



UNITED STATES  
NATIONAL ARCHIVES REGISTRY COMMISSION  
WASHINGTON, D. C. 20541

January 10, 1984

MEMORANDUM FOR: Tom Combs  
SECY

FROM: Donnie H. Grimsley, Acting Chief  
Freedom of Information and Privacy Acts Branch

SUBJECT: REQUEST FOR OFFICE OF COMMISSIONERS' CONCURRENCE ON  
STAFF RECOMMENDATIONS REGARDING DISCLOSURE OF DOCUMENTS  
SUBJECT TO FOIA-83-508

The documents listed below are subject to FOIA-83-508 and are enclosed.  
Also identified below are recommendations regarding their disclosure.  
Please provide the Office of the Commissioners' concurrence or nonconcurrence  
in these recommendations no later than NOON January 23, 1984.

Please return the documents with your response.

Donnie H. Grimsley, Acting Chief  
Freedom of Information and Privacy  
Acts Branch

Enclosures: As stated

CONTACT: Frank W. Kards  
AS-26610

DOCUMENT DESCRIPTION

OFFICE RECOMMENDATION

- |    |         |   |                        |
|----|---------|---|------------------------|
| 1. | 6/8/83  | Memo for R. C. DeYoung from J. K. Joosten, Subject: WATERFORD QA (1 page) | 01 - No Recommendation |
| 2. | Undated | Letter from "Concerned Citizen"   | 01 - No Recommendation |

*Jerry Litebrun says OK*

*To release*

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PDR FOIA  
BERGMANBB-43 PDR

*(Handwritten mark)*

ROUTING AND TRANSMITTAL SLIP

Date 2/13/85

TO (Name, title symbol, room number, building Agency/Post)	Initial	Date
1. Pat Kyleon	H-1149	
2. Comm. Roberts' office		
3.		
4.		
5.		

Action	File	Note and Return
Approval	For Clearance	For Conversation
As Requested	For Correction	Prepare Reply
Circulate	For Your Information	See file
Comment	Investigate	Signature
Coordination	Justify	

REMARKS

Re your 1/10/84  
 signing today, attached  
 is a copy of our 1/10/84  
 referral memo to SC&Y with  
 a note on the bottom of the memo  
 authorizing us to release the 6/5/83

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

FROM: (Name, title symbol, Agency/Post)

110

28/85

OPTIONAL FORM 85 (May 1962)

TESTIMONY OF BEN B. HAYES  
DIRECTOR, OFFICE OF INVESTIGATIONS  
UNITED STATES NUCLEAR REGULATORY COMMISSION

My name is Ben B. Hayes. I was appointed the first permanent director of the NRC Office of Investigations (OI) in February 1983. I came to the NRC after 17 years of criminal investigative experience with the Internal Revenue Service, Criminal Investigation Division. My last assignment prior to coming to the NRC was as Chief of Criminal Investigations for the Cleveland District which covers Northern Ohio.

On March 26, 1987, I was deposed under oath by Mr. Stephen Ryan, Counsel for the Majority in the Senate Government Governmental Affairs Committee. My appearance at that deposition was as a result of a written request from Senator Glenn, the Committee Chairman rather than on my own initiative. I subsequently was afforded an opportunity to review the transcript of my deposition. Over this past weekend, I was informed that the Committee would like me to summarize the information that I provided during the deposition, and sponsor this summary as my testimony today. I was not able to complete my review of this testimony until I returned from leave yesterday. I would like to emphasize that the opportunity to provide my testimony, either during my deposition or here today, is not a privilege that I particularly sought. To the contrary, it was thrust upon me. Nonetheless, the information that I have provided to the Committee Staff, and which I am summarizing today, is truthful and as accurate as I can make it.

OI is the NRC organization responsible for the conduct of all investigations involving NRC licensees, licensee vendors, and other persons or entities over which NRC has jurisdiction. The office is staffed with investigators having a broad range of experience gained with other Federal investigative agencies such as the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, the Naval Investigative Service, and the Army Criminal Investigations Division. OI investigations that uncover or document wrongdoing that appears to violate criminal statutes are referred to the U.S. Department of Justice. Investigative reports are also sent to the NRC official who requested the OI investigation so that the NRC may take any necessary actions to protect the public health and safety.

There is a strong feeling within the industry and certain quarters of the Commission to "decriminalize" OI investigations, i.e. not prosecute them criminally. There are significant and important persons in the Commission, both at the staff and Commission level, who desire far less emphasis on criminal prosecutions. During the years that I have been Director, OI has been in a constant battle to maintain its independence. There are people within the NRC, including some on the Commission itself, that want to decrease the level of confrontation that exists between OI and the nuclear industry.

#### MID-SOUTH DOCUMENTS

I have been asked to describe the circumstances surrounding the discovery by OI investigators of a sensitive NRC document in the files of a senior official of Louisiana Power and Light (LP&L), the utility licensed to operate the Waterford Nuclear Plant near New Orleans, La. During the course of an investigation at Waterford in March 1985, one of my investigators found this document in the personal files of the Vice President-Nuclear of LP&L. The NRC document is an internal NRC memorandum prepared by the Technical Assistant to then Commissioner Victor Gilinsky which had been addressed to the then Director of the Office of Inspection and Enforcement. The memorandum dealt with allegations of collusion between the NRC and LP&L, as well as cracks in the reactor base mat. The OI investigator who found the documents, Mr. William J. Ward, immediately recognized the importance of the documents, initialed and dated the reverse of them for evidentiary purposes, and brought them to my attention.

I noted the following characteristics of the documents. First, the internal NRC memorandum appeared to have come directly out of Commissioner Thomas Roberts' office or files in view of the initials on it. Second, the memorandum was attached to a transmittal memorandum on the letterhead of Middle South Services, Inc. which bore the date of June 15, 1983. It was addressed to Mr. John J. Cordaro and was sent from a Middle South official by the name of George E. White. The memorandum was marked "confidential" with that term underscored. The brief text of that memorandum states, "Attached is a memorandum received from sources inside the NRC regarding Waterford quality assurance matters. This memorandum is for your information but I would hope that you would limit its distribution to protect the source within the NRC".

I felt that the documents indicated that Middle South (the holding company for LP&L) had a source directly inside the NRC, especially inasmuch as the documents came from the files of Commissioner Roberts. Particularly startling was the fact that the document was received in Commissioner Roberts office on Thursday, June 9, 1983, and was transmitted by Mr. White of LP&L only four working days later, June 15, 1983. The memorandum was important as it dealt with a base mat issue which was under active review by the NRC staff, and that it reports collusion with the licensee on the part of NRC personnel, a very serious allegation in my opinion.

The document also notes that LP&L may have withheld information on the base mat cracks from the NRC. OI subsequently initiated an investigation of that issue. For a licensee to know that the NRC was discussing the issues of possible collusion and the base mat issue would give them a tremendous advantage. This is an example of someone within the NRC tipping a licensee of a potential investigation. There have been instances where senior managers have tipped the fact that they intended to refer a matter to OI for investigation, or advised licensees as to how to respond to an official inquiry by the Commission.

After leaving copies of the document at the Waterford Site, we returned to Washington and consulted with other members of the OI Headquarters staff. Having concluded that the document in question came from the Office of Commissioner Roberts, based on various markings contained on the documents, I saw two options: take it to the Director of the NRC Office of Inspector and Auditor, or take it to the Chairman of the NRC. I elected to take the matter to the Chairman who at that time was Nunzio J. Palladino.

I met with the Chairman and the Chairman's Executive Assistant to share the document with them, and to explain how it came into the possession of OI. Chairman Palladino asked a few questions about the circumstances, including whether I had discussed the matter with Commissioner Roberts. The Chairman asked me for my recommendation and I responded that the matter should be referred to the Director of OIA. On March 14, 1985, I received a one page memorandum from the Chairman that was hand delivered to my office. That memorandum directed me to discuss the matter with Commissioner Roberts as soon as possible, and stated that the Chairman had given Commissioner Roberts the copies of the documents that I had provided him. The memorandum also stated that the reorganization

plan of 1980 provides that supervision of the personnel within each Commissioner's office is that Commissioners' responsibility. That memorandum did not direct me to refer the matter to OIA.

The next day, March 15, 1985, I and Mr. William Ward, Assistant to the Director of OI, met with Commissioner Roberts and Commissioner Roberts' Legal Assistant, Mr. James Cutchin, in Commissioner Roberts' office. Commissioner Roberts held up what was apparently his file copy of the memorandum in question. The memorandum that he showed me appeared to be identical to the copy we found at the Waterford Site. Commissioner Roberts indicated that he had inquired into the matter, talked to all members of his staff, and was convinced that no one on his staff had sent the documents; he suggested the documents might have been obtained by janitorial personnel or perhaps part time help that had been working in his office. Commissioner Roberts asked me why I did not personally bring the matter to him. I replied that I thought my first obligation was to notify the Chairman.

Commissioner Roberts then requested that I send him all copies of the documents in OI files. I advised Commissioner Roberts that I had taken notes during my prior discussion with the Chairman. Commissioner Roberts then stated he wanted all copies of my notes as well. I complied with Commissioner Roberts' instructions. As we were leaving his office, Commissioner Roberts commented that he would probably see this on the Hill. We assumed that Commissioner Roberts was referring to his upcoming confirmation hearings which would be held prior to his reappointment as an NRC Commissioner. After reflecting on the manner in which the matter had been handled, I elected to annotate the March 14, 1985, memorandum to reflect Commissioner Roberts' request for the documentation relating to this matter. This annotation was made by me on March 18, 1985, at which time it was countersigned by Mr. Ward.

I have been specifically asked what I would have done had I been in charge of the investigation of this incident. I would have interviewed the Middle South and LP&L officials involved in this matter under oath, to include all recipients of the document. I would have placed Commissioner Roberts' staff under oath, and have questioned each member about the extent of their knowledge concerning this memorandum. In short, I would have conducted a very extensive and exhaustive investigation to determine who was leaking information to a licensee.

The leaked document was definitely not the type of document that is publicly released. I would have objected if the document were proposed to be released to the licensee within 7 days of it being provided to the NRC Staff. I have never before seen an internal document of this nature given to a party at interest, either in this or any other agency where I have worked.

In response to specific questions during my deposition, I acknowledged that Commissioner Roberts' office has been, in general, a continual critic of OI operations. Commissioner Roberts has raised proposals before the Commission that would limit in some respects OI's ability to initiate investigations, to make referrals to the Department of Justice, or otherwise to conduct the business of OI.

Another incident involved a second Middle South utility, Grand Gulf Nuclear Station in Mississippi. The then Regional Administrator of the NRC Region II Office in Atlanta, Georgia, or his immediate staff, reviewed draft documents that the licensee proposed to submit to the NRC. On detecting the fact that the documents appeared to contain a material false statement, the Regional Administrator or his staff told the licensee to go back and resubmit the document because it would be considered a material false statement.

#### TVA PROBLEMS

Another incident occurred that appeared to be an improper contact between the NRC's Executive Director for Operations (EDO), Victor Stello, and the Tennessee Valley Authority (TVA) Manager of Nuclear Power, Mr. Steven White. The EDO is essentially the chief operating officer of the NRC. Most of the day to day activities of the NRC to include inspection, enforcement, licensing, and other regulatory activities are done under his general supervision. The general subject of that contact was one of the major issues being investigated by OI concerning the well publicized difficulties regarding the TVA nuclear program.

By way of background, in December 1985, NRC Commissioner Asselstine was being briefed by NRC Region II personnel as well as TVA representatives on the status of the Watts Bar Nuclear Power Plant in Tennessee. I am told that during that briefing, members of the TVA Nuclear Safety Review Staff reported that the plant was not built in accordance with NRC requirements; specifically, that the Watts

Bar quality assurance program was not in conformance with the requirements of Appendix B to 10 CFR 50. Subsequent to this briefing, the NRC sent a January 3, 1986, letter to TVA asking TVA's official position as to whether Watts Bar was in compliance with Appendix B, and allowed TVA 7 days to respond in writing. The NRC letter was very important. If TVA were to have indicated that the plant was not in compliance with Appendix B, then the NRC Staff might have issued an immediate stop work order to halt construction. It was also noteworthy that Watts Bar was very close to licensing; in fact, they were anticipating licensing as early as April 1986.

I was informed by Harold Denton, Director, Office of Nuclear Reactor Regulation, that Mr. Stello had initiated a telephone call in his presence while the two of them and other NRC staff were returning from a meeting at the Commission offices on H Street in Washington D.C.. Mr. Denton related that the telephone call was to Mr. Steven White, the TVA Manager of Nuclear Power, and that the conversation dealt with TVA's proposed response to the NRC's January 3 letter. Mr. Denton was very uncomfortable with that because of his view that White should respond without any advice from the Commission. Mr. Denton told me that James Taylor, Director, IE, was also present in the van during that telephone call. I then went to Mr. Taylor and asked him about it. Mr. Taylor confirmed that the call took place.

I was very concerned on learning of that phone call as OI had ongoing investigations regarding TVA, and one investigation in particular had addressed the issue of whether a former TVA manager had lied to the NRC concerning readiness of Watts Bar for fuel load. There would be no reason for a licensee not to try to get a reading from the NRC as to how best to handle a very difficult situation such as a reply to that letter; however, in my view, it would be improper for the NRC to give it. Mr. Denton indicated that Mr. White appeared to be shopping for advice as to how to reply to the January 3 letter. At the time of the telephone conversation, the NRC had not received a response to the letter. Such a response was not received until March 20, 1986.

Both Mr. Denton and Mr. Taylor felt the NRC should be dealing at arms length with TVA on such a critical issue. Because of my concerns about the possible impropriety of the telephone call, concerns that were heightened by the obvious concern expressed by Mr. Denton and Mr. Taylor, I elected to discuss the matter



with Chairman Palladino. Chairman Palladino requested that I take the matter to Ms. Sharon Connelly, the Director of OIA, which I did that same day.

After reporting the matter to OIA, I was deposed by investigators from that office shortly after making the initial report to Ms. Connelly. I subsequently read the OIA report concerning this matter and noted that the report consisted of my deposition and that of Mr. Stello, neither of which was taken under oath. It also consisted of memoranda of interview rather than depositions of Messrs. Taylor and Denton. The thrust of Mr. Stello's deposition was that he advised White not to give a definitive response to the January 3, 1986 NRC letter which, in fact, asked for a very definitive response.

The March 20, 1986 TVA response was not, in fact, definitive, i.e., it did not provide a clear yes or no answer. Rather, it reported that Mr. White found that there was no "pervasive" breakdown in the quality assurance program at Watts Bar. The OIA report on this matter concluded that there was no misconduct by NRC officials.

My OIA deposition was taken four days after my initial report to Ms. Connelly (April 11, 1986), but Mr. Denton and Mr. Taylor were not interviewed until the middle of June 1986. Mr. Stello was not deposed until July 30, 1986. In my view, this was a very serious, sensitive matter that deserved an expeditious review and investigation, and that especially considering the stature of Mr. Stello in the NRC structure, an investigation should be quick, complete, and thorough.

Judging from the report, no one from TVA was interviewed regarding any aspect of the investigation. During my Committee deposition, in response to Mr. Ryan's question, I acknowledged, that I would have placed Mr. White under oath and have taken a deposition concerning that telephone call. I agreed that a fair characterization of this matter was that a very senior NRC official was in contact with the licensee in a way that creates the impression that the official tipped the licensee as to how they should answer a particular inquiry that was also the subject of an OI investigation.

THREATS BY STELLO

In the latter part of 1985 -- late November or early December -- I met with Chairman Palladino to give him an update on ongoing investigations involving TVA. Responding to the Chairman's questions, I offered my impression that the Commission's handling of the TVA matter appeared to be disorganized, and that NRC had not in fact set forth a comprehensive program to identify the problems at TVA, much less a program geared toward resolving these issues.

Consequently, I recommended that the Commission appoint a senior executive to take the responsibility over the TVA project and provide that executive with the necessary resources. Later that day, I provided a similar briefing to then Commissioner, now Chairman, Zech. I subsequently drove to a management meeting at the NRC Region I Office at King of Prussia, Pennsylvania. The next morning the management meeting commenced under the leadership of then EDO, Mr. William Dircks. That morning, Mr. Stello came up to me, and standing face to face and shaking his fist in my face said, "Ben if what you said comes to pass, I'm going to get you." At first I thought Mr. Stello was kidding, and I responded in a jovial tone, "What are you doing Vic, threatening me?" Mr. Stello's reply was "I don't care how long it takes, I'm going to get you." I believe Mr. Stello was dead serious.

A little later, Mr. Dircks, the EDO, met with me in a small conference room; in the presence of Mr. Denton, Mr. Taylor, and the Region II Administrator, Mr. Dircks said, "All right, Ben, what in the hell did you tell the Commissioners because we've got to do damage control". I informed Mr. Dircks that I provided the Chairman and Commissioner Zech my personal views as they requested, that I report to the Chairman, and when asked for my views, I intend to give them to him. The threatening incident and the conversation with Mr. Dircks took place on December 5, 1985. Within thirty days, Mr. Dircks retired, and Mr. Stello became the Acting EDO.

Subsequent to that meeting, there have been changes that affect the way in which OI operates. One of these actions was the establishment of the Investigation Review Board (IRB). The purpose of the IRB is basically twofold, to establish national priorities, and to assure that Staff investigative requests are

warranted. The IRB has been in existence for five months. Prior to the establishment of the IRB, Regional Administrators could refer suspected wrongdoing matters directly to OI. This is no longer the case. A Regional Administrator can no longer request an investigation without IRB concurrence.

The practical effect of the IRB has been a dramatic downturn in the number of wrongdoing matters referred to OI for investigation. There have been a total of 8 requests for investigation in a five month period since the board has been in operation. In contrast, for a comparable five month period just one year earlier, OI received 42 referrals for investigation. For example, as of the date of my deposition, one of the five NRC Regional offices, Region I, King of Prussia, Pennsylvania, had not submitted a single request for investigation since the initiation of the IRB.

I agree with Commissioner Asselstine's statement that the IRB appears to be a "...thinly veiled attempt by the EDO to control OI by controlling what referrals are made, and thus what OI investigates." After Mr. Stello expressed the view that cases were being referred to OI that should not have been, I wrote the EDO and asked for a list of such cases. Mr. Stello's response was a memorandum that basically stated that he didn't have the resources to answer that question. I failed to see what the problem was that the staff was attempting to resolve.

Another change was SECY 85-369 which placed major limitations upon the NRC staff in its referral of matters to OI. That document establishes priorities for conducting investigations, defines wrongdoing, and provides a threshold for staff requests for investigations. I believe the effect of that threshold has been to direct the staff to make their own internal evaluation in a way usurping the ultimate goal of an OI investigation, i.e., the determination of whether the matter is or is not willful. The staff's interpretation of this threshold appears to be that they are required to gather evidence indicating willfulness rather than merely reporting wrongdoing. This appears to have "chilled" surfacing of wrongdoing items to OI. It is the role of the investigator to determine whether or not a particular act was done willfully.

Other limitations exist on the authority of OI to initiate investigations regarding the character and competence of licensees. To begin an investigation solely relating to those issues, OI is required to make a recommendation to the

Commission as to whether the investigation is warranted, and then be guided by a majority vote of the Commission as to whether or not to open the case.

There is one instance where the Commission declined to authorize an investigation of this nature that involved senior officials at the Wolf Creek Generating Station operated by Kansas Gas & Electric. On Dec. 24, 1984, I wrote the Commission and outlined certain character issues pertaining to two senior Kansas Gas & Electric managers. Among the allegations described in that memorandum were senior officials of the licensee ordering licensee employees to break into the car of a licensee employee in order to remove files; sexual harassment; and "blackballing" by the person responsible for the quality assurance program at Wolf Creek. The latter involved an allegation that the official prevented a former employee who had raised safety concerns from getting a job elsewhere in the industry. The Commission subsequently voted 4 to 1 not to authorize the investigation. (Commissioner Asselstine desired an investigation.)

There were other instances of attempts to curtail OI authority, especially OI's authority to self initiate investigations. A recent example of this was the February 13, 1987 memorandum from Commissioner Roberts to the balance of the Commission which criticizes certain investigations initiated by OI. Commissioner Roberts' memorandum recommends to the Commission, that in the event that I did not provide a satisfactory explanation, the Commission should, "...seriously consider whether organizational and management changes are necessary to assure that OI functions as we intend it to function, and that its activities are adequately supervised and controlled."

It is my understanding, based on his memorandum, that Commissioner Roberts believes that OI no longer has the right to self-initiate investigations on wrongdoing matters identified or reported by NRC employees. As noted in our March 20, 1987, response to Commissioner Roberts' memorandum, a response that we prepared at the direction of the Commission, I feel OI must retain the ability to self-initiate investigations regardless of the origin of the allegation.

On one occasion, Commissioner Roberts' legal assistant criticized OI's self initiation of a recent hospital case, and stated during a telephone conversation with me, "Quite frankly, Ben, you may have committed a material false statement

before the Commission". (I of course did not.) I took the comment seriously, especially when I subsequently learned the legal assistant voiced the same concern to a member of the NRC Office of the General Counsel. Nonetheless, I believe that OI did the right thing, especially in the particular case-in controversy which was a blatant example of not allowing my office to conduct a thorough, aggressive investigation into some identified false documents.

That was not the first time Commissioner Roberts' assistant has suggested to OI staff members that their jobs may be in jeopardy. In one such incident, the he told Roger Fortuna, the Deputy Director of OI, that OI's management could be replaced if "we or I" ever were to find OI not abiding by the "will" of the Commission.

One way of controlling OI would be to remove its independent status as a Commission-level office and make it instead report to the EDO. There have been several Commission initiatives to move OI under the EDO. One such effort resulted in a two to two tie with one Commissioner, then Chairman Palladino, abstaining. The effect of such a move would be to remove OI's ability to go directly to the Commissioners; rather, OI would have to go through the EDO. A strong letter from the Department of Justice opposed any movement of OI under Staff.

The proposed movement of OI under the EDO was of great concern to my staff and I because we do not feel that we could exercise the independence, the thoroughness, and completeness that we feel a professional Federal investigator must have to do a competent job were we to become a Staff office. If the Commission is going to have an investigative arm, I believe that investigations of wrongdoing matters must be supervised directly by the Commission rather than the NRC Staff.

All cases involving potential violations of 18 USC 1001 have to be given to the Commission for consultation before being released to the Department of Justice. Moreover, all referrals to the Department of Justice require consultation with the NRC Office of the General Counsel. In response to Mr. Ryan's question, I agreed that in disclosing these investigative results within the agency to the Commissioners and their staff and Office of the General Counsel, there would be a possibility that this information could get back to the licensee, especially in light of the situations where such tips have been made by NRC in the past.

I would like to emphasize, however, that although this is, of course, a possibility, I do not have any indication that it in fact has ever occurred on a referred matter.

The Commission has the right to tell OI not to refer cases to the Department of Justice. The OI investigation related to the D.C. Cook Nuclear Plant, was referred to the Department of Justice. That investigation focused on willful material false statements made to NRC by the licensee regarding compliance with NRC fire protection guidelines. At the conclusion of that investigation, I exercised the authority I then had to refer matters directly to the Department of Justice. I no longer have that authority.

The completed report of investigation was provided the NRC Staff. The Staff declined to make a decision whether the false statement was willful. They took it to the Commission. In one of the meetings subsequently held regarding the D.C. Cook matter, the Commission voted 3 to 2 that it was a material false statement, but then voted 3 to 2 that the statement was not willful. I recall that during that meeting, there was a discussion on the record as to perhaps "unreferring" the matter from the Department of Justice. Apparently the Department of Justice disagreed with the Commission as they sought and obtained criminal indictments of the utility officials and the utility itself regarding the material false statements issues. These indictments were recently dismissed on statute of limitations grounds.

It was subsequent to that investigation and the controversy surrounding the DC Cook referral that OI was required to send any OI reports that we wished to refer to the Department of Justice to the Office of the General Counsel, and if they involved material false statement issues, to the Commission as well, prior to such referrals.

The Commission has specifically directed OI not to conduct or perfect criminal investigations. Nonetheless, I believe criminal prosecution of those licensees who chose to deliberately violate Commission rules and regulations would have a deterrent effect on the conduct of other licensees. Notwithstanding these restraints, however, the Commission has authorized technical and investigative support at the request of the Department of Justice once the matter has been referred.