregated.

Playboy Enterprises, Inc. v. Dep't of Justice,³⁴ relied on by the County,³⁵ does not require a contrary result. In that case, the court concluded that whether material is considered factual or deliberative is determined in part by

³¹ See id. (privilege applies to predecisional documents which are used as part of a process to determine whether certain profits by government contactors were excessive); Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), cited with approval in United States v. Weber Aircraft Corp., 52 U.S.L.W. 4351, 4352 (U.S. March 20, 1984) (privilege applies to accident reports where disclosure would hamper the efficient operation of the Air Force flight safety program).

³² Sterling Drug Inc. v. Harris, 488 F. Supp. 1019, 1024 (S.D.N.Y. 1980).

³³ Russell, supra, 682 F.2d at 1048.

³⁴ 677 F.2d 931 (D.C. Cir. 1982).

³⁵ App. Tr. 148.

the context in which the material was prepared. Factual material included in case summaries was protected against disclosure where prepared "for the sole purpose of assisting the . . . [decisionmaker] to make a complex decision in an adjudicatory proceeding."³⁶ Such material was contrasted with that "prepared only to inform the Attorney General of facts which he in turn would make available to members of Congress."³⁷ The Playboy case is consistent with the well recognized distinction between memoranda prepared in order to assist a decisionmaker in arriving at a decision and those -- such as postdecisional memoranda -- that are not.³⁸ Cases decided after Playboy have approved the withholding of "the raw materials that went into the formulation" of an agency commissioner's remarks³⁹ as well as "a preliminary draft of . . . [an] official document."⁴⁰

Having found that the privilege was properly asserted, the Licensing Board went on to find that, under a balancing test, the County's need for the documents was sufficient to

³⁶ Playboy Enterprises, supra, 677 F.2d at 936.

³⁷ Ibid.

³⁸ Renegotiation Board, supra, 421 U.S. at 184.

³⁹ ITT World Communications v. FCC, 699 F.2d 1219, 1236-37 (D.C. Cir. 1983), rev'd on other grounds, 52 U.S.L.W. 4507 (U.S. April 30, 1984).

⁴⁰ Russell, supra, 682 F.2d at 1047.

override the privilege claim. Ordinarily, we would accord deference to the Board's ultimate balance. In the instant case, however, we find that the Board improperly evaluated the relevant factors and its ultimate balance is therefore tainted.

As far as we are able to tell, the thirty documents now in dispute were part of omnibus requests made by Suffolk County, both through discovery and under the Freedom of Information provisions of the Administrative Procedure Act, 5 USC § 552. Numerous documents have been released to the County voluntarily.⁴¹ In addition, FEMA has agreed to make four witnesses available for deposition, three of whom participated in the RAC process. Suffolk County was offered an opportunity to depose these witnesses together or separately and has chosen to do so separately.⁴² While we can understand the County's desire to review the undisclosed documents in the interest of obtaining the maximum amount of

⁴¹ LILCO states that FEMA has produced "over 1100 pages of documents relative to its review of Shoreham in response to an FOIA request. . . ; forty of these documents have been identified by FEMA as bearing on the RAC Review." LILCO Brief at 5. FEMA indicates that it has produced "numerous other documents . . . and identified at least fifty of those released documents that were directly responsive to Suffolk County's motion to compel production of documents relating to the RAC review." FEMA Brief at 11. Suffolk County acknowledges that 40 or 50 documents were made available. App. Tr. 120.

⁴² LILCO Brief at 5-6.

background information -- and, indeed, the County would be entitled to do so in the absence of the invocation of the privilege -- Commission⁴³ and judicial⁴⁴ precedent requires some overriding need or special circumstances in order to overcome a valid claim of privilege. In our view, the County has not demonstrated -- at least at this juncture -- that currently available sources are inadequate to permit a genuine probing of the bases for the FEMA findings and the RAC's collegial conclusions.

Essentially, we cannot agree with the Board that the County has as yet made out a convincing case that it cannot obtain relevant information elsewhere. Obviously, the

⁴³ North Anna, *supra*, 7 AEC at 313 (Advisory Committee on Reactor Safeguards documents ordered disclosed where withheld information necessary to a proper decision, information not reasonably obtainable elsewhere, the safety issue discovered after original proceedings concluded, and existence of serious allegations that the licensee had intentionally withheld information for several years). Cf. Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-715, 17 NRC 102 (1983) (exceptional circumstances for issuance of subpoena to additional staff witnesses found where there may be a genuine scientific disagreement on a central decisional issue).

⁴⁴ Carl Zeiss Stiftung, *supra*, 40 F.R.D. at 328-29 (privileged Department of Justice documents containing internal opinions, advice, and recommendations immune from discovery in civil litigation between private parties where other documents were made available by the government and no showing of need). See also, United States v. Nixon, 418 U.S. 683 (1974) (due process rights of criminal defendants to obtain relevant evidence outweigh the President's interest in maintaining confidentiality of privileged communications).

County is entitled to probe the FEMA findings, explore their bases, assess their accuracy, and determine what reliance should be placed on them. To that end, FEMA will make its sponsoring witnesses available for deposition and cross-examination. They may be examined as to the soundness and reliability of the scientific assumptions or professional judgments underlying the FEMA findings. While the County may well find it helpful to have predecisional materials -- for impeachment purposes or to reveal soft spots in the final testimony, for example -- it has not shown that its right to explore the underpinnings of the FEMA findings and determinations cannot be satisfied without the documents it seeks.

During the course of oral argument there was substantial conjecture over precisely what information FEMA's sponsoring witnesses would provide and whether such information would turn out to be adequate for the County's needs. Not surprisingly, counsel for FEMA argued that the agency's witnesses will be forthcoming and the substantive bases or professional judgments underlying FEMA's findings will be subjected to scrutiny. FEMA appears interested primarily in protecting the identity of those RAC participants who articulated certain views, rather than the

existence or substance of those views.⁴⁵ Counsel for the County disavows any particular interest in the names of individuals putting forth specific views; she seeks only the bases for the RAC conclusions.⁴⁶ She nonetheless claims that she simply does not know precisely how far she would be permitted to examine the witnesses before FEMA will interpose an objection.⁴⁷ What we have before us at the moment is little more than speculation regarding what may occur as the discovery or hearing process unfolds. Such conjecture cannot constitute the requisite showing of need sufficient to override FEMA's invocation of the privilege.

There are other, equally compelling considerations that dictate that the Licensing Board for the moment should have stayed its hand. If FEMA is correct that sufficient information will be forthcoming, there will be no need to order the requested documents to be released. Such result would, of course, avoid any confrontation with FEMA's legitimate interest in protecting the integrity of its internal processes. Were we to order release of the

⁴⁵ App. Tr. 162-68.

⁴⁶ "Now, with respect to the individual views of . . . [RAC] members, I want to emphasize that we -- our discovery request was not please tell us who said what -- our discovery request was give us the documents that form the basis of the . . . [RAC] conclusions." App. Tr. 123.

⁴⁷ App. Tr. 132, 138-41.

documents now, however, and it should turn out that release is not genuinely required, we may have needlessly compromised FEMA's operations. If the County is right, there may, of course, be an eventual need to order release of the documents. That can be done at a later stage, albeit with some compromise in efficiency and additional delay.

3. Additional Observations. Although we need go no further to dispose of FEMA's appeal, we believe it useful to offer some general observations to assist the parties and the Licensing Board in the event the issue of disclosure of the documents should reemerge.

In reaching its determination that the County had shown the requisite need for the documents, the Licensing Board relied on five factors, as follows:

(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.⁴⁸

The Board properly began its inquiry with a reference to the importance of the documents and the likely availability

⁴⁸ Memorandum and Order at 4.

elsewhere of information equivalent to that contained in the documents. These are plainly key considerations.⁴⁹ But the Board's analysis of these factors is somewhat sketchy and, in our view, faulty.

To begin with, we do not share the Board's perspective regarding the importance of the withheld documents. The Board indicated:

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 [the] 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.⁵⁰

The Board appears to have been strongly influenced by the fact that the RAC Report has become part of the final testimony. But virtually all predecisional material, like a good deal of privileged matter such as an attorney's work product, are produced during an evolutionary process leading up to, and may ultimately be incorporated into, the presentation of some publicly available information such as testimony. To conclude that mere incorporation of deliberative material into a final product demonstrates a

⁴⁹ See Leggett & Platt, supra, 542 F.2d at 659.

⁵⁰ Memorandum and Order at 8.

compelling need for the material would essentially render the privilege meaningless.⁵¹

It is also important to place in perspective the significance of the FEMA findings. First of all, it is the ultimate institutional findings and determinations by FEMA, not the predecisional opinions of various members of the RAC, that are centrally important.⁵² Moreover, although these findings constitute a rebuttable presumption under the Commission's regulations,⁵³ the applicant bears the ultimate burden of demonstrating that the emergency plans are satisfactory and, on the basis of all the information submitted, the Licensing Board must be able to conclude that the state of emergency preparedness provides "reasonable assurance that adequate protective measures can and will be

⁵¹ Suffolk also contends that the privilege has been waived because FEMA has affirmatively placed into controversy the matters that were the subject of its deliberations. Suffolk cites no authority for its assertion. More important, we believe its argument is a variant of its more general assertion that the deliberative privilege fails simply because matters discussed ultimately evolve into some form of public presentation.

⁵² Cf. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-717, 17 NRC 346, 365-68 (1983) (collegial document requires sponsoring witness who need not be the author).

⁵³ 10 CFR § 50.47(a)(2).

taken in the event of a radiological emergency."⁵⁴ As we pointed out in our San Onofre opinion,

[t]he fact that a final FEMA finding is entitled to a rebuttable presumption does not convert that agency into a decisionmaker in Commission licensing proceedings.⁵⁵

A failure by the four FEMA witnesses adequately to defend the FEMA findings and determinations deprives them of whatever reliability, and hence whatever presumptive effect, they might otherwise have.

We also believe, contrary to the Licensing Board's suggestion and the County's argument,⁵⁶ that the mere fact that all RAC members are not subordinates of the persons to whom the documents are addressed is not necessarily significant. The privilege protects both intra-agency and inter-agency documents and may even extend to outside consultants to an agency.⁵⁷ While there may be added reason

⁵⁴ 10 CFR § 50.47(a)(1).

⁵⁵ San Onofre, supra, 17 NRC at 378-79.

⁵⁶ Suffolk County Brief at 17-18.

⁵⁷ Lead Industries Ass'n v. OSHA, 610 F.2d 70, 83 (2d Cir. 1979), citing Soucie v. David, 448 F.2d 1067, 1078 n.44 (D.C. Cir. 1971); Wu v. National Endowment for Humanities, 460 F.2d 1030, 1032 (5th Cir. 1972), cert. denied, 410 U.S. 926 (1973). Cf. National Small Shipments Traffic Conference, Inc. v. ICC, 725 F.2d 1442, 1449 (D.C. Cir. 1984) ("[b]ecause. . . consultants operate as the functional equivalent of regular staff, they constitute agency insiders").

to protect opinions given by subordinates to their supervisors, the basic reason behind the privilege -- i.e., the encouragement of frank discussion in government decisionmaking -- can apply as well to non-FEMA RAC members and consultants.

We are also concerned that the Board may have underestimated the value of the free and candid exchange of ideas leading up to FEMA's expert evaluation of emergency plans. Roger B. Kowieski, the chairman of Region II's RAC, states that

by releasing the RAC individual comments which are predecisional, my ability to operate the Regional Assistance Committee will be [severely weakened]. The RAC members, in fact, may be very reluctant to provide me with written material which could be disclosed later at the ASLB hearing or other proceedings. Some of these comments may be sensitive in nature and their disclosure could have a negative impact on our relationship with the states, and local governments and utilities.⁵⁸

Given the existence of the collaborative arrangement between the NRC and FEMA -- which presumes due regard for the other agency's responsibilities -- and FEMA's independent role with regard to offsite nuclear emergency planning and response, we believe Mr. Kowieski's judgment is entitled to a high degree of deference.

⁵⁸ Memorandum in Support of FEMA's Appeal (May 21, 1984) (affidavit of Roger B. Kowieski at 6).

We nonetheless confess to some uneasiness over the blanket assertion by FEMA that release of any or all portions of the thirty documents will have a chilling effect on its operations. To begin with, it appears that some material can be released once identifying details, such as the names of the reviewers, are deleted.⁵⁹ Certain of the documents, moreover, were prepared by consultants who will now testify at the hearings. Although the fact that they are consultants does not render the privilege inapplicable, we find some merit in the Licensing Board's judgment that the candor of their informal advice to FEMA during preparation of the FEMA findings may not be seriously affected by disclosure of their original reports because they will be required to justify their views during cross-examination. Should this issue reemerge, we believe FEMA has some obligation to provide a more particularized explanation of precisely how release of underlying documents will have a "chilling effect" on the advice received from its non-FEMA members or consultants.⁶⁰

⁵⁹ See App. Tr. 87.

⁶⁰ The Licensing Board noted that the "chilling effect" on FEMA's operation as a result of disclosure of the underlying documents "will be less than those cases where we have previously withheld discovery." Memorandum and Order at 8. Some elaboration of this conclusion would likewise be helpful.

We can appreciate the Board's view, strongly endorsed on appeal by the County, that FEMA documents should be ordered to be disclosed because the County and the State of New York have been required to disclose supposedly similar deliberative documents. But we do not share the Board's opinion that disclosure is warranted simply in the interest of equity or fairness. Neither the County nor the State appealed from earlier decisions ordering disclosure, so we must assume that they did not believe that their governmental functions would be unduly impaired by disclosure. FEMA takes a different view and it is plainly entitled to press that view. More importantly, each disclosure decision ultimately turns on a careful weighing of the need for the information against the adverse effect disclosure would likely produce. On earlier occasions, the Licensing Board ordered some information released but refused to order disclosure of other documents.⁶¹ While we strongly encourage FEMA to reevaluate its governmental needs with a view toward disclosing documents to the maximum extent feasible, we cannot conclude that the determination by either Suffolk County or the State not to appeal the Board's earlier decisions, or those decisions themselves,

⁶¹ See, for example, LBP-83-72, 18 NRC 1221 (1983) and LBP-82-82, 16 NRC 1144 (1982).

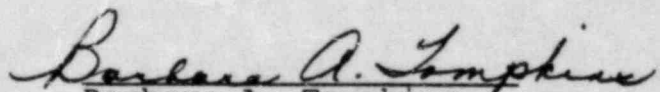
are tantamount to a need sufficient to override FEMA's claim of privilege.

4. Conclusion. We emphasize the preliminary nature of our conclusion and the narrowness of our holding. Upon deposition or cross-examination of the sponsoring witnesses, or the review of documents voluntarily released, it may appear that there are good and sufficient reasons to warrant disclosure, such as significant differences of opinion among members of the RAC on important issues affecting the adequacy of LILCO's plan. It may turn out that the sponsoring witnesses are unable to defend or explain adequately the underlying bases for FEMA's determinations or reveal that they have relied to an inordinate degree on the views of others. In such circumstances (and, perhaps, in others), the County may well be able to establish a sufficiently compelling need for the underlying documents.

The Licensing Board's decision is reversed and the case is remanded with instructions to deny the County's motion for production of the remaining thirty documents.

It is so ORDERED.

FOR THE APPEAL BOARD


Barbara A. Tompkins
Secretary to the
Appeal Board