

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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In the Matter of )

Tennessee Valley Authority )  
Chattanooga, Tennessee )

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) Docket Nos. EA-20-006, EA-20-007

**Motion for Return and Protection of Privileged and Confidential Documents**

The Tennessee Valley Authority (“TVA”) seeks relief from the NRC Staff’s improper disclosure of two documents that are attorney-client privileged communications, and a third document containing confidential personnel information. On February 18, 2021, the NRC Staff publicly disclosed and published privileged and confidential records in violation of common law principles of attorney-client privilege, NRC regulations regarding public disclosure, and the agreed-upon Protective Order entered by the Board. After TVA’s good faith attempts to resolve these disclosures, the parties have reached an impasse on the proper treatment of the three documents that the NRC Staff insists, with little explanation, should be released into the public record. TVA therefore submits this motion to seek protection over these documents consistent with the terms of the Protective Order.<sup>1</sup>

Specifically, TVA respectfully requests that the Board direct the NRC Staff to return two privileged attorney-client communications that it received through an unauthorized source. The NRC Staff used these documents in its investigation, and disclosed them publicly on ADAMS, despite being on notice since November 2019 of TVA’s privilege claims over legal analysis

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<sup>1</sup> Protective Order, at ¶ B.1. (Feb. 8, 2021) (ADAMS Accession No. ML21039A629).

contained in a confidential legal memorandum. The decision whether to produce and use these materials in this litigation is a decision that rests with TVA alone and will be informed by discovery proceedings currently underway. Further, TVA asks that the Board direct the staff to withhold permanently from public disclosure both of these privileged communications, and a third record reflecting [REDACTED], which the NRC Staff publicly released with its initial disclosures.

## **I. Background and Procedural History**

### *A. The NRC Staff Retained Documents Over Which TVA Claimed Privilege*

On February 18, 2021, the NRC Staff made its initial discovery disclosures in this proceeding.<sup>2</sup> Among those disclosures is the record formerly located at NRC ADAMS Accession No. ML21040A247, which consists of a May 23, 2019 email from TVA employee Deanna Fults transmitting multiple documents to NRC Special Agent Scott Luina, including (1) an August 30, 2018 memorandum prepared by TVA Office of General Counsel (“OGC”) attorneys Christopher Chandler and Jennifer Grace entitled “Investigation into Harassment and Hostile Work Environment Allegations in Nuclear Licensing Organization — Involvement of Beth Wetzel” (the “OGC Memorandum”), and (2) an August 10, 2018 Letter from TVA General Counsel Sherry Quirk to TVA Vice President Joseph Shea (“Quirk Letter”) communicating OGC’s legal conclusion and recommendation about employment action related to Michael McBrearty.<sup>3</sup> Both documents are privileged attorney-client communications that the Staff has not only refused to return, but maintains should be publicly available.

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<sup>2</sup> NRC Staff Initial Disclosures (Feb. 18, 2021) (ADAMS Accession No. ML21049A372).

<sup>3</sup> TVA considers these documents to be privileged attorney-client communications. As such, TVA is not attaching these documents to this motion.

The NRC obtained these privileged communications from Ms. Fults without TVA's knowledge or consent. The OGC Memorandum was marked "Confidential Attorney-Client Communication," and according to an NRC Office of Investigations Report ("OI Report") included in the NRC Staff's initial disclosures, Special Agent Luina recognized that it contained "legal analysis."<sup>4</sup> Nevertheless, the NRC investigators retained this privileged material and used it in their ongoing investigation of TVA. On November 20, 2019, TVA learned for the first time that the NRC OI was in possession of the OGC Memorandum during an interview of OGC Senior Attorney John Slater by Special Agent Luina and Special Agent in Charge Alex Echavarria.<sup>5</sup> When the investigators presented Mr. Slater with a copy of the OGC Memorandum and attempted to question him about it, counsel for TVA objected and informed the investigators that the OGC Memorandum was privileged.

On December 11, 2019, TVA outside counsel Todd Presnell wrote to Special Agent Luina, copying NRC Regional Counsel Sarah Price, and again asserted TVA's attorney-client privilege over the OGC Memorandum. Mr. Presnell demanded that the NRC return the document and destroy any internal NRC documents that reference or incorporate the record or its contents. A copy of Mr. Presnell's letter is provided at Attachment B. As Mr. Presnell's letter explained, TVA did not know how the NRC obtained the record, had not waived its attorney-client privilege over it, and did not authorize any TVA employee or contractor to provide it to the NRC.<sup>6</sup>

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<sup>4</sup> NRC Office of Investigations, *Report of Investigation - Watts Bar Nuclear Plant Discrimination Against a Former Manager for Raising Nuclear Safety Concerns* (Jan. 21, 2020) (Adams Accession No. ML21043A294) (the "OI Report") at p. 51. For ease of the Board's reference, this page has been included as Attachment A.

<sup>5</sup> See Todd Presnell Letter to Scott Luina (Dec. 11, 2019) (Attachment B).

<sup>6</sup> *Id.*

According to the OI Report, on December 12, 2019, three NRC Staff counsel and two NRC OI Staff discussed Mr. Presnell's demand on behalf of TVA to return the OGC Memorandum. They decided that the NRC counsel would respond to Mr. Presnell's letter, and determined that "OI should continue their investigation as normal" and "should still use the document referenced by Presnell...as an exhibit to the [Report of Investigation]."<sup>7</sup> The reason for this determination is not apparent from the OI Report.

On December 16, 2019, NRC Staff Counsel Sara Kirkwood responded to Mr. Presnell in a letter provided at Attachment C. In her letter, Ms. Kirkwood asserted that the NRC had "lawfully" and "legally" obtained the Memorandum, without explaining how the memorandum was obtained, or substantively addressing TVA's assertion of privilege.<sup>8</sup> She also did not offer an explanation for why the NRC Staff disputed TVA's privilege claim.

During the period of December 2019 to February 2020, TVA also had received requests from the NRC OI to interview Mr. Chandler and Ms. Grace, the TVA attorneys who signed the OGC Memorandum, which TVA deferred until the parties resolved TVA's demand that the NRC return the OGC Memorandum. However, no resolution was reached before the NRC closed its investigation in January 2020 nor before the NRC issued a notice of apparent violation on March 2, 2020.<sup>9</sup>

With respect to the Quirk Letter, it was not until the NRC Staff's February 18, 2021 initial disclosures that TVA became aware that the Staff was in possession of that privileged document, which the Staff had in its records for months, and never informed TVA.

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<sup>7</sup> OI Report, Attachment A.

<sup>8</sup> See Sara Kirkwood Letter to Todd Presnell Letter (Dec. 11, 2019) (Attachment C).

<sup>9</sup> OI Report, *supra* note 5, (Dated Jan. 21, 2020); Apparent Violations of Employee Protection Requirements (Office of Investigations Report Nos. 2-2018-033 and 2-2019-015) (March 2, 2020).

*B. Settlement Agreement Containing Sensitive Personally Identifiable Information*

The NRC Staff's February 18, 2021 initial disclosures also included a copy [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].<sup>10</sup> The Staff made this document available on the public docket at NRC ADAMS Accession No. ML21046A023. Prior to this disclosure, TVA was unaware that the NRC Staff was in possession of this confidential agreement.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]"<sup>11</sup> According to the record, the Department of Labor transmitted to the NRC Staff a copy of [REDACTED] on July 16, 2019.<sup>12</sup>

*C. NRC Staff's Unwillingness to Return and Protect Privileged and Confidential Documents in this Proceeding*

Immediately following the Staff's initial disclosures on February 18, 2021, TVA repeatedly requested the NRC sequester or otherwise not publicly disclose such materials. On February 19, 2021,<sup>13</sup> TVA counsel notified the NRC Staff counsel that two privileged documents

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<sup>10</sup> Pursuant to the Protective Order, TVA is submitting (1) a public version of this pleading that excludes Attachment D because Attachment D contains personal privacy information under 10 C.F.R. § 2.390(a)(6); and (2) a non-public version of this pleading that includes Attachment D on the non-public docket for this proceeding.

<sup>11</sup> Attachment D [REDACTED].

<sup>12</sup> *Id.*

<sup>13</sup> Tim Walsh E-Mail to NRC Staff Counsel (Feb. 19, 2021) (Attachment E).

(the Quirk Letter and the OGC Memorandum) were included in the Staff's initial disclosures, and requested that they be removed from ADAMS.

On February 20, 2021,<sup>14</sup> TVA counsel notified the NRC Staff counsel that the record disclosed at NRC ADAMS Accession No. ML21046A023 included a copy of the private and confidential [REDACTED], and requested that this record also be removed from ADAMS, noting in particular [REDACTED]

[REDACTED].

Having not initially received a response, TVA counsel telephoned and emailed the Staff on February 22, 2021. In the email, TVA counsel objected to the Staff's apparent refusal to address the concerns TVA identified with these three records, explaining that the Staff had "failed to comply with its disclosure obligations and the Protective Order."<sup>15</sup> The Protective Order states, in relevant part, that "production of privileged or work-product protected documents, whether inadvertent or otherwise, is not a waiver of the privilege or protection from discovery in this case," and that "[u]pon receiving written notice from the producing party that privileged and/or work product material has been produced," the information shall be destroyed and not used for any purpose.<sup>16</sup> The Protective Order also states that "[i]f a Party maintains that information . . . qualify for protection under 10 C.F.R. §§ 2.390(a)(4), 2.390(a)(5)–(6), 2.390(b)(4)(i)–(v), or 2.705(c), then such Party may designate it as CONFIDENTIAL, and it shall be protected in accordance with the terms of this Protective Order."<sup>17</sup>

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<sup>14</sup> Tim Walsh E-Mail to NRC Staff Counsel (Feb. 20, 2021) (Attachment E).

<sup>15</sup> Tim Walsh E-Mail to NRC Staff Counsel (Feb. 22, 2021) (Attachment E).

<sup>16</sup> Protective Order, *supra* note 1, at p. ¶ B.4.

<sup>17</sup> *Id.* at p. 2 ¶ A.1.

TVA counsel further noted that, during a telephone call with the NRC Staff earlier that day, Staff counsel stated that the NRC would not take action to address TVA’s privilege and confidentiality concerns and asserted that TVA previously failed to perfect its clawback request with respect to privileged OGC documents.<sup>18</sup> NRC counsel later responded via email that the NRC Staff did not agree that these documents should not have been publicly disclosed, and anticipated that the Board would need to resolve this confidentiality dispute, agreeing temporarily to re-profile the records as non-public pending a motion by TVA.<sup>19</sup> TVA counsel replied that it intended to file a motion on or before March 1, 2021.<sup>20</sup>

On February 24, 2021, TVA reported to the NRC Staff that the Staff’s initial disclosures included additional copies of the Quirk Letter and the OGC Memorandum at NRC ADAMS Accession No. ML21040A247, requested that the NRC Staff make them non-public as it had with the other records, and informed the Staff that its Motion also would seek relief with respect to the Staff’s public disclosure of those records.

## **II. Argument**

### *A. Privileged Documents*

#### *1. Legal Standards*

The NRC applies the federal common law standard from *Upjohn Co. v. United States*<sup>21</sup> to assess claims of privilege in the context of internal investigations.<sup>22</sup> Indeed, the NRC acknowledges the importance of privilege as it encourages truth-seeking to enable “appropriate management action, in a complex regulatory setting in which an enforcement action was

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<sup>18</sup> Tim Walsh E-Mail to NRC Staff Counsel (Feb. 22, 2021) (Attachment E).

<sup>19</sup> Kevin Roach E-Mail to Tim Walsh (Feb. 22, 2021) (Attachment E).

<sup>20</sup> Tim Walsh E-Mail to NRC Staff Counsel (Feb. 23, 2021) (Attachment E).

<sup>21</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>22</sup> *In the Matter of Georgia Power Co., et al. (Vogtle Elec. Generating Plant, Units 1 & 2)*, 42 N.R.C. 181 (Nov. 21, 1995).

reasonably foreseeable.”<sup>23</sup> The NRC will apply attorney-client privilege upon a “showing that the communication was made for the corporation to obtain legal advice, that it was made confidentially, and that it was not disseminated beyond those with a need to know.”<sup>24</sup>

Communications made in the course of internal investigations that result in legal analysis or recommendations are generally accepted as communications made for the corporation to obtain legal advice.<sup>25</sup> A communication remains confidential and not widely disseminated “if not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services.”<sup>26</sup> Those employees with a “need to know” the privileged information are those who need the information to speak or act on behalf of the organization.<sup>27</sup>

Unauthorized disclosure of a privileged communication to third parties does not waive the privilege.<sup>28</sup> In such cases (like this one), federal courts “will find the privilege preserved if the privilege holder has made efforts ‘reasonably designed’ to protect and preserve the privilege.”<sup>29</sup> Typically the “power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors.”<sup>30</sup> Therefore,

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<sup>23</sup> *In the Matter of Georgia Power Co., et al. (Vogle Elec. Generating Plant, Units 1 & 2)*, 38 N.R.C. 121, 125 (Sept. 8, 1993).

<sup>24</sup> *In the Matter of Georgia Power Co., et al.*, 42 N.R.C. at 187.

<sup>25</sup> *See, e.g., Amco Ins. Co. v. Madera Quality Nut LLC*, No. 1:04-cv-06456-SMS, 2006 WL 931437, at \*8-9 (E.D. Cal. Apr. 11, 2006) (Communications between company employees to in-house counsel and counsel’s agents were privileged communications as a part of an internal investigation, the dominant purpose of which was to obtain factual information in order to give legal advice.); *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 757-60 (D.C. Cir. 2014) (holding that internal investigations conducted for a significant legal purpose are privileged even where there are also significant business purposes for the investigation.)

<sup>26</sup> *Faloney v. Wachovia Bank, N.A.*, 254 F.R.D. 204, 210 (E.D. Pa. 2008) (quoting *United States v. Moscony*, 927 F.2d 742, 752 (3d Cir.1991)) (internal quotations omitted).

<sup>27</sup> *F.T.C. v. GlaxoSmithKline*, 294 F.3d 141, 147 (D.C. Cir. 2002).

<sup>28</sup> *See, e.g., Resolution Trust Corp. v. Dean*, 813 F. Supp. 1426 (D. Ariz. 1993) (unauthorized disclosure of internal memo subject to strict confidentiality restrictions did not waive privilege).

<sup>29</sup> *S.E.C. v. Lavin*, 111 F.3d 921, 930 (D.C. Cir. 1997) (quoting *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992)).

<sup>30</sup> *Commodity Futures Trading Comm’n v. Weintraub*, 471 U.S. 343, 348 (1985).



where an employee outside corporate management discloses, without their employer's authorization, otherwise privileged communications to a regulatory authority, the disclosure does not automatically constitute waiver of the attorney-client privilege.<sup>31</sup>

2. *The Quirk Letter and the OGC Memorandum are Privileged and Confidential*

The Quirk Letter and the OGC Memorandum both were communications made for TVA to obtain legal advice, and were treated confidentially and not disseminated beyond those with a need to know. Ms. Fults's disclosure of these documents to the NRC OI investigators did not waive TVA's privilege because she did not have the authority to do so, and TVA undertook reasonable efforts to protect its privilege once it became aware of this disclosure. The NRC Staff should have recognized the documents in question were privileged and returned them upon receipt from Ms. Fults. Even if they did not realize when initially receiving the documents, the NRC Staff should have agreed to return and not rely on these documents when TVA first objected on privilege grounds in December 2019; the NRC Staff is equally obligated to do so now, and must also remove these documents permanently from disclosure on ADAMS.

*First*, the Quirk Letter and the OGC Memorandum are unambiguously privileged. Both documents contain legal conclusions provided to advise TVA regarding employment actions resulting from an investigation. There is no reasonable dispute that these documents convey OGC's legal analysis to TVA—even the NRC recognized that fact as soon as it received the OGC Memorandum. *See supra* I.A.

*Second*, the Quirk Letter and the OGC Memorandum were treated as confidential in that they were disseminated to those with a need to know the findings and no wider. The OGC

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<sup>31</sup> *United States Equal Employment Opportunity Comm'n v. George Washington Univ.*, No. 17-CV-1978 (CKK/GMH), 2020 WL 6504573, at \*3 (D.D.C. Nov. 5, 2020) (no waiver where employee provided communications to EEOC).

Memorandum was marked “Confidential Attorney Client Communication” at the top of the first page. TVA limited the dissemination of these documents to management, members of the Executive Review Board (“ERB”), and a limited number of other employees within Human Resources who needed to know the facts and legally supportable bases for a potential personnel action against Mr. McBrearty and the personnel action taken against Beth Wetzel, so that management could make appropriate personnel decisions and, in the case of Ms. Wetzel, the ERB could review that decision consistent with TVA employment policy.<sup>32</sup> In other words, TVA “limited dissemination to specific individuals whose corporate duties relate generally to the contents of the documents.”<sup>33</sup>

*Third*, the NRC received these documents through an unauthorized disclosure that did not waive the privilege.<sup>34</sup> *See supra* I.A. As a non-managerial employee, Ms. Fults’s transmittal of these documents to an NRC investigator “cannot be construed as waiver of the privilege” by TVA because the “power to waive the corporate attorney-client privilege rests with the corporation’s management and is normally exercised by its officers and directors.”<sup>35</sup> This is also the case specifically where an employee discloses privileged information to a regulatory authority pursuant to a request from that authority: there is no waiver unless the employer authorizes the disclosure.<sup>36</sup>

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<sup>32</sup> *See GlaxoSmithKline*, 294 F.3d at 147 (“The Company’s burden is to show that it limited its dissemination of the documents in keeping with their asserted confidentiality, not to justify each determination that a particular employee should have access to the information therein.”).

<sup>33</sup> *Id.* at 148.

<sup>34</sup> *Dukes v. Wal-Mart Stores, Inc.*, No. 01-CV-2252 CRB JSC, 2013 WL 1282892, at \*6 (N.D. Cal. Mar. 26, 2013).

<sup>35</sup> *See Reinsdorf v. Skechers U.S.A., Inc.*, No. CV-10-7181, 2013 WL 12116415, at \*4 (C.D. Cal. May 31, 2013). (quoting *Weintraub*, 471 U.S. at 348).

<sup>36</sup> *See George Washington Univ.*, 2020 WL 6504573, at \*11 (holding that the defendant university did not waive privilege where its employee disclosed privilege communications pursuant to a discovery request “without the University’s authorization”).

Ms. Fults was not a managerial employee with the power to waive TVA's attorney-client privilege. The e-mail forwarding the package of materials revealed as much, with Ms. Fults's signature line indicating she was a "Senior Program Manager," not an officer or director of TVA. The NRC was on notice that Ms. Fults's e-mail attached privileged communications, given the prominent privilege markings on the OGC Memorandum and the NRC's immediate recognition that the OGC Memorandum contained legal analysis, which arguably triggered attendant ethical obligations to notify TVA of its receipt.<sup>37</sup> Regardless, the NRC was certainly aware that this disclosure was unauthorized when TVA counsel notified the NRC of that fact as soon as TVA became aware of the disclosure during John Slater's interview with Scott Luina and through the correspondence sent by TVA's counsel soon after. *See supra* I.C.

*Fourth*, privilege is preserved in the face of involuntary disclosure "if the privilege holder has made efforts reasonably designed to protect and preserve the privilege."<sup>38</sup> TVA guards privileged communications and has a policy prohibiting disclosure of such information. TVA's policy on employee discipline states that "TVA employees are also subject to discipline for unauthorized dissemination of certain other types of information including . . . information that an employee knows or should know is confidential or sensitive, either by markings on the information or by the subject matter of the content."<sup>39</sup>

Despite the unauthorized disclosure by TVA's employee, TVA took reasonable steps to protect and preserve the privilege upon being made aware of the disclosure. Counsel for TVA immediately objected to the NRC's use of the OGC Memorandum on the basis of attorney-client

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<sup>37</sup> *Lifewise Master Funding v. Telebank*, 206 F.R.D. 298, 301 (D. Utah 2002) ("The labeling may alert a recipient of the document of a possible privilege claim and thereby invoke ethical inquiry by the recipient to determine if the document was privileged.")

<sup>38</sup> *Lavin*, 111 F.3d at 930 (D.C. Cir. 1997) (quoting *de la Jara*, 973 F.2d at 749).

<sup>39</sup> TVA-SPP-11.316, Employee Discipline, p. 17 ¶ 1.1.4 (Attachment F).

privilege as soon as TVA became aware that it was in the NRC's records. *See supra* I.A. TVA thereafter repeatedly informed both the NRC investigators and the NRC Staff that the communications were privileged and confidential. *See supra* I.A., I.C. The NRC Staff continues to refuse to sequester and destroy the documents, and has never addressed the substance of TVA's privilege claims, relying only on conclusory statements that the documents were "lawfully obtained" and that TVA failed to perfect its clawback request in December 2019. *See supra* I.A. Whether the documents were lawfully obtained is inapposite. TVA did not authorize disclosure of privileged communications, and the NRC is under an obligation to observe and respect TVA's attorney-client privilege.<sup>40</sup> Instead, the NRC Staff, aware of the privileged communication, consciously decided to continue to rely on privileged materials in its investigation, and then egregiously made the documents publicly available on ADAMS. But only TVA has the authority to waive privilege over these documents, and it has not done so. Moreover, the Staff's assertion that TVA failed to perfect its clawback request is hollow. TVA demanded return and destruction of the OGC Memorandum in December 2019, and the issue is now ripe for consideration by the Board.

The Staff's conduct has deprived TVA of an opportunity to evaluate its case and determine whether, upon completion of discovery, the subject matter of these documents is material to its affirmative case such that a waiver is necessary. TVA therefore respectfully request that the Board order the NRC Staff to return or destroy these documents pending that determination by TVA.

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<sup>40</sup>*See generally* *George Washington Univ.*, 2020 WL 6504573.

*B. Sensitive Personally Identifiable Information*

*1. Legal Standards*

The public disclosure of [REDACTED] is contrary to the NRC's regulations, which provide for exemptions to public disclosures in discovery consistent with those contained in the Freedom of Information Act ("FOIA"). One such exemption prohibits public disclosure of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly warranted invasion of personal privacy."<sup>41</sup> The NRC's own rulemaking provides that a document should not be publicly disclosed in a Subpart G proceeding when an exemption under 10 C.F.R. § 2.390 applies.<sup>42</sup> To that end, the Protective Order in this case provides for confidential designation and treatment of documents that fall under the aforementioned exemption.<sup>43</sup>

When a potential invasion of personal privacy is asserted as grounds for non-disclosure in FOIA litigation, courts balance the public's interest in disclosure against the privacy interest at stake.<sup>44</sup> If a substantial privacy interest is asserted a court will "weigh that privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, disclosure would work a clearly unwarranted invasion of personal privacy."<sup>45</sup> The only public interest considered under FOIA is the "the extent to which

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<sup>41</sup> 10 C.F.R. § 2.390(a)(6); *see* 5 U.S.C. § 552(b)(6).

<sup>42</sup> NRC Final Rule: Change to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,195 (Jan. 14 2004) (codified at 10 C.F.R. pts. 1, *et seq.*) ("All documentation between the NRC and the applicant/subject of the enforcement action with respect to the licensing application or enforcement action is public (*unless protected from public disclosure, see § 2.390*), and will be placed into the hearing file or electronic docket.") (emphasis added).

<sup>43</sup> Protective Order, p. 2 ¶ A.1 (providing for confidential treatment of documents including those that fall under 10 C.F.R. § 2.390(a)(6)).

<sup>44</sup> *See, e.g., Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989).

<sup>45</sup> *Id.*

disclosure would . . . contribut[e] significantly to public understanding of the operations or activities of the government.”<sup>46</sup>

2. *TVA’s Settlement with [REDACTED] was Improperly Disclosed*

The [REDACTED] falls within the NRC’s discovery disclosure exemption (and the corresponding FOIA provision) prohibiting public disclosure of “personnel . . . files” the disclosure of which “would constitute a clearly warranted invasion of personal privacy.”<sup>47</sup> Moreover, the Protective Order in this litigation requires both parties to take “reasonable precautions” to assure that confidential documents are not released to unauthorized parties. The NRC Staff’s release of this document on ADAMS was therefore improper.

Settlement agreements have been recognized as “personnel or similar files” within the meaning of FOIA.<sup>48</sup> Disclosure of the settlement agreement contains sensitive information about [REDACTED]. The NRC Staff did not identify any relevance to the proceeding,<sup>49</sup> let alone any public interest in the disclosure of the agreement.<sup>50</sup> Where, as here, a single employee’s settlement agreement is at issue, courts have held that “public interest in the documents . . . could not possibly outweigh the employee’s privacy interest, even if that interest is minimal.”<sup>51</sup>

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<sup>46</sup> *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (quoting *D.O.J. v. Repts. Comm. for Freedom of Press*, 489 U.S. 749, 775 (1989)).

<sup>47</sup> 5 U.S.C. § 552(b)(6); 10 C.F.R. § 2.390(a)(6).

<sup>48</sup> *Norwood v. F.A.A.*, 580 F. Supp. 994, 998 (W.D. Tenn. 1983) (“The Court finds that the proposed letters of removal, final letters of removal and settlement agreements are personnel or similar files within the meaning of 5 U.S.C. § 552(b)(6).”).

<sup>49</sup> Note that Federal Rules bar admission of settlement agreements or offers of compromise to show fault. *See* Fed. R. Ev. 408(a)(1).

<sup>50</sup> *Horner*, 879 F.2d at 879 (If no public interest is asserted or identified, “something, even a modest privacy interest, outweighs nothing every time.”).

<sup>51</sup> *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1136 (9th Cir. 2014).

The NRC’s own public-facing guidance on the relevant exemption in FOIA, which is identical to the public disclosure exemption in 10 C.F.R. § 2.390(a)(6), provides that “[m]atters ‘the disclosure of which would constitute a clearly unwarranted invasion of personal privacy’” include, “financial information” and “[p]erformance and disciplinary information.”<sup>52</sup> These categories naturally encompass a settlement agreement with compensation information. The NRC’s decision to disclose such material without assessment of the privacy interests is curious in light of its own publicly disseminated policy guidance in this regard. Moreover, the Privacy Act<sup>53</sup> has previously been held to cover employment-related settlement records that identify individuals by name, like [REDACTED].<sup>54</sup>

The confidential nature of the document is readily apparent on its face. The agreement contains sensitive material including [REDACTED]

[REDACTED] [REDACTED].<sup>56</sup>

Moreover, the agreement states that it includes “[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]”<sup>57</sup> Under the Protective Order, the NRC Staff was obligated to “take all

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<sup>52</sup> United States Nuclear Regulatory Commission, *Freedom of Information Act Guide*, available at <https://www.nrc.gov/reading-rm/foia/freedom-info-act-guide.pdf>.

<sup>53</sup> 5 U.S.C. § 552a.

<sup>54</sup> See, e.g., *Walia v. Napolitano*, 986 F. Supp. 2d 169, 186 (E.D.N.Y. 2013) (“[T]he source of the alleged Privacy Act material was the DHS’s information contained in employment/personnel files—namely, the Plaintiff’s EEO activity. Given the broad definition of the term ‘record’ under the Privacy Act, the Court finds that this information may qualify as ‘records’ because they identify the Plaintiff by name and contain information about a prospective investigation premised on the Plaintiff’s alleged misconduct.”); *Carlson v. GSA*, No. 04-C-7937, 2006 WL 3409150, at \*3-4 (N.D. Ill. Nov. 21, 2006) (finding that supervisor’s email detailing employee’s settlement of his wrongful termination claims was a “‘communication’ of a protected ‘record’” even though supervisor, who conducted investigation that resulted in the settlement, “compiled the email from his own memory”).

<sup>55</sup> Attachment D at p. 3-4 ¶¶ 11-16

<sup>56</sup> *Id.* at p. 7 ¶ 26.

<sup>57</sup> *Id.* at p. 5 ¶ 22.

reasonable precautions necessary to assure that Confidential Documents and the information contained therein are not distributed to unauthorized persons”—which it did not do when it released [REDACTED] publicly on ADAMS.<sup>58</sup> *See supra* I.C. Because the NRC Staff continues to insist, without basis, that [REDACTED] is subject to public disclosure, TVA respectfully requests that the Board order the Staff to permanently maintain this document as confidential.

### **III. Conclusion**

The Board should resolve this dispute pursuant to its authority under the Protective Order. With respect to privileged documents, TVA respectfully requests the Board order the NRC Staff “to retrieve and return or destroy all copies of the documents in electronic format” in addition to “[a]ny analyses, memoranda or notes which were internally generated based upon such produced information shall be destroyed,” pending a decision from TVA whether to waive privilege over these documents in connection this proceeding, as is TVA’s sole prerogative.<sup>59</sup> TVA further requests that [REDACTED] be designated as a “Confidential Document” under the Protective Order and withheld from public disclosure.<sup>60</sup>

### **IV. Certification**

Undersigned counsel hereby certifies that counsel has made a sincere effort to contact the NRC Staff and to resolve the question raised in this motion, pursuant to 10 C.F.R. § 2.323(b), and that counsel’s efforts to resolve the issue have been unsuccessful. The NRC Staff counsel represented that the Staff does not oppose TVA’s filing of this Motion, but stated that it would respond to the Motion after further evaluating TVA’s position.

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<sup>58</sup> Protective Order, *supra* note 1, at p. 3 ¶ A.6.

<sup>59</sup> *Id.* at p. 6 ¶ B.4.

<sup>60</sup> *Id.*



Dated: Washington, DC  
March 1, 2021

Respectfully submitted,

Executed in Accord with 10 C.F.R. § 2.304(d)

Mary Pat Brown  
O'MELVENY & MYERS LLP  
1625 Eye St., NW Washington, DC 20006  
Telephone: 202-383-5376  
Facsimile: 202-383-5414  
E-mail: mpbrown@omm.com

Executed in Accord with 10 C.F.R. § 2.304(d)

Laurel Loomis Rimon  
O'MELVENY & MYERS LLP  
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Telephone: 202-383-5335  
Facsimile: 202-383-5414  
E-mail: lrimon@omm.com

Executed in Accord with 10 C.F.R. § 2.304(d)

Timothy J. V. Walsh  
PILLSBURY WINTHROP SHAW PITTMAN LLP  
1200 Seventeenth Street NW Washington, DC 20036  
Telephone: 202-663-8455  
Facsimile: 202-663-8007  
E-mail: timothy.walsh@pillsburylaw.com

Executed in Accord with 10 C.F.R. § 2.304(d)

Michael G. Lepre  
PILLSBURY WINTHROP SHAW PITTMAN LLP  
1200 Seventeenth Street NW  
Washington, DC 20036  
Telephone: 202-663-8193  
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E-mail: michael.lepre@pillsburylaw.com

Executed in Accord with 10 C.F.R. § 2.304(d)

Anne R. Leidich  
PILLSBURY WINTHROP SHAW PITTMAN LLP  
1200 Seventeenth Street NW  
Washington, DC 20036  
Telephone: 202-663-8707  
Facsimile: 202-663-8007  
E-mail: anne.leidich@pillsburylaw.com

Counsel for TVA

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
	)	
Tennessee Valley Authority	)	Docket Nos. EA-20-006, EA-20-007
Chattanooga, Tennessee	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Return and Protection of Privileged and Confidential Documents have been served through the E-Filing system in the above-captioned proceeding this 1st day of March, 2021.

/Electronically signed by Alexander Duran/  
Alexander Duran  
O'MELVENY & MYERS LLP  
Two Embarcadero Center, 28th Floor  
San Francisco, CA 94111  
Telephone: 415-984-8700  
Facsimile: 415-984-8701  
E-mail: aduran@omm.com

# ATTACHMENT A

**OFFICIAL USE ONLY - OI INVESTIGATION INFORMATION**

**SUPPLEMENTAL INFORMATION**

This investigation (2-2019-015) is related to OI investigation 2-2018-033.

In May 2019, Christopher CHANDLER, Associate General Counsel with the TVA's OGC was initially TVA's representative for information and documents OI requested related to the WETZEL matter. In June 2019, CHANDLER represented SHEA, POLAND, JOHNSON, HENDERSON and BONO during their OI interviews. In accordance with OI's Investigations Procedure Manual (IPM) and as documented in the interview transcripts, during each of these interviews when questioned by OI, CHANDLER stated he did not have any conflict of interest with representing the witnesses and TVA during the interviews. This investigation determined, that in August 2018, CHANDLER was one of the authors of a legal analysis of WETZEL's actions which was provided to TVA managers, specifically to SHEA, and included a recommendation to terminate WETZEL's employment with TVA. In November 2018, TVA retained outside counsel (Timothy J. WALSH, Special Counsel, Pillsbury Winthrop Shaw Pittman LLP) to represent TVA and individual employees that OI had planned to interview.

On May 23, 2019, FULTS provided OI:RII with an electronic copy of documents she described as being provided to her in preparation for and for use during WETZEL's ERB in September 2018. On December 11, 2019, OI:RII and Sarah PRICE, NRC RII Regional Counsel, received an email with a letter attached from Todd PRESNELL, Attorney, Nashville, Tennessee (maintained in OI case file). PRESNELL's letter related that he represents TVA and that the supplemental memorandum (Exhibit 14, pp. 40-42) in OI's possession contained attorney client privileged information and needed to be returned to TVA. The letter from PRESNELL confirmed to OI:RII that CHANDLER and Jennifer L. GRACE, TVA Managing Attorney were the authors of the supplemental memorandum. On December 12, 2019, OI:RII participated in a teleconference with NRC OGC (Mauri LEMONCELLI and Sarah KIRKWOOD), Regional Counsel (PRICE), OI:RII SAIC (Alex ECHAVARRIA) and the OI Director (Andy SHUTTLEWORTH) to discuss the letter from PRESNELL. It was determined that NRC OGC would provide a response to PRESNELL and OI should continue their investigation as normal. It was also determined that OI should still use the document referenced by PRESNELL (Exhibit 14, pp. 40-42) as an exhibit to the ROI.

On December 13, 2019, OI:RII contacted CHANDLER and GRACE to schedule OI interviews which they initially agreed to but requested legal counsel to be present. On December 16, 2019, OI:RII was contacted by WALSH and advised that he was requested to represent CHANDLER and GRACE for the OI interviews. OI:RII related to WALSH part of the OI questioning would be related to the supplemental memorandum, so WALSH requested for OI to delay these interviews until the privileged document issue was resolved by TVA and NRC. OI:RII through coordination with OI:HQ and NRC OGC decided to close this investigation and provide a supplemental report if or when the interviews of CHANDLER and GRACE occur.

**NOT FOR PUBLIC DISCLOSURE WITHOUT APPROVAL OF  
SPECIAL AGENT IN CHARGE, OFFICE OF INVESTIGATIONS, REGION II**

Case No. 2-2019-015

# ATTACHMENT B





CONFIDENTIAL AND PROTECTED BY ATTORNEY-CLIENT PRIVILEGE

**E. Todd Presnell**

Direct: (615) 252-2355

Fax: (615) 252-6355

tpresnell@bradley.com

December 11, 2019

VIA EMAIL AND U.S. MAIL

*Scott.Luina@nrc.gov*

Scott K. Luina, Senior Special Agent  
Office of Investigations, Region II  
U. S. Nuclear Regulatory Commission  
245 Peachtree Center Avenue, NE Suite 1200  
Atlanta, Georgia 30303-1257

Re: NRC Case No. 2-2019-215 (“Wetzel Investigation”)

Dear Mr. Luina:

I represent Tennessee Valley Authority (“TVA”). I write on TVA’s behalf to formally request that the U.S. Nuclear Regulatory Commission’s Office of Investigations (“NRC”) immediately return a privileged document that it obtained without TVA’s knowledge or consent during the Wetzel Investigation.

On November 20, 2019, an NRC investigator interviewed TVA attorney John Slater as part of its Wetzel Investigation. Tim Walsh, who was Mr. Slater’s personal representative during the interview and is TVA’s outside counsel, was present. During the interview, the NRC interviewer showed Mr. Slater a three-page document dated August 30, 2018 and titled *Investigation into Harassment and Hostile Work Environment Allegations in Nuclear Licensing Organization—Involvement of Beth Wetzel* (“OGC Memorandum”). The OGC Memorandum identified its origin as TVA’s “Office of General Counsel,” and two TVA attorneys, Christopher C. Chandler, Associate General Counsel, and Jennifer L. Grace, Managing Attorney, signed the OGC Memorandum as its authors.

When the NRC investigator began asking Mr. Slater questions about the OGC Memorandum, Mr. Walsh immediately objected, stating that the OGC Memorandum is TVA’s attorney-client privileged information and attorney work product. Mr. Slater told the NRC investigator that he did not author the OGC Memorandum, and that his interview was the first time

he saw the document. The NRC asked no further questions. Mr. Walsh asked the investigator how he obtained the OGC Memorandum, but the investigator refused to answer. The NRC investigator did not convey that NRC obtained the OGC Memorandum through TVA's formal and authorized production.

The attorney–client privilege protects the OGC Memorandum from disclosure. The OGC Memorandum contains—at the top of the first page—the notice in all caps: CONFIDENTIAL ATTORNEY–CLIENT COMMUNICATION. The authors identified themselves on the first page as TVA attorneys. The OGC Memorandum contains a summary on the first page that reveals TVA lawyers' findings and recommendations based on violations of “federal law.” In short, even a cursory review of the OGC Memorandum's first page reveals that this is a confidential and privileged document.

TVA does not know how the NRC obtained this document. TVA has produced several documents as part of the Wetzel Investigation, but the OGC Memorandum was not part of any formal production. TVA has never waived its privilege over the OGC Memorandum; nor has it ever authorized any TVA employee or contractor to provide the OGC Memorandum to the NRC or any other third-party.

In sum, NRC obtained the OGC Memorandum without TVA's authorization. The face of the OGC Memorandum clearly shows its privileged status. TVA demands that the NRC immediately return the OGC Memorandum, and any copies thereof, and destroy any internal NRC documents that reference or incorporate the OGC Memorandum or its contents. This includes copies that may be held by other NRC offices, including, but not limited to, the Office of Investigations, the Office of Enforcement, and the Office of General Counsel.

Please provide all copies of the OGC Memorandum in NRC's possession and a letter certifying that the NRC no longer possesses any copies of the OGC Memorandum or internal documents that reference the OGC Memorandum no later than **Monday, December 16, 2019**.

By copy of this letter, I am notifying NRC Region II's counsel, Sarah Price, of this issue and request her assistance in ensuring the return of the OGC Memorandum and deletion of any NRC internal documents that reference it. If your office receives advice and counsel from a different NRC attorney, please advise me of the lawyer's name and contact information and provide him or her with a copy of this letter.

Scott K. Luiña, Senior Special Agent  
December 11, 2019  
Page 3

I will appreciate your prompt attention to this matter and look forward to the return of the OGC Memorandum and the NRC's certification.

Yours very truly,

BRADLEY ARANT BOULT CUMMINGS LLP



E. Todd Presnell

cc: Sarah Price  
Regional Counsel  
U.S. NRC Region II  
Marquis One Tower  
245 Peachtree Center Avenue N.E.  
Suite 1200  
Atlanta, GA 30303  
[sarah.price@nrc.gov](mailto:sarah.price@nrc.gov)



# ATTACHMENT C



OFFICE OF THE  
GENERAL COUNSEL

UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

December 16, 2019

E. Todd Presnell  
Bradley Arant Boult Cummings LLP  
Roundabout Plaza  
1600 Division Street, Suite 700  
Nashville, TN 37203-2754  
sent via email

SUBJECT: NRC CASE NO. 2-2019-215 ("WETZEL INVESTIGATION")

Dear Mr. Presnell,

Your letter to Scott Luiña, Senior Special Agent (SSA), dated December 11, 2019, regarding the Wetzel investigation was referred to me. I provide counsel to the Office of Investigations regarding this matter. I understand your letter to seek return of a document that the Office of Investigations lawfully obtained as part of its investigation. Your letter asserted attorney-client privilege for the document, and demanded the return of the document, as well as the destruction of all copies of the document, within three business days.

Your letter demanding return of the document did not appear to provide any legal authority which would require the NRC to return this legally obtained document to TVA. If you would like us to consider your request to return the document to TVA, and not further rely on it, please provide legal authority justifying the demand to return the document. Please note that our acknowledgement that you have asserted attorney-client privilege for this document should not be construed as NRC's agreement that such a privilege actually exists for this document.

Sincerely,

/signed (electronically) by/

Sara Kirkwood  
Senior Attorney  
Office of the General Counsel

cc via email: S. Luiña  
A. Echavarría  
A. Shuttleworth  
S. Price

# ATTACHMENT E

---

**From:** Walsh, Timothy J. <timothy.walsh@pillsburylaw.com>  
**Sent:** Friday, February 19, 2021 2:07 PM  
**To:** Kirkwood, Sara; Roach, Kevin; Steinfeldt, Thomas  
**Cc:** Lepre, Michael G.; Rimon, Laurel Loomis; Brown, Mary Patrice  
**Subject:** Request to Remove from ADAMS TVA's Privileged & Confidential Records

**Importance:** High

Dear NRC Staff Counsel,

On behalf of the Tennessee Valley Authority (TVA), I request that the NRC Staff immediately remove from ADAMS the document located at Accession No. ML21040A247 because it contains TVA's attorney-client privileged and confidential information.

This document is an email from a TVA employee (Deanna Fults) to the NRC Investigator (Scott Lunia) transmitting, among other records, (1) copies of the August 30, 2018 memorandum from the TVA Office of General Counsel (authored by attorneys Chandler and Grace) concerning the Wetzels matter; and (2) a copy of the August 10 memorandum from the TVA General Counsel, Sherry Quirk to Joseph Shea providing an Office of General Counsel recommendation to him.

Even a cursory review of these documents shows on their face that they are privileged and confidential attorney client communications. Indeed, the August 30 memo is marked as such. Further, the NRC Staff has been on notice of the privileged nature of the August 30 memo since at least December 11, 2019 when TVA counsel previously explained in writing to the Staff that it was privileged and demanded that the Staff return it to TVA. Furthermore, TVA has not waived the privilege regarding either record.

Please advise when the NRC Staff has removed this information from ADAMS.

In the meantime, we are continuing to review the documents the NRC Staff has provided in its initial disclosures, including whether the NRC Staff has improperly released any additional documents that are subject to TVA's attorney-client privilege, and has met its statutory and regulatory obligations to comply with FOIA exemptions.

Sincerely,  
Tim Walsh  
Counsel for TVA

**Timothy J. Walsh | Partner**

Pillsbury Winthrop Shaw Pittman LLP  
1200 Seventeenth Street NW | Washington, DC 20036-3006  
t +1.202.663.8455 | m +1.202.306.2691  
timothy.walsh@pillsburylaw.com | website bio

AUSTIN BEIJING HONG KONG HOUSTON LONDON LOS ANGELES MIAMI  
NASHVILLE NEW YORK NORTHERN VIRGINIA PALM BEACH SACRAMENTO  
SAN DIEGO SAN DIEGO NORTH COUNTY SAN FRANCISCO SHANGHAI  
SILICON VALLEY TAIPEI TOKYO WASHINGTON, DC



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**From:** Roach, Kevin <Kevin.Roach@nrc.gov>  
**Sent:** Thursday, February 25, 2021 9:21 AM  
**To:** Walsh, Timothy J.  
**Cc:** Lepre, Michael G.; Kirkwood, Sara; Steinfeldt, Thomas; Rimon, Laurel Loomis; Brown, Mary Patrice  
**Subject:** RE: RE: RE: RE: Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records

Mr. Walsh,

I confirmed that the document at ADAMS Accession No. ML21040A247 was reprofiled as non-public earlier this morning. We will alert TVA if we discover other instances of the documents you have addressed in the NRC staff's disclosures. If TVA has additional requests regarding documents in the NRC staff's initial disclosures, please provide the ML# of the document and an explanation of the basis for your request and we will conduct a timely evaluation.

Sincerely,  
Kevin

---

**From:** Walsh, Timothy J. <timothy.walsh@pillsburylaw.com>  
**Sent:** Wednesday, February 24, 2021 7:41 PM  
**To:** Roach, Kevin <Kevin.Roach@nrc.gov>  
**Cc:** Lepre, Michael G. <michael.lepre@pillsburylaw.com>; Kirkwood, Sara <Sara.Kirkwood@nrc.gov>; Steinfeldt, Thomas <Thomas.Steinfeldt@nrc.gov>; Rimon, Laurel Loomis <Rimon@omm.com>; Brown, Mary Patrice <mpbrown@omm.com>  
**Subject:** [External\_Sender] RE: RE: RE: Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records

Mr. Roach,

Thank you for your response, and we will represent the Staff's position accordingly.

Since we first alerted you last Friday that the privileged and confidential records were disclosed at NRC ADAMS Accession No. ML21040A247, we have discovered that the same privileged and confidential records are also located at Accession No. ML21043A012 as Exhibit 14 to OI Report 2-2019-015. Our intended motion will also address this record.

In the meantime, we respectfully request that the NRC Staff treat this record in the same manner as the others (i.e., reprofile it as non-public until this dispute is resolved). We also respectfully request that the NRC Staff undertake all necessary and appropriate steps to ensure that other copies of these records are not located elsewhere in the Staff's disclosures, and that other privileged and confidential TVA records are not publicly disclosed.

Sincerely,  
Tim

---

**From:** Roach, Kevin <[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)>  
**Sent:** Wednesday, February 24, 2021 10:53 AM  
**To:** Walsh, Timothy J. <[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)>  
**Cc:** Lepre, Michael G. <[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)>; Kirkwood, Sara <[Sara.Kirkwood@nrc.gov](mailto:Sara.Kirkwood@nrc.gov)>; Steinfeldt, Thomas

<[Thomas.Steinfeldt@nrc.gov](mailto:Thomas.Steinfeldt@nrc.gov)>; Rimon, Laurel Loomis <[lrimon@omm.com](mailto:lrimon@omm.com)>; Brown, Mary Patrice <[mpbrown@omm.com](mailto:mpbrown@omm.com)>

**Subject:** RE: RE: RE: Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records

Mr. Walsh,

The NRC staff does not oppose TVA filing a motion regarding the two documents on or before Monday March 1, 2021. Based on the information we currently have, the Staff disagrees with TVA's position on the documents in question. However, we will evaluate the positions in TVA's motion once it is filed and respond accordingly.

Sincerely,  
Kevin

Kevin C. Roach  
U.S. Nuclear Regulatory Commission  
Senior Attorney  
Office of the General Counsel  
MS O14-A44  
11555 Rockville Pike  
Rockville, MD 20852  
Phone: (201)521-2078  
[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)

---

**From:** Walsh, Timothy J. <[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)>

**Sent:** Tuesday, February 23, 2021 4:52 PM

**To:** Roach, Kevin <[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)>

**Cc:** Lepre, Michael G. <[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)>; Kirkwood, Sara <[Sara.Kirkwood@nrc.gov](mailto:Sara.Kirkwood@nrc.gov)>; Steinfeldt, Thomas <[Thomas.Steinfeldt@nrc.gov](mailto:Thomas.Steinfeldt@nrc.gov)>; Rimon, Laurel Loomis <[lrimon@omm.com](mailto:lrimon@omm.com)>; Brown, Mary Patrice <[mpbrown@omm.com](mailto:mpbrown@omm.com)>

**Subject:** [External\_Sender] RE: RE: Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records

Mr. Roach,

Thank you for your emails from yesterday and this morning. TVA appreciates that the Staff has removed the two documents from public availability until this dispute is resolved.

We agree that it will be necessary to put this matter before the Board for its resolution. We disagree that we must do so by the arbitrary deadline you have suggested, which is not in accordance with the Commission's rule on motions. TVA intends to file a motion with the Board concerning these two documents on or before Monday March 1, 2021.

In accordance with the certification requirement under 10 CFR 2.323(b), please advise if I can represent that the NRC Staff would oppose such motion.

Sincerely,  
Tim Walsh  
Counsel for TVA

---

**From:** Roach, Kevin <[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)>

**Sent:** Tuesday, February 23, 2021 8:30 AM

**To:** Walsh, Timothy J. <[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)>

**Cc:** Lepre, Michael G. <[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)>; Kirkwood, Sara <[Sara.Kirkwood@nrc.gov](mailto:Sara.Kirkwood@nrc.gov)>; Steinfeldt, Thomas <[Thomas.Steinfeldt@nrc.gov](mailto:Thomas.Steinfeldt@nrc.gov)>; Rimon, Laurel Loomis <[lrimon@omm.com](mailto:lrimon@omm.com)>; Brown, Mary Patrice <[mpbrown@omm.com](mailto:mpbrown@omm.com)>

**Subject:** RE: RE: Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records

**\* EXTERNAL EMAIL \***

Good morning,

FYI - I have confirmed that the documents at ML21040A247 and ML21046A023 have been reprofiled as non-public.

Sincerely,

Kevin

---

**From:** Roach, Kevin

**Sent:** Monday, February 22, 2021 5:51 PM

**To:** Walsh, Timothy J. <[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)>

**Cc:** Lepre, Michael G. <[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)>; Kirkwood, Sara <[Sara.Kirkwood@nrc.gov](mailto:Sara.Kirkwood@nrc.gov)>; Steinfeldt, Thomas <[Thomas.Steinfeldt@nrc.gov](mailto:Thomas.Steinfeldt@nrc.gov)>; Rimon, Laurel Loomis <[lrimon@omm.com](mailto:lrimon@omm.com)>; Brown, Mary Patrice <[mpbrown@omm.com](mailto:mpbrown@omm.com)>

**Subject:** RE: RE: Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records

Dear Mr. Walsh,

I am writing in response to your correspondence regarding the documents at ADAMS Accession Nos. ML21040A247 and ML21046A023. We do not agree with your assessment that these documents were not properly disclosed in accordance with the NRC staff's disclosure obligations, applicable bases for withholding, and applicable law. To address this disagreement, we anticipate that it will be necessary to put this matter before the Board for its resolution. Out of professional courtesy, we have requested reprofiling of these two documents as nonpublic and anticipate that action will be completed shortly. We will maintain these documents as nonpublic contingent on TVA submitting a motion or other request to the Board by the end of the day on February 25, 2021, for its determination regarding the disclosure of these documents. If TVA does not file a request with the Board regarding these documents by that time, the NRC staff will make the documents public in ADAMS again. Our response is limited to the documents you specifically identified

The NRC staff notes that TVA has failed to complete its initial disclosures in accordance with the Board Order governing this proceeding. Specifically, TVA has failed to submit any privilege logs and states that it will do so on or before February 25, 2021. While there is an ongoing disclosure obligation, that does not excuse TVA from completely producing the documents in its possession in accordance with the disclosure requirements, listing withheld documents on a privilege log, or seeking an extension of time by the disclosure deadline provided by the Board. If TVA does not promptly complete its initial disclosures, the NRC staff will consider and pursue available remedies.

Sincerely,

Kevin

[Kevin C. Roach](#)

U.S. Nuclear Regulatory Commission

Senior Attorney  
Office of the General Counsel  
MS O14-A44  
11555 Rockville Pike  
Rockville, MD 20852  
Phone: (201)521-2078  
[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)

---

**From:** Walsh, Timothy J. <[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)>  
**Sent:** Monday, February 22, 2021 1:44 PM  
**To:** Kirkwood, Sara <[Sara.Kirkwood@nrc.gov](mailto:Sara.Kirkwood@nrc.gov)>; Roach, Kevin <[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)>; Steinfeldt, Thomas <[Thomas.Steinfeldt@nrc.gov](mailto:Thomas.Steinfeldt@nrc.gov)>  
**Cc:** Lepre, Michael G. <[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)>; Rimon, Laurel Loomis <[lrimon@omm.com](mailto:lrimon@omm.com)>; Brown, Mary Patrice <[mpbrown@omm.com](mailto:mpbrown@omm.com)>  
**Subject:** [External\_Sender] RE: Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records  
**Importance:** High

Dear Sara,

I am writing to follow up on our discussion this morning regarding on the status of TVA's requests from Friday and Saturday that the NRC Staff remove from public disclosure in ADAMS (1) one record containing TVA's attorney-client privileged and confidential information; and (2) a second record (a confidential settlement agreement) containing TVA's private and confidential information. You stated in our discussion that the NRC Staff would not take action to address TVA's concerns with these two records because of your belief that TVA has not complied with its initial disclosure obligations.

Your belief that TVA has not complied with its disclosure obligations is wrong, and is otherwise an inappropriate basis for the Staff to refuse to take action to address TVA's actual and legitimate concerns about protecting from public disclosure two obviously highly sensitive records.

As I detailed with you in our discussion this morning, and as explained in TVA's filing with the Board and the Staff last Thursday, TVA disclosed to the NRC last Thursday copies of over 950 records comprising over 4,700 pages of non-privileged documents. TVA also made explicit in that filing that it was complying with its ongoing disclosure obligations by completing its disclosures this Thursday, February 25, and providing you with its privilege logs. Furthermore, contrary to what you suggested during our call, TVA is not intending to hold off production of relevant records until May (i.e., at the end of the discovery period). TVA's review of its voluminous records and disclosure of over a thousand documents is occurring in a more than reasonable time frame. TVA has complied with, and is continuing to comply with, its obligations.

Even if TVA had fallen short of its disclosure obligations (which it has not done), that would not justify your refusal to address TVA's legitimate concerns with the two records at issue here. It is, in fact, the Staff that has failed to comply with its disclosure obligations and the Protective Order by failing to withhold these records from public disclosure.

I respectfully request that the NRC Staff reconsider its position on these two records, and immediately remove them from public disclosure on ADAMS.

Sincerely,  
Tim



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**From:** Walsh, Timothy J. <[timothy.walsh@pillsburylaw.com](mailto:timothy.walsh@pillsburylaw.com)>

**Sent:** Saturday, February 20, 2021 12:13 PM

**To:** Kirkwood, Sara <[Sara.Kirkwood@nrc.gov](mailto:Sara.Kirkwood@nrc.gov)>; Roach, Kevin <[Kevin.Roach@nrc.gov](mailto:Kevin.Roach@nrc.gov)>; Steinfeldt, Thomas <[Thomas.Steinfeldt@nrc.gov](mailto:Thomas.Steinfeldt@nrc.gov)>

**Cc:** Lepre, Michael G. <[michael.lepre@pillsburylaw.com](mailto:michael.lepre@pillsburylaw.com)>; Rimon, Laurel Loomis <[lrimon@omm.com](mailto:lrimon@omm.com)>; Brown, Mary Patrice <[mpbrown@omm.com](mailto:mpbrown@omm.com)>

**Subject:** Request that NRC Staff Remove from ADAMS TVA's Private and Confidential Records

**Importance:** High

Dear NRC Staff Counsel,

On behalf of the Tennessee Valley Authority (TVA), I request that the NRC Staff immediately remove from ADAMS the document located at Accession No. ML21046A023 because it contains TVA's private and confidential information.

The record at issue is

[REDACTED]

The public disclosure of this record is contrary to rules governing discovery disclosures, and contrary to the Protective Order that is in place in this proceeding. The Commission made explicit when promulgating its 2004 amendments to Subpart G that, while certain of the Staff's discovery disclosures may be disclosed to the public, such disclosure was bounded by the limitations provided for under the Freedom of Information Act. 69 Fed. Reg. 2,182, 2,195 (Jan. 14 2004) ("By contrast, the vast majority of NRC proceedings concern licensing applications or enforcement actions. All documentation between the NRC and the applicant/subject of the enforcement action with respect to the licensing application or enforcement action is public (unless protected from public disclosure, see § 2.390), and will be placed into the hearing file or electronic docket") (emphasis added).

[REDACTED]

In addition, the Protective Order—which was agreed to by both the NRC Staff and TVA—obviously contemplates that private and confidential information would not be publicly disclosed. That's why there is a Protective Order in the first place.

Please advise when the record is removed from ADAMS.

In addition, in light of the issue summarized above and yesterday's discovery that the NRC Staff had publicly disclosed TVA's privileged and confidential information, TVA demands that the NRC Staff immediately begin a review of all of its public disclosures to ensure that the NRC Staff is complying with applicable disclosure requirements and the terms of the Protective Order. Please advise when this review has been completed, and that all documents (or portions of documents) inappropriately included in the Staff's public initial disclosures have been removed from ADAMS.

Tim Walsh  
Counsel for TVA

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# ATTACHMENT F

<b>TVA Standard Programs and Processes</b>	<b>Employee Discipline</b>	<b>TVA-SPP-11.316 Rev. 0005 Page 17 of 27</b>
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**Appendix B  
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**Disciplinary Guidelines: Range of Penalties\***

**1.1.3 Violation of Equal Opportunity (EO) Policy or Remedial Actions**

Every TVA employee must actively support TVA's EO policy and help ensure a working environment free from all types of discrimination (overt or inadvertent) and hostility or harassment or retaliation that may result. Items or words such as racial slurs, offensive symbols (e.g., nooses or swastikas), ethnic jokes, or sexually explicit and/or offensive jokes, comments, or photos will not be tolerated.

Failure to comply with the TVA EO policy or with required remedial actions resulting from an Equal Opportunity Compliance case, or retaliation for raising an EO concern will result in disciplinary action up to and including termination.

**1.1.4 Mishandling of Classified Information, Privacy Information, and Security Incidents**

- A. Employees are prohibited from the unauthorized disclosure of classified information and are required to appropriately safeguard classified materials. In addition to being subject to TVA disciplinary action for a violation of this section, those who willfully and knowingly furnish, communicate, transmit or otherwise make available classified information to an unauthorized person are subject to prosecution for violation of Title 18, U.S. Law.
- B. Employees are required to protect the security of personal information, especially Personally Identifiable Information (PII) and Restricted Personally Identifiable Information (RPII). In addition to being subject to TVA disciplinary action for a violation of this section, persons who willfully disclose information protected by the Privacy Act of 1974 to any person or agency not entitled to receive it may be subject to prosecution.
- C. The following are examples of mishandling privacy information:
  - 1. Leaving PII/RPII unsecured, unattended, or unlocked in desks, tables, filing cabinets, or elsewhere in work areas open to the general employee or visitor population either during or after normal working hours.
  - 2. Storing or transmitting PII/RPII on TVA systems or applications in violation of TVA-SPP-12.002, TVA Information Management Policy.
  - 3. Publically posting PII/RPII.
  - 4. Disseminating PII/RPII information to unauthorized persons in any manner.
- D. TVA employees are also subject to discipline for unauthorized dissemination of certain other types of information, including but not limited to nuclear safeguards information and any other information that an employee knows or should know is confidential or sensitive, either by markings on the information or by the subject matter content.