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September 7, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA	Docket No. 50-142 OL
(UCLA Research Reactor)	

RESPONSE TO BOARD ORDER OF AUGUST 6
PART B

I. INTRODUCTION

In Committee to Bridge the Gap's Response to University's Request to Withdraw Its Application for License Renewal, July 3, 1984, CBG requested that the Board dissolve its protective orders and order preservation of documents pending final disposition of the reactor. CBG reasserts this request and the bases for it.

Staff, in its Reply to CBG Response to University's Request to Withdraw Its Application, July 27, 1984, has misread CBG's request.

Staff states that "vacation of the protective order is inappropriate so long as fuel remains onsite." Staff Reply at 6. But CBG indeed requested that the order dissolve "effective at the date on which the SNM... has departed the UCLA reactor site." CBG Response at 8. Staff then asked that CBG "return" the documents pursuant to the protective order without recognizing in any way the varied types of documents involved, the changed circumstances of the proceedings, or the considerable interests in dissolution of the original orders.

University, in University's Reply to CBG's Response to University's Request to Withdraw the Application, July 20, 1984, asked that CBG "give up the information it received," likewise without recognizing the diversity of types of information involved. University wishes to assert a need for protection for a decommissioning period which it is unwilling to define, and for other building uses in no way within the contemplation of the protective order or of the regulations' protective authority. UCLA Reply at 7-9.

Even if the Board were to grant Staff and University's requests, the issue of the ultimate disposition of protected information would remain unsettled by the terms of the protective order, whereas the dissolution of the orders in accordance with CBG's Response would so resolve the issues, as discussed below.

Staff requests the "return" of "the documents" and University asks CBG to "give up" the "information it received." CBG has, under the protective orders and in its desire to protect safeguards information pursuant to 10 CFR 73.21, treated a diversity of materials in this way: (1) information originated by and made available by UCLA;

(2) Information in UCLA files but originated or independently filed by NRC Staff; (3) Information derived from visits to UCLA's facility; (4) Depositions comprising CBG's witnesses' statements made in the presence of CBG and UCLA representatives; (5) Work product of CBG's representatives created and recorded during or after discovery sessions and often intermingled with various amounts of data acquired during protected discovery. All of this information must ultimately cease to be protected pursuant to the mandatory command of 10 CFR 73.21(i).

CBG believes that much of the previously protected information is now releasable pursuant to §73.21(i), much will shortly be releasable and should be so designated by the Board, and that "giving up" is an inappropriate and unacceptable means of protecting the remainder.

II. A PRESUMPTION OF OPENNESS EXISTS FOR DISCOVERY MATERIALS

A. THERE IS A STATUTORY PRESUMPTION OF OPENNESS

A statutory presumption of openness exists for discovery materials generally, and derives from the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(c) requires a showing of good cause to limit the amount of use of discovery.[1] Courts generally agree.[2]

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1 / "It is abundantly clear that Appeals Boards favor the Federal Practice in Commission proceedings." Pacific Gas & Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-83-2, 17 NRC 45, 50 (1983).

2 / See, e.g., National Polymer Products v. Borg-Warner Corp., 641 F. 2d 418, 423 (6th Cir. 1981) ("/ t /he discovery rules

Thus University's argument, Reply at 7, that but for the litigation CBG would have no access to the information is, if true, nevertheless inapposite.

Disclosure of information obtained through discovery may be restricted only for "compelling reasons." See 10 CFR 2.744(e), 2.790(a). Even then, the Board must remove information from the protected category when a prior justification no longer exists. 10 CFR 73.21(i). The Board modelled the protective orders after those of Diablo Canyon. Memorandum and Order, January 18, 1984, at 2 See Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-592, 11 NRC 744 at 757-760 (1980); ALAB-600, 12 NRC 3 at 14-17 (1980). The Diablo order preceded the promulgation of 10 CFR 2.744 and 73.23(i), but there is no indication in the record, Prehearing Conference of June 29, 1982, TR 536-560, that the Board or parties intended protection other than that spelled out in the new regulations. CBG understood the protective order as originally proposed to track these new regulations. See, e.g., letter from CBG to the Board of June 17, 1982. Thus, as the protection of safeguards information becomes unnecessary, no other justification

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themselves place no limits on what a party may do with materials obtained in discovery"); Wilk v. American Medical Association, 635 F. 2d 1295, 1299 (7th Cir. 1980) (generally discovery material is public, absent compelling reasons to the contrary); In re Halkin, 598 F. 2d 176, 188 (D.C. Cir. 1979) ("Generally speaking, when a party obtains... information through the discovery process, he can..." use it "for any purpose....").

for the protective order remains. 10 CFR 2.744(e), 73.21(i).

B. CONSTITUTIONAL PRESUMPTION OF OPENNESS

CBG, as a litigant and as a representative of the public, possesses First Amendment rights of access to discovered material. "[C]ourts of this country recognize a general right to inspect and copy public records..., including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978). One purpose behind this argument is public supervision and inspection of courtroom proceedings, and the "citizens desire to keep a watchful eye on the workings of public agencies." Id. at 598, 98 S. Ct. at 1312. Accord, In re Halkin, 598 F. 2d 176, at 186-191 (D.C. Cir. 1979). Here we have both a public university and a government agency. The Supreme Court subsequently limited Halkin's unlimited First Amendment right of use in Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984). But those limitations involved protection of materials not used at trial, whereas the Board has issued orders based on CBG's protected materials. Memorandum and Order, June 5, 1984, at 5. And Rhinehart allowed protection of discovery material only after considering whether the protection was necessary to further an important or substantial government interest unrelated to the suppression of expression, that cannot be accommodated through a less restrictive alternative.

104 S. Ct. at 2207. In Rhinehart, unlike here, numerous and substantial Constitutionally-based personal privacy rights were at stake to overwhelm the First Amendment rights of the other party.

C. THE BURDEN IS ON THE PARTY SEEKING PROTECTION, AND THE NEED IS NARROWLY CONSTRUED

In both the courts and proceedings, the burden is on the party seeking protection. See, e.g., In re Halkin, 598 F. 2d at 188, n.24; 10 CFR 2.790(a), (b)(1). Initially justifiable protection must cease with the cessation of justification. 10 CFR 73.21(i). And generic security information cannot justify keeping a protective order in place. Congress deliberately deleted any provision in the Atomic Energy Act §147, 42 U.S.C. 2167, for protection of generic safeguard information. See SECY-81-464A, Enclosure A, at 16 (September 16, 1981).

University's argument that it "may" decide to use the facility after decommissioning as a non-nuclear storage area meets neither the burden on University nor the statutory exceptions, 10 CFR 2.790. CBG does recognize, however, that insofar as the reactor facility security systems may be part of or identical to other presently used University security systems, University may have a justifiable interest in protecting any specific information which could present a clear and present danger to a shared system. The University should meet its burden to clearly request continuing protection, to be narrowly limited to specific information of present, direct threat

to present, actual security systems.

III. CBG WORK PRODUCT CAN NOT BE "RETURNED"

Since CBG was not permitted copies of any of University's "security files," much of the materials CBG has carefully protected consists in large part of CBG representatives' observations and thoughts. Such "work product" is traditionally carefully protected by the courts from involuntary disclosure. While Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385 (1947) and the codification in 28 U.S.C.A. Fed. R. Civ. P. 26(b)(3) (West 1972), speak to discovery, the safeguard has been established more generally "to preclude unwarranted excursions into the privacy of a man's work," id. (emphasis added). The Court reaffirmed the strong public-policy rationale in Upjohn Co. v. United States, 449 U.S. 383, 398, 101 S. Ct. 677, 687, 66 L. Ed.2d 584 (1981). Since no party has, nor could, discover such materials in CBG's possession, and since the work-product doctrine overlaps and extends numerous statutory and common-law privileges, CBG must not be required to give up these materials involuntarily.

Because of the limited number and length of periods of access to University-held protected information, it was not possible for CBG to clearly segregate its recording of protected data from its interpretive observations. CBG did not therefore voluntarily waive its right to retention of its work product by such mingling.

The mingling does present the problem of how CBG is to obey the protective order requirement of delivering "notes and data which contain protected information..." to the Board or its designee, Protective Order of January 18, 1984, as revised, at para. 6. Most of this problem is obviated if the Board dissolves the orders effective upon offshipment of the SNM and disposal of metallic-core components, and if it allows only the narrowest of exceptions. See CBG Response to Staff's Proposed Conditions for UCLA Application Withdrawal, August 1, 1984, at 79.

At a minimum, (1)CBG must be permitted to retain the protected materials it has acquired, and associated work product, until the final disposition of the license application, the withdrawal request, related amendments, reapplications, and proceedings for licenses or permits for possession or operation of SNM, byproducts, or reactor, and until all rights of appeal have expired; and (2) Under no condition shall CBG be required to deliver materials to the Board without the option that CBG may choose to detach its work product for own retention or, if inseparable from protected data, its destruction by CBG; and (3) Any materials held by CBG and delivered to the Board must be sealed, be returned to CBG when the protective order dissolves or becomes ineffective, and under no circumstances be unsealed by any person or body other than CBG or its representative.

IV. THE PRESENT PROTECTIVE ORDERS ENVISION "SAFEKEEPING" OF INFORMATION FOR THE BENEFIT OF, AND ULTIMATE RELEASE TO, INTERVENOR CBG.

The Protective Order of January 18, 1984, as revised, at para. 6 requires CBG's representatives to deliver "those papers and materials to the Board... together with all notes and data which contain protected information for safekeeping during the lifetime of the plant" (emphasis added). This phrase, taken from the Diablo Canyon order, ALAB-600, 12 NRC at 14-17 (1980), envisions the custodial retention of the materials held or generated by CBG, with ultimate return to CBG. Had the Board intended those materials to be considered University's property, to be protected from untimely release, it could have ordered the materials delivered to University. Had the Board considered those materials the property of the government or the courts, it could more simply have ordered their destruction. It did neither, indicating the intent to safeguard the materials from release by their owners so long as the information posed a threat to the ongoing nuclear facility. The use interest reverts automatically to CBG (i.e., is a fee simple determinable) upon the closure of the facility and cessation of need for safekeeping. Both Staff and University have focused on the first step of "delivery" without recognizing that, sooner or later, CBG is entitled to return of the materials.

By asserting a generalized need to continue protection of its facility, University ignores two requirements of the order. First, it ignores the ultimate return to CBG of CBG's documents. Second, it implicitly interprets "plant" to allow protection of any non-nuclear physical residual of a nuclear plant. Surely the Diablo Canyon Board used the term "plant" as shorthand for "nuclear power plant". Neither Diablo Canyon nor the regulations express an interest or authority to protect a plant when it ceases to be a nuclear plant, any more than the protective order, at para. 1, envisioned "licensee" to include a former licensee no longer licensed.

Surely the issues are better resolved now by dissolving the protective orders in whole or in part as specific information no longer relates to a security threat to an actual, present nuclear facility, rather than by establishing an undetermined custodianship with the problems of non-releasable work product.

V. CONCLUSION

CBG has invested much effort and expense to record and interpret security information in the hands of UCLA. CBG is entitled to retain those protected materials for use in this and related license, termination, withdrawal, amendment, or appeal proceedings. Further, UCLA cannot restrict use of discovery materials in the absence of clear and compelling arguments of likely security breaches to a nuclear facility. The Protective Order of January 18, 1984, as

revised, requires the ultimate return of any of CBG's materials to CBG, even if transferred to the interim custody of the Board. 10 CFR 73.21(i) and the Protective Order require the return of CBG's materials no later than the time that various materials no longer fall in the protectable safeguards-information category. CBG's work product, in many cases intermingled with protected data should remain in CBG's own hands, in any case. Prompt offshipment of SNM, removal of metallic core components, and prompt dissolution of the protective order is required by the protective order, the regulations, and strong court-supported public policy.

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September 7, 1984
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NUCLEAR REGULATORY COMMISSION

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	)	Docket No. 50-142
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA	)	(Proposed Renewal of Facility License)
	)	
(UCLA Research Reactor)	)	

DECLARATION OF SERVICE

I hereby declare that copies of the attached: RESPONSE TO BOARD ORDER OF AUGUST 6, PART B

in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, postage prepaid, addressed as indicated, on this date: September 7, 1984.

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