

574

RELATED CORRESPONDENCE

DOCKETED
USNRC

GOVERNMENT ACCOUNTABILITY PROJECT
1555 Connecticut Avenue, N.W., Suite 202
Washington, D.C. 20036

'84 DEC 11 11:05
(202) 232-8550

HAND-DELIVERED OFFICE OF SECRETARY
DOCKETING & SERVICE
December 10, 1984 BRANCH

50-289 SP

Sharon Connelly, Esquire
Director
Office of Inspector and Auditor
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Ms. Connelly:

On behalf of Three Mile Island Alert ("TMIA"), an intervenor in the Three Mile Island restart hearings (management phase), I request that the Office of Inspector and Auditor conduct an investigation into agency harassment of a witness TMIA called during the hearing, and possible improper ex parte contacts between the Office of General Counsel and the Nuclear Regulatory Commission ("NRC") Staff, a party in the proceedings.

I request an investigation because it appears that the NRC Staff or the Office of General Counsel has attempted to harass David Gamble, a former OIA investigator, so that he would not testify, and, in any case, succeeded in restricting the areas in which he did testify at the hearing. Moreover, it appears, Mr. Rothchild of the Office of General Counsel ("OGC") has spoken to either the NRC Staff or the Office of Executive Legal Director ("ELD") directly about Mr. Gamble's testimony and restricting Mr. Gamble's testimony by applying the Ethics in Government Act and regulations to foreclose areas of inquiry. Such communications are directly in violation of 10 CFR 2.780, which prohibits communications between those NRC officials and employees who advise the Commissioners in the exercise of their quasi-judicial functions, and the NRC Staff, a party to the TMI restart hearings.

A short history will lay the foundation for TMIA's request.

In late September, 1984, TMIA requested that Mr. Gamble testify on the deficiencies in the Office of Inspection and Enforcement ("IE") investigation into information flow during the TMI-2 accident and the report which resulted from that investigation, NUREG-0760. TMIA requested his testimony as relevant to the "Dieckamp Mailgram" issue before the Atomic Safety and Licensing Board ("Licensing Board"). Mr. Gamble was a member of the Task Group which conducted this investigation, and the OIA representative assigned "to protect the interests of the Department of Justice" in the investigation. Mr. Gamble was employed by the NRC until August, 1982, at which time he left to work for his current employer, the Department of Defense.

8412130446 841210
PDR ADOCK 05000289
G PDR

D503

On October 1, 1984, TMIA notified the other parties to the proceeding that it intended to call Mr. Gamble to testify on the deficiencies in the IE investigation and in NUREG-0760. Almost two weeks later, the NRC Staff served extensive discovery requests on TMIA, to which TMIA, with Mr. Gamble's assistance, provided a timely response.

In the course of discovery, TMIA requested of Jack Goldberg, ELD, the attorney representing the NRC Staff, that TMIA be provided with specific OIA documents to assist Mr. Gamble in preparing his testimony. Mr. Goldberg provided TMIA with these documents. In the course of this discovery process, Ron Smith, an OIA investigator, discussed with Mr. Gamble the documents which had been requested in order that he might assist Mr. Goldberg in providing the requested documents, many of which have in the intervening five and one-half years since the accident been placed in storage.

On November 1, 1984, in accordance with a ruling of the Licensing Board, TMIA prefiled written testimony for Mr. Gamble. See Gamble Prefiled Testiomny, attached and incorporated herein as Exhibit 1. 1/

On November 9, 1984, during a prehearing conference on other matters, Mr. Goldberg stated that he believed that Mr. Gamble should make sure before he testified that he was familiar with the Ethics in Government Act since Mr. Goldberg indicated he believed there was an issue involving the Ethics in Government Act pertaining to Mr. Gamble's testimony. He stated that he wanted to alert the Licensing Board "to the sensitivity that we have that everyone is aware of the Ethics in Government Act" so that each witness could make his or her individual, informed decision as to whether he wished to participate in the hearings as a witness for TMIA. Tr. at 27881.

Mr. Goldberg did not explain in any greater detail what he intended by his remarks. He also did not make a concrete request of the Licensing Board at that time.

On November 13, 1984, pursuant to an application from TMIA, the Licensing Board issued a subpoena commanding Mr. Gamble's appearance to testify at the hearings.

On November 21, 1984, Mr. Gamble spoke again to Mr. Smith. According to Mr. Gamble, Mr. Smith told him at that time that he (Smith) had learned from Mr. Rothchild of OGC that OGC had reviewed Mr. Gamble's testimony and indicated to other offices in the agency, presumably ELD and

1/ By letter of November 19, 1984, TMIA attached five exhibits to Mr. Gamble's prefiled testimony. These documents had not been available at the time of filing the testimony. See Letter of November 19, 1984 and attachments, attached and incorporated herein as Exhibit 2.

and the NRC Staff, that if Mr. Gamble were to testify he ought to consider whether sections 205 and 207 of the Ethics in Government Act would apply to his testimony. Mr. Rothchild, upon being asked by Mr. Smith what actions Mr. Gamble should take to prevent the agency from considering criminal charges against him because of his testimony, was told by Mr. Rothchild that Mr. Gamble might seek a legal opinion from OGC as to the permissible scope of his testimony.

On November 23, 1984, pursuant to Mr. Rothchild's suggestion, Mr. Gamble wrote a letter to Herzel Plaine, NRC General Counsel, which requested a legal opinion as to whether his proposed testimony would constitute a conflict of interest in violation of criminal provisions of the Ethics in Government Act. See Gamble Letter of November 23, 1984, attached and incorporated herein as Exhibit 3. Mr. Gamble also sought from the Licensing Board suspension of the subpoena pending receipt of this opinion.

Mr. Gamble wrote in his letter to Mr. Plaine, "Despite my impression of the inapplicability of these statutes, the prospect of NRC's initiating criminal action sufficiently intimidates me that I do not wish to testify until and unless I receive an authoritative decision from you that it would be proper."

On November 27, 1984, in discussing this matter with the Licensing Board, TMIA complained that it appeared that the Office of General Counsel's review or investigation of the Gamble testimony had frightened Mr. Gamble from testifying without OGC's permission. Further, TMIA stated its belief that the relevant provision of the Act, Section 205, does not bar Mr. Gamble's testimony under oath, pursuant to a subpoena. TMIA told the Licensing Board that it interpreted the actions of OGC which had caused Mr. Gamble to seek a legal opinion and suspension of the subpoena, an intimidation of TMIA's witness. TMIA requested further that the Licensing Board protect the integrity of the proceedings and ensure that no such OGC attempt to intimidate Mr. Gamble succeeded. Tr. at 29,230-29,232; 29,240. The Licensing Board stated that it would inquire to determine whether either OGC or OIA were conducting any investigation or review which might have been construed by Mr. Gamble to constitute harassment or intimidation. Tr. at 29, 250; 29, 255.

Judge Ivan W. Smith, Chairman of the Licensing Board, reported to the parties, that Judge Robert M. Lazo, had spoken about this matter both to Mr. Rothchild and to you, Director of OIA. Judge Smith stated that OGC "is not conducting any investigation or any inquiry into the activities of Mr. Gamble with respect to this matter, and moreover, has no authority to, and couldn't." Judge Smith stated that "[w]ith respect to the Office of Inspector and Auditor, they have nothing going with respect to Mr. Gamble and his proposed testimony." Judge Smith assured TMIA that "the only concern that Mr. Gamble -- the only basis Mr. Gamble had for particular concern was what he inferred from Mr. Goldberg's remarks, and his own reading of the Ethics in Government Act." Tr. at 29,496-29,497.

In light of Judge Smith's assurances that OGC was not investigating or inquiring into Mr. Gamble's testimony, on the evening of November 29, 1984, TMIA-counsel asked Mr. Gamble the basis for his statement in his letter of November 23, that it had come to his attention "that NRC officials are considering whether I would violate the Federal conflict of interest statutes by so testifying."

Mr. Gamble informed me at that time of his November 21 conversation with Mr. Smith of OIA, which clearly indicated otherwise, that is, that OGC had in fact reviewed Mr. Gamble's testimony, had considered that sections 205 and 207 of the Ethics in Government Act might apply to that testimony, and told Mr. Smith that OGC had contacted other NRC offices to suggest this interpretation of the Ethics in Government Act to apply to Mr. Gamble's testimony.

I brought this matter to Judge Smith's attention the following morning, November 30. I told Judge Smith that it appeared Mr. Rothchild may have given him inaccurate information since it did appear that OGC, prior to receipt of Mr. Gamble's letter of November 23, had reviewed Mr. Gamble's testimony and raised the point of possible conflicts problems with other NRC offices, presumably ELD. Judge Smith stated that he did not believe that this information about OGC conducting a review of the testimony conflicted with Mr. Rothchild's representation that OGC was not conducting an investigation or inquiry. Tr. at 29,983. Judge Smith also stated that "It they recognized, as Mr. Gamble recognized, that the General Counsel is the officer in the Commission who has first responsibility for making that determination, and presumably they have been constantly aware of that. These hearings are monitored." Tr. at 29,984.

TMIA believes the relevant question is whether OGC is conducting any type of review, not whether OGC has defined its actions as an inquiry, or investigation, or in some other way.

On December 3, 1984, the General Counsel issued a legal opinion, severely restricting the areas in which Mr. Gamble would be permitted to testify. Mr. Plaine stated that Mr. Gamble would only be permitted to discuss facts that were known to him while he was an NRC employee and opinions which he held while an NRC employee. He further stated that Mr. Gamble would not be permitted to offer any expert opinions other than to the extent that he testified from personal knowledge as to occurrences which are relevant to the issues in the proceeding. Finally, Mr. Plaine informed Mr. Gamble that his testimony would be further limited by Executive Order 11222 and implementing regulation 10 CFR 0.735-41, which provide that no employee shall use information gained as a government employee which has not been made available to the general public to further a private interest unless prior written authorization to use such information has been obtained from the Executive Director for Operations. Mr. Plaine interpreted this to prohibit Mr. Gamble from testifying as to information which had not been made publicly available except if the Licensing Board were to order Mr. Gamble to disclose such information. See Plaine Letter of December 3, 1984, attached and incorporated herein as Exhibit 4.

TMIA called Mr. Gamble to testify on December 6, 1984. 2/

At that time Mr. Gamble stated on the record that he would carefully observe the restrictions OGC had placed on him. Tr. at 30,460-30,463. TMIA objected to these restrictions as an attempt to "gag" Mr. Gamble and requested that the Licensing Board order Mr. Gamble to answer all relevant inquiries. Otherwise, TMIA stated, the Board would be ratifying the agency's attempts to restrict Mr. Gamble's testimony about deficiencies in the IE investigation. Tr. at 30,464-30,467. The Licensing Board indicated that it would not direct Mr. Gamble to answer questions when Mr. Gamble believed himself prohibited from answering, even though it could thereby ensure that Mr. Gamble answered all relevant inquiries. Tr. at 30,467-30,468.

At several points during cross-examination of Mr. Gamble on December 6, he refused to answer because of his fear that adverse actions would be taken against him if he testified beyond the bounds outlined by OGC.

On December 7, 1984, again Mr. Gamble declined to answer several questions because of these same fears. Although TMIA counsel requested that the Licensing Board order Mr. Gamble to answer the questions, Judge Smith declined to do so. OGC had clearly indicated that if the Licensing Board were to order Mr. Gamble to testify that he could have done so without violating OGC's restrictions.

At one point during Mr. Goldberg's cross-examination of Mr. Gamble on December 7, Judge Smith chided him for questioning which held a tone of "punishment" and stopped further questioning along the line Mr. Goldberg was pursuing.

Mr. Gamble stated at the end of his testimony on December 7 that he wished the record to reflect that he had attempted to comply in good faith with OGC's restrictions and asked the Licensing Board to ratify that he appropriately censored his testimony. Judge Smith appeared to agree that Mr. Gamble had attempted to conform his testimony to the restrictions OGC had placed on his testimony.

Mr. Gamble also stated that he understood from a conversation with Mr. Rothchild that OGC was reviewing on a regular basis the transcripts

2/ Pursuant to Mr. Gamble's request, Judge Smith had previously suspended Mr. Gamble's subpoena until such time as OGC had rendered a legal opinion on the permissibility of Mr. Gamble's testimony.

Although Mr. Gamble had been called on November 20, 1984, to testify, and in fact appeared at the hearing in Harrisburg on that date, the Board ordered his testimony narrowed. Therefore, TMIA was ordered to modify Mr. Gamble's testimony. See Modified Prefiled Testimony of David H. Gamble, attached and incorporated herein as Exhibit 5.

On December 4, the Licensing Board lifted the suspension of Mr. Gamble's subpoena.

from the TMI restart hearings. Therefore, he wished approval of the Licensing Board to appear on the record for OGC review. 3/

Mr. Gamble's concluding remarks reveal that his apprehension about OGC's restrictions pervaded his entire testimony.

TMIA requests that OIA conduct an investigation to determine if any branch of the agency has attempted to harass or intimidate Mr. Gamble from testifying as a TMIA witness at the restart proceedings; and to determine whether there have been improper ex parte contacts between the Office of General Counsel and any other branch of the NRC, including the Office of Executive Legal Director, the NRC Staff, including the Office of Inspection and Enforcement, or the Atomic Safety and Licensing Board Panel itself.

TMIA believes OIA should determine the following:

- 1) What instructions OGC has received to review Mr. Gamble's testimony and what directions OGC has to determine possible application of the Ethics in Government Act or implementing regulations to that testimony;
- 2) All communications between OGC and any other NRC office concerning Mr. Gamble's testimony in the restart hearings, starting from October 1, 1984, the date on which Mr. Gamble was announced as a TMIA witness, to the present;
- 3) All communications between ELD or the Atomic Safety and Licensing Board Panel, on the one hand, and the Office of General Counsel, on the other hand, concerning the Gamble testimony, including any suggestion by OGC to ELD that ELD raise the possible application of the Ethics in Government Act to Mr. Gamble's testimony. It appears from Mr. Goldberg's remarks at the November 9, 1984, prehearing conference that Mr. Rothchild may have discussed possible application of sections 205 and 207 of the Act with Mr. Goldberg prior to the time Mr. Goldberg raised the issue before the Licensing Board;
- 4) What directions or instructions were given to OGC to read the transcripts of the TMI restart hearings on an ongoing basis;
- 5) The purpose and intent of Mr. Rothchild's suggestion to Mr. Smith that Mr. Gamble seek a legal opinion from OGC as to the permissibility of his testimony;

3/ On December 4, 1984, after receipt of the Plaine letter, Mr. Gamble requested that OGC provide counsel to him during the hearing to advise him as to how to conform his testimony to OGC's restrictions. See Gamble letter of December 4, 1984, attached and incorporated herein as Exhibit 6.

OGC declined to provide such counsel.

Sharon Connelly, Esquire
December 10, 1984
Page Seven

6) All communications between the offices of any of the Commissioners and OGC concerning Mr. Gamble's testimony, including any request for a review or summary of his testimony;

7) All communications within OGC concerning the possible application of the Ethics in Government Act, the Act's implementing regulations, or Executive Order 11222 to prohibit or restrict in any manner Mr. Gamble's testimony, including the date of each such communication; the purpose of each such communication; the participants in each such communication; and the actions taken as a result of each such communication. OIA should also address when OGC postulated the additional restriction placed on Mr. Gamble's testimony relating to disclosure of official information;

8) Whether OGC can explain the inconsistency between OGC's representation to the Licensing Board that it was not conducting an investigation or inquiry concerning Mr. Gamble's testimony and OGC's acknowledgement to OIA that it had conducted a review of his testimony and communicated the results of that review to other NRC offices.

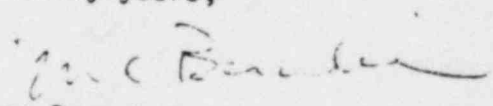
TMIA urges OIA to conduct such an investigation to determine the following:

1) Whether there have been any improper ex parte contacts between any NRC officials and employees advising the Commissioners in the exercise of their quasi-judicial functions, including but not limited to OGC, and the NRC Staff or ELD, a party to the ongoing TMI restart hearings; and

2) Whether any NRC official or employee has attempted to harass or intimidate Mr. Gamble from testifying by threatening or attempting to threaten him with application of the criminal provisions of the Ethics in Government Act, the Act's implementing regulations, or restrictions on use of official information. 4/

The hearings on the Dieckman Mailgram issue are expected to end this week. In order to cure any error which may have occurred due to intimidation or harassment of Mr. Gamble, I urge you to conduct an investigation of this matter expeditiously.

Sincerely yours,


Lynne Bernabei
Attorney for Three Mile Island Alert

Attachments as stated

cc: TMI-1 Restart Service List (without attachments)

4/ As you are well aware, any attempt to intimidate a witness or impede his testimony in a proceeding before a federal agency is punishable as a criminal offense. 18 U.S.C. 1505.