

SEP 14 1978

SECY-78-504

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THE PROVISIONS OF EO 12958, DATED 4/17/95
By Authority of [Signature] 2249
(Declassification Authority/Number)

Date of Declassification 9/23/96

For: The Commissioners
From: Clifford V. Smith, Jr., Director
Office of Nuclear Material Safety
and Safeguards
(Signed) William J. Duoka
Thru: Executive Director for Operations

Subject: CLASSIFICATION OF SENSITIVE SAFEGUARDS INFORMATION
(IMPLEMENTATION OF NSDM-347)

Purpose: To provide the Commission, as requested by the Chairman, supplemental information to update that contained in SECY-77-75, February 11, 1977 ("Implementation of National Security Decision Memorandum 347, January 20, 1977"); and to obtain Commission action on the implementation of a classification program for safeguards information.

Category: This paper covers a major policy question.

Issue: Whether the Commission should approve an action plan for implementation of a classification program for safeguards information.

Decision Criteria:

1. Does the alternative of choice satisfy the requirements of Executive Order 12065?
2. Is the alternative of choice consistent with the views of the National Security Council (NSC) regarding the information that should be classified?

Contact:
G. W. McCorkle
D. B. Matthews
42-74181

NSDM-347
C-NSI (GDS)
1/20/77

Classified by [Signature]
(name)
Special Assistant for Licensing
(title)

SUBJECT TO GENERAL DECLASSIFICATION SCHEDULE OF
EXECUTIVE ORDER 11652 AUTOMATICALLY DOWNGRADED
AT TWO YEAR INTERVALS AND DECLASSIFIED ON DEC. 31

1983
(insert year)

200061
NATIONAL SECURITY
INFORMATION
Unauthorized Disclosure Subject To
Criminal Sanctions.

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Decision
Criteria:
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3. Will the alternative of choice provide, if fully implemented, a legal basis for exempting safeguards information from public disclosure?

Alternatives:

1. Approve the plan contained in SECY-77-75 for implementation of a classification program applicable only to activities involving significant quantities of SSNM. Defer a final decision on the classification of security-related information for commercial LWRs* and solicit current NSC views on this issue as a follow-up to the NRC's letter of June 30, 1977. Continue to support enactment of comprehensive legislation to protect unclassified sensitive safeguards information (see Attachment D).
2. In addition to approving implementation of a proposed classification program applicable to SSNM activities, approve extension of the plan to include classification of security-related information for commercial LWRs. Continue to support enactment of comprehensive legislation to protect unclassified sensitive safeguards information.
3. Pending enactment of legislation applicable to sensitive safeguards information requiring protection in the interest of public health and safety, continue the present policy of restricting access to safeguards information in possession of the NRC under existing regulations.

Background:

In January 1975 the AEC Chairman recommended that the National Security Council (NSC) review the problem of public release of safeguards related information with the aim of establishing a national policy. The NSC directed, in National Security Study Memorandum (NSSM)-216, that an examination be made of the national security impact of the release of information relating to procedures for protecting and accounting for nuclear materials (including inventory discrepancy data) and to examine options for protecting sensitive safeguards information. Following the completion of the initial and the supplemental reports, a majority of ~~the~~ ^{NRC} the Commissioners agreed that certain safeguards information needed protection by a classification program (Commissioner

* Currently this information includes physical security plans, associated procedures and vulnerability analyses.

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Background:
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Gilinsky dissented) but requested that a decision on classifying security-related information at commercial LWRs be deferred pending a decision on GESMO.

On January 20, 1977, the NSC issued NSDM-347 stating that the President approved the recommendations developed during the course of the NSSM-216 review and directed that information related to physical protection measures, material control and accounting procedures and inventory discrepancy data for significant quantities of SSNM be classified under Executive Order 11652, "Classification and Declassification of National Security Information and Material." A decision on the applicability of the directive to security information for commercial LWRs was deferred until completion of the GESMO.

In February 1977, the staff transmitted SECY-77-75 to the Commission with an action plan outlining how NRC would implement NSDM-347. Commission approval for the proposed action plan has not been received.

A chronology of significant actions relating to the NSSM-216 review, including NRC's participation and subsequent recommendations, is provided in Attachment A. Attachment B is a copy of SECY-77-75 with the following enclosures:

- 1) NSDM-347
- 2) NRC letter to NSC, dated May 20, 1975
- 3) NRC letter to NSC, dated December 19, 1975
- 4) Draft proposed letter to NSC
- 5) Draft proposed NRC Action Plan
- 6) SECY-76-365, dated July 15, 1976

Subsequent to the events summarized above (and prior to the termination of the GESMO proceeding), the Commission again reviewed the question of classifying security-related information at commercial power reactors. By letter of June 30, 1977 to the NSC, Chairman Rowden indicated that the NRC was in the process of consulting with the NSC staff prior to implementation of NSDM-347 and set forth a revised recommendation that security plans for power reactors (and certain other reactors) not covered by the NSDM-347 decision should be classified under the provisions of E.O. 11652 to protect them from unauthorized disclosure. This letter requested NSC views relative to this point and noted that Commissioner Gilinsky was not in agreement. The staff is not aware of any reply to the June 30 letter, which appears as Attachment C (minus all enclosures except that containing the separate views of Commissioner Gilinsky).

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Discussion:

Following the staff's development of the action plan forwarded with SECY-77-75 there have been no comprehensive actions taken by NRC to implement a classification program generally applicable to SSNM activities or commercial LWRs. There have been, however, subsequent developments pertaining to a) proposed legislative changes and b) a new Executive Order which must each be addressed in terms of their impact upon the Commission's current review of NRC programs for the protection of safeguards information. A discussion of each of these developments and impacts follows:

a. Legislation

Under the Commission's present regulations site-specific safeguards information is "deemed to be commercial or financial information" and has been withheld from public disclosure while in the hands of the NRC based on 10 CFR 2.790(d)(1). The Commission's regulations do not presently address protection of the same information in possession of the licensee, nor do the regulations provide a basis for the Commission to assure the trustworthiness of licensee employees and other private parties for access to safeguards information.

The legislative proposals developed in staff papers SECY-77-611A through E formed the basis for a draft bill to amend the Atomic Energy Act. By letters of May 23, 1978 (Attachment D) to the Speaker of the House and President of the Senate, the Chairman transmitted the NRC legislative proposal to provide additional and confirmatory authority to the Commission. While recognizing that the Commission may control access to safeguards information determined to be National Security Information in accordance with E.O. 11652, the Chairman's letter to Congress notes that "There is no existing law which expressly provides that unclassified NRC sensitive safeguards information be withheld from disclosure" (emphasis added). Such unclassified information may have significance from the standpoint of public health and safety and should be protected from either compulsory or unauthorized disclosure, as distinct from certain safeguards information the release of which could reasonably be expected to cause ~~some damage~~ to the national security and which is properly classified under the Executive

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The Commissioners

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Discussion:
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Order. The proposed legislative changes would, among other things, establish an explicit statutory basis for exempting sensitive safeguards information from disclosure under the FOIA.

b. Executive Order

In a separate action, the NRC responded to requests from the Office of Management and Budget for views on a proposed Executive Order to replace E.O. 11652. The last response was contained in a letter from the Chairman to OMB dated January 30, 1978 (Attachment E). The new Executive Order (E.O. 12065) was issued on June 29, 1978 to be effective December 1, 1978 (Attachment F). Included therein is a specific reference to a category of information relating to nuclear safeguards (generally consistent with the Commission's earlier recommendations to OMB, dated October 25, 1977). The following pertinent portion from Section 1-3 captioned "Classification Requirements" is quoted:

"1-301. Information may not be considered for classification unless it concerns:...

"(f) United States Government* programs for safeguarding nuclear materials or facilities;..."

The portion of new the Executive Order which relates to the application of this requirement is also quoted:

"1-302. Even though information is determined to concern one or more of the criteria in Section 1-301, it may not be classified unless an original classification authority also determines that its unauthorized disclosure reasonably could be expected to cause at least identifiable damage to the national security."

* The word "Government" did not appear in the Commission's proposed wording supplied with their October 25, 1977 comments. The Commission's response of January 30, 1978 did not address the inclusion of this word in the later version.

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The Commissioners

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Discussion:
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The issues surrounding the implementation of the action plan contained in SECY-77-75 are not expected to be materially changed by the contents of the new Executive Order.

There still remains a need to examine the relationship between the implementation of a classification program in connection with the protection of safeguards information and the protection offered by the proposed legislation. Information related to the protection of the public health and safety and protectable under a legislative amendment (and the associated implementing regulations) could include information that is also classifiable from the standpoint of national security. The program implemented in response to such an amendment would not affect the ability to classify information which meets the criteria of the Executive Order and is determined to be National Security Information (NSI) by an official with classification authority.

Neither of the above developments appears to substantially modify the basic issues surrounding the general subject of protection of safeguards information. Future deliberations will still require judgments as to whether information is (1) information determined to be NSI under provisions of the related Executive Order in the interest of national security or is (2) information which does not meet the classification criteria of the E.O. but which requires protection in the interest of public health and safety and for which means other than classification (e.g., specific legislation) must be employed to prevent its disclosure while in NRC or non-NRC hands.

Establishment of the specific types of information falling within the first of the above two categories of material; i.e., identification of particular sensitive safeguards information as NSI and subject to classification in response to the requirements imposed by the Executive Order, is a necessary element in the implementation of a classification program. Classification action taken through the use of classification "guides" approved by an original classification authority is termed "Derivative Classification" in E.O. 12065. The following extracts are pertinent:

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Discussion:
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"2-201. Classification guides used to direct derivative classification shall specifically identify the information to be classified....

"2-202. Each such guide shall be approved personally and in writing by an agency head listed in Section 1-2 or by an official with Top Secret classification authority. Such approval constitutes an original classification decision."

(The Division of Security is currently reviewing the new Executive Order, to become effective on December 1, 1978, with the intent of disseminating additional information regarding its provisions.)

It will be necessary to identify the types of information that would require protection in connection with NRC implementation of a classification program such as described in the action plan forwarded with SECY-77-75. Thus, the need still exists for an expression of Commission policy in connection with classification guidance in order to permit implementation of the existing, or an appropriately modified, action plan. In addition to addressing certain other specific classification issues, the guidance will include (1) the selection of nuclear activities that present a potential for harm to the national security stemming from successful malevolent acts and (2) the specific categories of safeguards information that require classification.

The first determination was explored at great length during the NSSM-216 review. The Commission's prior recommendations in this regard were summarized earlier under Background (and as itemized in Attachment A). Although the NSC specifically addressed (in NSDM-347) the national security implications associated with the handling of plutonium or highly enriched uranium, it has yet to express an opinion on whether information related to sabotage protection at licensed LWRs (using uranium fuel of low enrichment) necessitates application of national security classification.

The identification of categories of safeguards information that require classification rests, in some instances, upon judgments regarding the expected value of the information to a potential adversary. Information concerning inventory discrepancy data was identified as a distinct category of

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classified information in NSDM-347. However, information concerning measures for physical protection and material control and accounting is expected to require individual evaluation to determine if the disclosure of such information may be reasonably expected to facilitate theft, diversion or sabotage.*

Draft classification criteria addressed to specific categories of safeguards information associated with SSNM activities was discussed in SECY-76-375 (which was, in turn, forwarded with SECY-77-75). Attachment G to this paper summarizes the criteria proposed earlier and reflects a modification to the original NMSS position on classification of specific threat information.

The establishment of policy as it relates to this overall issue is presently complicated by the absence of an NSC response in connection with extension of the authority originally granted in NSDM-347 to include security-related information at commercial LWRs. The NRC is presently included in the list of agencies authorized to classify HSI consistent with the provisions of the current Executive Order (E.O. 11652) and retains similar authority under E.O. 12065 (subsequent to its effective date of December 1, 1978). (From a technical standpoint, there is no requirement for the Commission to seek NSC approval prior to taking action consistent with the Executive Order.) Notwithstanding the above, the staff's review of the specific issues related to classification and the more general problem of protection of safeguards information has suggested the alternative courses of action discussed below:

- * The application of such a "test" has implications beyond that of developing uniform classification guidance -- such judgments establish the basis for exempting the disclosure of specific portions of documents under exemption (1) of the FOIA. At the present time declassification reviews are mandated by Sec. 552(b) of the FOIA and 10 CFR 9.5(b) whenever a classified document is identified in response to an FOIA request; the reviews have as their purpose the segregation of exempt from non-exempt (and therefore "releasable") portions of NRC records. Further, following the effective date of E.O. 12065, each classified document will have to be marked to indicate clearly which portions are classified (with the applicable classification designation) and which portions are not classified (cf. Sec. 1-504 of E.O. 12065).

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Discussion:
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Alt. 1

Approve the action plan contained in SECY-77-75 for implementation of a classification program applicable only to activities involving significant quantities of SSNM. Defer a final decision on the classification of security-related information for commercial LWRs and solicit current NSC views on this issue as a follow-up to the NRC's letter of June 30, 1977. Continue to support enactment of comprehensive legislation to protect unclassified sensitive safeguards information (Attachment D).

Immediate application of the proposed program to safeguard information for SSNM activities would remove the present inconsistency regarding the treatment being afforded to similar information by the Department of Energy (by virtue of their implementation of the NSDM-347 directive). This has already been noted by several NRC licensees handling SSNM under contract to DOE. This inconsistency was recently addressed by the DOE in correspondence to the Congress in connection with the Omnibus Anti-Terrorism Act of 1978 (S.2236). (A representative letter is included as Attachment H.)

The first alternative would result in protection of safeguards information consistent with the results of the inter-agency review of such issues conducted under NSC aegis (NSSM-216, etc.) and with the Presidential decision reflected in NSDM-347.

Deferral of decision regarding commercial LWRs is compatible with the approach to this issue taken in the NRC's earlier letter to NSC on this matter (Attachment C). Information excluded from the classification program implemented as envisioned in Alternative 1 (e.g. LWR security-related information) but still requiring protection will continue to be treated, while in NRC hands, as proprietary information. Enactment of the Commission's legislative proposals is necessary to complement the proposed classification program. The legislative changes recommended by the Commission would provide authority to protect safeguards information that, although not classifiable, should be protected because of its significance from the standpoint of public health and safety. (In the instance that a subsequent decision were made not to classify security information for LWRs, then the legislative proposal would provide an explicit statutory basis for protecting such information.)

Discussion:
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Alt. 2 In addition to approving implementation of a proposed classification program applicable to SSNM activities, approve extension of the action plan to encompass classification of security-related information for commercial LWRs. Continue to support enactment of comprehensive legislation to protect unclassified sensitive safeguards information.

The only substantive distinction between this approach and Alternative 1 would be an independent Commission determination that certain LWR security information is national security information and should therefore be protected in accordance with the applicable requirements of the Executive Order.

Selection of either of the above alternatives will require adoption of comprehensive classification guidance. Criteria for the development of such guidance has been developed by the staff for Alternative 1 information (summarized in Attachment G). The criteria would have to be modified, in case Alternative 2 is preferred, to reflect its applicability to both SSNM activities and power reactors.

Implementation of any form of classification program will require the granting of NRC personnel and facility security clearances to those licensees requiring access to classified information. This issue (and its relationship to the proposed clearance rule for persons having access to or control over SNM) was addressed most recently in SECY-77-290A dealing with proposed Parts 25 and 95. The Office of the Secretary returned SECY-77-290A without action pending resolution of the issues discussed herein. The proposed Parts 25 and 95 are identified as a key element in the action plan forwarded with SECY-77-75 and will be resubmitted, as necessary, in connection with the possible implementation of either of the above alternatives.

Alt. 3 Pending enactment of legislation applicable to sensitive safeguards information requiring protection in the interest of public health and safety, continue the present policy of restricting access to safeguards information in possession of the NRC under existing regulations.

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The third alternative is a continuation of existing policy while pursuing more comprehensive statutory authority. The shortcomings of such an approach, in the near term, relate to (1) the existing inability to assure protection of safeguards information in non-NRC hands, (2) the existing inability to assure the trustworthiness of personnel who may have access to this information, and (3) the possibility for a successful legal challenge under the FOIA to the use of the proprietary designation. Further, any additional delays on the part of NRC in establishing a classification program for sensitive safeguards information may raise difficult questions as to why we have not taken action responsive to NSDM-347 (and E.O. 12065), especially in light of DOE's action resulting from NSDM-347 to classify certain safeguards information in the hands of some NRC licensees.

Recommendations: That the Commission:

1. Approve Alternative 1: Approve the action plan contained in SECY-77-75 for implementation of a classification program applicable only to activities involving significant quantities of SSNM. Defer a final decision on the classification of security-related information for commercial LWRs and solicit current NSC views on this issue as a follow-up to the NRC's letter of June 30, 1977. Continue to support enactment of comprehensive legislation to protect unclassified sensitive safeguards information.
2. Note:
 - a. that the action plan forwarded with SECY-77-75, if approved, will provide a basis for future staff actions related to implementation of the classification program applicable to SSNM activities.
 - b. that the preparation of a classification guide as part of the proposed action plan requires Commission action in connection with the criteria discussed in Attachment G and that the classification guide will be submitted for final approval.
 - c. that personnel and facility clearances will be required for affected licensees, therefore, proposed Parts 25 and 95 (including NRC and licensee resource estimates) will be resubmitted.

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Coordination:

The Offices of Inspection and Enforcement, Nuclear Reactor Regulation, Standards Development and Administration and the Divisions of Security and Rules and Records agree that Alternative 1 is the proper choice. The Executive Legal Director has no legal objection.

OGC and OPE comments received and responded to at Attachments I and J, respectively. In addition to requesting further information on several facets of the staff's analysis, OGC suggested two additional alternative courses of action available to the Commission in connection with the earlier (June 30, 1977) recommendation to the NSC on the classification of security-related information for commercial LWRs. NMSS agrees that additional options exist relative to disposition of the earlier NRC recommendations, but believes such options represent variations upon the three basic alternatives offered by the staff. NMSS responses to this and the remaining OGC comments appear at Attachment I. OPE agrees with that portion of the staff's recommended Alternative approving implementation of a classification program applicable only to licensed activities involving SSNM. OPE does not believe, however, that Commission solicitation of current NSC views on the classification of security-related information for the licensed LWR industry is appropriate or necessary at this time. NMSS and NRR believe that it would be prudent to communicate with the NSC on the LWR classification issue. The NMSS response is at Attachment J.

Scheduling:

It is recommended that this matter be considered at a closed meeting in view of the classified nature of the information involved (see staff Sunshine memorandum forwarded separately).

Original Signed By
CLIFFORD V. SMITH, JR.

Clifford V. Smith, Jr., Director
Office of Nuclear Material Safety
and Safeguards

Attachments:

- A. History of NSSM-216 Actions
- B. SECY-77-75, dtd Feb. 11, 1977
- C. NRC ltr to NSC, dtd June 30, 1977
- D. NRC ltr to Senate, dtd May 23, 1978
- E. NRC ltr to OMB, dtd January 30, 1978
- F. Executive Order 12065

NOTE: Last page retyped to ^{reflect} coordination with OGC and OPE and to include the OGC/OPE comments and NMSS responses at Attachments I and J. (See Previous Yellow)

OFFICE	G. Background Paper on SECY-76-375, Classification Criteria	NRR	NMSS	EDO
SURNAME	DOE ltr to Senate Foreign Relations Committee, dtd June 19, 1978	H. Denton	C. Smith	LV Gossick
DATE	NMSS Response to OGC Comments	9/13/78	9/15/78	9/17/78
	NMSS Response to OPE Comments			

Recommendations:
(Cont'd.)

- b. that the preparation of a classification guide as part of the proposed action plan requires Commission action in connection with the criteria discussed in Attachment G and that the classification guide will be submitted to the Commission for final approval.
- c. that personnel and facility clearances will be required for affected licensees, therefore, proposed Parts 25 and 95 (including NRC and licensee resource estimates) will be resubmitted.

Coordination:

The Offices of Inspection and Enforcement, Nuclear Reactor Regulation, and Administration and the Divisions of Security and Rules and Records agree that Alternative 1 is the proper choice. The Executive Legal Director has no legal objection to the adoption of Alternative 1.

OPE concurs with the selection of Alternative 1.

Scheduling:

It is recommended that this matter be considered at a closed meeting in view of the classified nature of the information involved (see staff Sunshine memorandum forwarded separately).

Clifford V. Smith, Jr., Director
Office of Nuclear Material Safety
and Safeguards

Attachments:

- A. History of NSSM-216 Actions
B. SECY-77-75, dtd Feb. 11, 1977
C. NRC ltr to NSC, dtd June 30, 1977
D. NRC ltr to Senate, dtd May 23, 1978
E. NRC ltr to OMB, dtd January 30, 1978
F. Executive Order 12065
G. Background Paper on SECY-76-375, "Classification Criteria"
H. DOE ltr to Senate Foreign Relations Committee, dtd June 19, 1978

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SURNAME	<i>Telecom</i> <i>Blackburn</i>		<i>DM</i> <i>Partlow</i>	HShapar	CVSmith, Jr.	LVGossic
DATE	8/1/78 7/28	8/1/78	8/1/78	8/1/78	8/1/78	8/1/78

Recommendations:
(Cont'd.)

- b. that the preparation of a classification guide as part of the proposed action plan requires Commission action in connection with the criteria discussed in Attachment G and that the classification guide will be submitted to the Commission for final approval.
- c. that personnel and facility clearances will be required for affected licensees, therefore, proposed Parts 25 and 95 (including NRC and licensee resource estimates) will be resubmitted.

Coordination:

The Offices of Inspection and Enforcement, Nuclear Reactor Regulation, and Administration and the Divisions of Security and Rules and Records agree that Alternative 1 is the proper choice. The Executive Legal Director has no legal objection to the adoption of Alternative 1.

OPE concurs with the selection of Alternative 1.

Scheduling:

It is recommended that this matter be considered at a closed meeting in view of the classified nature of the information involved (see staff Sunshine memorandum forwarded separately).

Clifford V. Smith, Jr., Director
Office of Nuclear Material Safety
and Safeguards

Attachments:

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F. Executive Order 12065
G. Background Paper on SECY-76-375,
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H. DOE ltr to Senate Foreign Relations
Committee, dtd June 19, 1978

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8-17-78

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Date

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2.

3.

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5.

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Approval	For Clearance	Per Conversation
As Requested	For Correction	Prepare Reply
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Comment	Investigate	Signature
Coordination	Justify	

REMARKS

This is Attachment I (ONMSS Response to OGC Comments) for addition to the staff paper on the implementation of NSDM-347.

done

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)

D. Matthews

Room No.—Bldg.
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74181

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U.S. G.P.O. 1977-241-530/3090

OPTIONAL FORM 41 (Rev. 7-76)

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FPMR (41 CFR) 101-11.206



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

August 3, 1978

OGC
OPE

For your concurrence/comments. Chairman is pressing. I would appreciate by 7/8 if not too difficult for you. Only Enclosures A & G included in this copy--others should be known to you and mostly background.

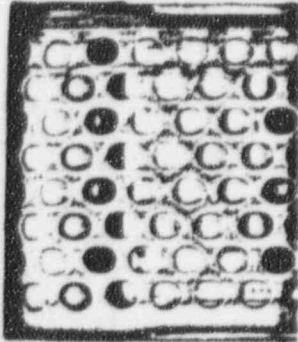
TAR *slg*
T. A. Rehm, A/EDO

Attachment:

Memo to Commissioners from Clifford V. Smith,
Subject, CLASSIFICATION OF SENSITIVE SAFEGUARDS
INFORMATION (IMPLEMENTATION OF NSDM-347)



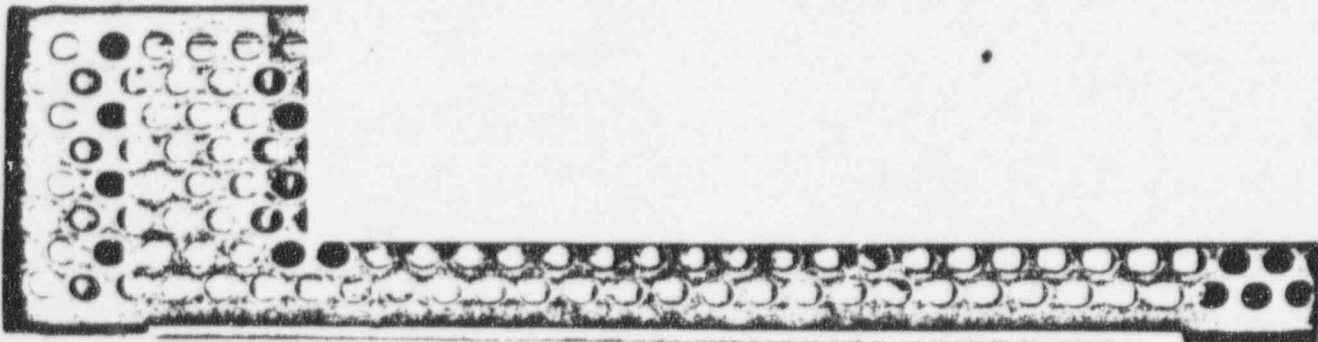
UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555



(HOLD THIS IN THE
SAFE FOR ME)

Bill
This is a draft. Have you any interest?
K28

- Re: ~~OGC~~ paper letter to Glenn (NRC) - need to do log. auth
O NRCSS paper SSNM + PWR SFGD
O Div. Sec paper Dept T.S.





UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 6, 1978

1155

MEMORANDUM FOR: Lee V. Gossick
Executive Director for Operations

FROM: Chairman Hendrie

SUBJECT: NRC PROGRAMS FOR PROTECTION OF SENSITIVE INFORMATION

In connection with the new Executive Order issued by the President on June 29, 1978 (E.O. 12065 - "National Security Information"), I have been reviewing NRC's programs for protecting sensitive information. In particular, I note that the Commission has never taken action on the staff proposal contained in SECY-77-75 dated February 11, 1977.

I believe that it would be desirable for you to have the staff review this Commission paper, updating it as might be appropriate and resubmitting it to the Commission for consideration.

cc: Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Samuel J. Chilk, SECY
Ken Pedersen, OPE
James Kelley, OGC

Rec'd Off. 100
Date 7-7-78
Time 9:20