

October 11, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

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Before the Presiding Officer

OFFICE OF SECRETARY
DOCKETING & SERVICE
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In the Matter of)	
)	
METROPOLITAN EDISON COMPANY)	Docket No. 50-289 SP
)	(Restart - Management Phase)
(Three Mile Island Nuclear)	
Station, Unit No. 1))	

UNION OF CONCERNED SCIENTISTS' MOTION TO COMPEL
STAFF PRODUCTION OF HANDWRITTEN NOTES BY AN NRC PSYCHOLOGIST
AND TO COMPEL THE STAFF TO IDENTIFY ALL SUCH MATERIALS

The Union of Concerned Scientists moves the Presiding Officer to compel the NRC Staff to release copies of certain handwritten notes in the possession of a psychologist employed by the NRC Staff. UCS also moves that the Presiding Officer compel the Staff to identify and describe all documents that fall within UCS' discovery requests, but which the Staff does not intend to identify or provide in response to the requests.

Background

On Thursday, October 4, Mary Wagner, counsel for the NRC Staff informed William Jordan, counsel for UCS, that the Staff had identified handwritten notes taken by a psychologist as covered by one of UCS' document requests. Ms. Wagner did not identify the document request. She did, however, explain that

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the notes involved interviews with TMI reactor operators. As Mr. Jordan recalls, the interviews involved the TMI training program.

The purpose of Ms. Wagner's call was to discuss the fact that the psychologist had promised to protect the identity of the individuals interviewed. Ms. Wagner and Mr. Jordan discussed the matter and ultimately agreed that UCS would accept copies of the notes with the names deleted, and that UCS could pursue the identities of the individuals in question at a later time if that should eventually become necessary.

Shortly thereafter, however, Ms. Wagner called Mr. Jordan to inform him that the Staff had determined that the notes in question were personal notes that are not subject to disclosure. When Mr. Jordan responded that the Staff should simply include this explanation in its response to the discovery and seek the appropriate protective order, Ms. Wagner explained that the Staff would treat the information as if it were not in the NRC at all, and that Staff would not identify or discuss this information in any way in its discovery response.

On the morning of Friday, October 5, 1984, Ms. Wagner called Mr. Jordan in response to a message he had left the previous evening. Mr. Jordan requested that the Staff assure that the notes in question are not destroyed or otherwise made unavailable pending this Board's review of their status. Ms. Wagner again asserted that the notes were not within the control of the NRC

Staff and that the Staff could not act to protect them from destruction. She also reiterated that the Staff would not even discuss these documents or others like them in its response to UCS' discovery requests.

As a result of these discussions, UCS now moves for the following relief: (1) an order compelling the Staff to prevent loss or destruction of the notes in question, (2) an order compelling the Staff to release the notes in question, and (3) an order compelling the Staff to identify all other documents that the Staff has failed to identify or that it does not intend to identify for the same reasons that it does not intend to identify these notes.

ARGUMENT

The production of NRC records and documents is governed by 10 CFR §§ 2.744 and 2.790. 10 CFR § 2.741(e).¹ As authority for NRC's ability to withhold the subject notes, Ms. Wagner cited British Airports Authority v. C.A.B., 531 F. Supp. 408 (D.D.C. 1982). Relying on and extensively quoting from Porter County Chapter of the Isaac Walton League v. AEC, 380 F. Supp. 630 (N.D. Ind. 1974), the court in British Airports held that handwritten notes by a CAB employee were not "agency

¹ Footnote 10 to 10 CFR § 2.790(a) purports to exempt from release under that provision all handwritten notes and drafts. As section 2.790 constitutes the NRC's implementation of the Freedom of Information Act, 5 U.S.C.A. § 551 et seq., it must be interpreted in light of that statute and its caselaw. No such broad exemption from release for handwritten notes and drafts is justified under FOIA or the cases interpreting it.

records" subject to disclosure under FOIA. The holding in Porter County was that handwritten notes prepared by agency staff members for their own use, not circulated to or used by anyone other than the authors, and discarded or retained at the author's sole discretion, were not subject to disclosure as agency records under FOIA.

The case cited by Ms. Wagner does not stand for the proposition that handwritten notes of agency employees are ipso facto not agency records. The decision in Porter County was based not just on the fact that the materials were handwritten by an agency employee, but also on their intended use solely by the author, their temporary nature, the fact that they were not circulated to or used by anyone other than the author, and the author's sole discretion to discard or retain them. 380 F. Supp at 633.

The NRC Staff has made no showing as to whether the subject notes were intended for the sole use of the author; whether they were temporary in nature; whether they have been circulated to or used by anyone other than the author; and whether they may be discarded or retained at the author's sole discretion.

Other than Ms. Wagner's post hoc assertion that the Staff had no authority to prevent the destruction of these notes, the only information we have about their nature is the fact that Ms. Wagner or other NRC Staff members were sufficiently familiar with them that they were identified as being responsive to UCS's discovery request. These facts suggest that the notes in question may have been circulated to and used by NRC staff

members other than the author, and thus would not fall within the scope of the Porter County and British Airports cases.

10 CFR § 2.744 provides for the production of NRC records and documents even if they would not be available pursuant to § 2.790 upon a showing that the requested materials are relevant, that their disclosure is necessary to a proper decision in the proceeding, and that they are not reasonably obtainable from another source. 10 CFR § 2.744(a)-(d). The relevancy of the subject notes is not in dispute. Ms. Wagner stated that they were within the scope of UCS's discovery request, and initially engaged in discussions concerning their production. NRC Staff has not objected to the request on the grounds of relevancy. A key issue in this proceeding is the adequacy of the Licensee's operator training program. The records of an NRC employee on the attitudes of operators toward that program are obviously relevant to the issue.

For the same reasons, the disclosure of these notes is necessary to a proper decision in this proceeding. If, for example, the NRC psychologist noted that operators seemed to have poor attitudes toward the training program, that is clearly evidence which the Board should have in passing on the adequacy of the program. If, on the other hand, the psychologist noted that the operators seem to be highly motivated about the training program, that, too, is information which the Board should have in making a proper decision in this proceeding.

We note that the confidentiality with which the statements may have been made to the NRC psychologist is not here in issue. UCS does not now seek release of the identities of the operators who made the statements.

Finally, the information that UCS seeks cannot be obtained from any other source. The statements in question were made to an employee of the NRC. We are aware of no other documentation concerning these or similar statements by the TMI operators. If any such other documentation exists, then it, too, is responsive to UCS's discovery request and should be produced.

Conclusion

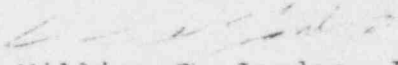
In conclusion, it is not at all clear that the conditions for exempting NRC records from release under 10 CFR § 2.790 are present here. What evidence there is indicates that the subject psychologist's notes may have been circulated to and used by persons other than the author, and thus would not be excluded from the definition of "agency record" under relevant FOIA caselaw.

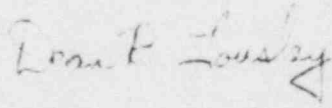
Even if the notes would be deemed exempt from disclosure under § 2.790, however, they must be produced under § 2.744(d). That is, the materials in issue are unquestionably relevant to the instant proceeding; disclosure of them is necessary to a proper decision in the proceeding; and they cannot reasonably be obtained from any other source. Certainly the Staff cannot be permitted to withhold from disclosure relevant

materials simply on the grounds that they consist of handwritten notes. No such blanket exemption is justified under pertinent law.

Accordingly, UCS moves the Presiding Officer pursuant to 10 CFR § 2.744(c) to issue an order compelling the Staff to produce the notes in question. UCS further moves the Board to compel the staff to identify any other records or documents that are responsive to its legitimate discovery requests, but which the Staff has failed to identify on these same grounds.

Respectfully submitted,


William S. Jordan, III


Dean R. Tousley
HARMON, WEISS & JORDAN
2001 S Street, N.W.
Suite 430
Washington, D.C. 20009
(202) 328-3500

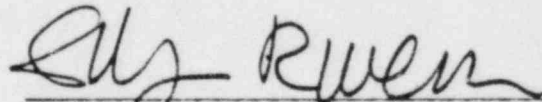
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CERTIFICATE OF SERVICE

I hereby certify that copies of UNION OF CONCERNED SCIENTISTS' MOTION TO COMPEL STAFF PRODUCTION OF HANDWRITTEN NOTES BY NRC PSYCHOLOGIST AND TO COMPEL THE STAFF TO IDENTIFY ALL SUCH MATERIALS was served on the following by deposit in The United States mail, first class, postage prepaid, on October 11, 1984.


Ellyn R. Weiss

Gary J. Edles, Chairman
Administrative Judge
Atomic Safety & Licensing Appeal Bd
U.S. Nuclear Regulatory Commission
Washington, DC 20555

John H. Buck
Administrative Judge
Atomic Safety & Licensing Appeal Bd
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Christine N. Kohl
Administrative Judge
Atomic Safety & Licensing Appeal Bd
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Ivan W. Smith, Chairman
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Sheldon J. Wolfe
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Gustave A. Linenberger, Jr.
Administrative Judge
Atomic Safety & Licensing Board
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jack R. Goldberg, Esq.
Office of the Executive Legal Dir.
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Ernest L. Blake, Jr.
Shaw, Pittman, Potts & Trowbridge
1800 M Street, N.W.
Washington, DC 20036

Louise Bradford
TMI Alert
1011 Green Street
Harrisburg, PA 17102

Joanne Doroshaw, Esq.
The Christic Institute
1324 North Capitol Street
Washington, DC 20002

Mr./Mrs. Norman Aamodt
R.D. 5
Coatesville, PA 19320

Lynne Bernabei, Esq.
Government Accountability Project
1555 Connecticut Ave.
Washington, DC 20009

Michael F. McBride, Esq.
LeBoeuf, Lamb, Leiby & MacRae
1333 New Hampshire Ave., N.W.
#1100
Washington, DC 20036

Michael W. Maupin, Esq.
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, VA 23212

Thomas Y. Au, Esq.
Office of Chief Counsel
Dept of Environmental Resources
505 Exec. Houses P.O. Box 2357
Harrisburg, PA 17120