

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

Before the Atomic Safety and Licensing Board

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

**Memorandum Responding to Board’s March 17 Order**

The Tennessee Valley Authority (“TVA”) submits this memorandum in response to the Board’s March 17, 2021 Order requesting clarification.<sup>1</sup> The Board requested each party’s position on the significance, if any, of the Memorandum of Understanding (“MOU”)<sup>2</sup> between the Nuclear Regulatory Commission (“NRC”) and the Department of Labor (“DOL”) to the Board’s consideration of the settlement agreement over which TVA requested confidential treatment in its March 1, 2021 motion (“Motion”).<sup>3</sup> The Board specifically asked whether, to qualify as “information identified as sensitive that has been supplied to it by the other agency” pursuant to the MOU, it is sufficient for the information to be sensitive on its face, or whether the other agency must identify the information as sensitive.<sup>4</sup>

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<sup>1</sup> Order (Request for Clarification) (Mar. 17, 2021) (ADAMS Accession No. ML21076A244).

<sup>2</sup> There are two versions of the Memorandum of Understanding in the Federal Register, an original and a revised version. There are no substantive differences between the two for the purposes of the Board’s question. *See* Memorandum of Understanding Between NRC and Department of Labor, Employee Protection, 47 Fed. Reg. 54,585 (Dec. 3, 1982) (“MOU”); Notice of Signing of a Revised Memorandum of Understanding Between the NRC and the Department of Labor (DOL), 63 Fed. Reg. 57,324 (Oct. 27, 1998) (“Notice of Signing Revised MOU”).

<sup>3</sup> Motion for Return and Protection of Privileged and Confidential Documents (Mar. 1, 2021) (ADAMS Accession No. ML21060B597).

<sup>4</sup> Order, *supra* note 1 (“Among other things, to qualify as ‘information identified as sensitive that has been supplied to it by the other agency,’ must the other agency identify information as sensitive? Or is it sufficient that the information identifies itself as sensitive?”).

The MOU is relevant insofar as it contemplates information sharing between the two agencies in light of their overlapping jurisdiction, and reflects an intention to protect confidential and sensitive information. The MOU establishes the procedures and expectations for sharing information between the agencies, but does not supersede confidentiality obligations both agencies have under federal law, such as the Privacy Act and the Freedom of Information Act (“FOIA”). Nor does it purport to. Instead, the MOU contemplates that each agency will treat with appropriate discretion “sensitive” information gathered while investigating a discrimination complaint. In other words, the MOU contemplates potential *additional* protections for “sensitive” information, but does not affect the existing legal protections that form the basis of TVA’s Motion. If anything, the Board should construe the MOU broadly as providing additional protection against disclosure of the relevant settlement agreement, as the MOU is silent on *who* must identify a document as “sensitive,” and it is evident from the face of the document that the settling parties wished to keep its terms confidential. In sum, the MOU does not undermine—and, if anything, bolsters—TVA’s claim of confidentiality.

## **I. Argument**

NRC and DOL have “complementary” responsibilities over employee retaliation claims in the nuclear industry.<sup>5</sup> The MOU between the NRC and DOL reflects the two agencies’ intentions to maximize “administrative efficiency and sound enforcement policies” by sharing information about employment matters where the agencies’ interests overlap.<sup>6</sup> The MOU also recognizes the agencies’ mutual agreement to protect sensitive information shared in the context of employee discrimination cases, stating that “[e]very agency agrees to share all information it

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<sup>5</sup> Notice of Signing Revised MOU, 63 Fed. Reg. at 57,324 (“The NRC and DOL have complementary responsibilities in the area of employee protection.”).

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

obtains concerning a particular complaint of discrimination and, *to the extent permitted by law*, will protect information identified as sensitive that has been supplied to it by the other agency.”<sup>7</sup> But the MOU does not define the scope of “sensitive” information, nor does it address the substance of any other confidentiality protections. In other words, the MOU establishes procedures and expectations for sharing information, but does not purport to abridge or modify any existing legal rights or obligations regarding confidentiality.

As a result, the MOU does not absolve the NRC of underlying, independent obligations to maintain confidentiality of information shared. Particularly where, as here, the document is a confidential settlement agreement that falls squarely within a category of confidential information protected from disclosure by federal law and the NRC’s own regulations. To the extent the NRC Staff argues that the MOU’s reference to identification of sensitive information requires it to protect information *only if* the providing agency expressly identifies it as sensitive, that argument is contrary to law. The MOU does not discuss the Privacy Act, FOIA, or any other federal law that safeguards confidential information, much less suggest that either agency may unilaterally waive these independent protections simply because a document is not designated “sensitive” by the transmitting agency. After all, “where personal privacy interests are implicated, only the *individual* who owns such interest may validly waive it.”<sup>8</sup> For instance, were DOL to transmit to NRC a document containing a list of Social Security Numbers, that

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<sup>7</sup> *Id.* at 57,324 (Oct. 27, 1998) (emphasis added); *see also* MOU, 47 Fed. Reg. at 54,585 (“Each agency agrees to share and promote access to all information it obtains concerning a particular allegation and, to the extent permitted by law, will protect the confidentiality of information identified as sensitive that has been supplied to it by the other agency.”).

<sup>8</sup> *Joseph W. Diemert, Jr. & Assocs. Co., L.P.A. v. F.A.A.*, 218 F. App’x 479, 482 (6th Cir. 2007) (emphasis added).

information would not lose its protection from disclosure even if DOL transmitted it under the MOU without indicating confidentiality.<sup>9</sup>

FOIA itself does not require express confidentiality designations for its exemptions to apply. Rather, it imposes an obligation on agencies to independently identify the privacy interest at stake and balance it against the public interest.<sup>10</sup> As TVA’s Motion notes, Courts routinely hold that privacy interests in protecting a single settlement agreement outweigh any public interest in disclosure under FOIA.<sup>11</sup> And the settlement agreement in question itself provides indicia of sensitive contents, including a previously undisclosed settlement amount, terms regarding future employment, and an express confidentiality provision. Indeed, DOL recognizes the sensitive nature of such documents, and obliges settling parties’ requests to treat such settlement agreements as confidential.<sup>12</sup>

The MOU is thus of limited relevance to the relief TVA’s Motion seeks, because it is largely a process document that does not address the substance of any of these underlying confidentiality questions. The MOU may, however, afford *additional* protection over the relevant settlement agreement. The MOU recognizes that investigations of discrimination complaints are particularly likely to involve sensitive evidence, and memorializes an intent that the receiving agency treat such information with caution to the extent it can under the law. Thus,

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<sup>9</sup> See, e.g., *Sherman v. U.S. Dep’t of Army*, 244 F.3d 357, 364 (5th Cir. 2001) (prior disclosure of Social Security Numbers by the Department of Army did not waive individual privacy interests against disclosure.).

<sup>10</sup> *Bartko v. U.S. Dep’t of Just.*, 898 F.3d 51, 66 (D.C. Cir. 2018) (“OPR ignores altogether its obligation to specifically identify the privacy interest at stake.”).

<sup>11</sup> Motion, *supra* note 3 at 14; *Kowack v. U.S. Forest Serv.*, 766 F.3d 1130, 1136 (9th Cir. 2014) (holding that public interest in a single employee’s settlement agreement “could not possibly outweigh the employee’s privacy interest”).

<sup>12</sup> See e.g. *In re Leslie E. Hayden*, No. 2010-SOX-00041, 2011 WL 121917, at \*1 (U.S. Dep’t of Labor SAROX Jan. 3, 2011) (“The parties in this matter have indicated that the settlement agreement comprises and includes confidential information which may be exempt from disclosure under FOIA. The Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requestors from denials of requests and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. § 70.26. The settlement agreement in this case will be placed in a separate envelope and identified as being confidential commercial information pursuant to the parties’ request.”).

the MOU in fact contemplates *heightened* protection over information gathered in an employment investigation that may be “sensitive” even if not formally shielded by some existing legal protection against disclosure—which, as discussed above, the MOU does not purport to address.

As to the Board’s more pointed question: the language of the MOU leaves “information identified as sensitive” ambiguous as to who identifies the information as sensitive. But given the context of this provision, which highlights potential “sensitivity” of information related to discrimination complaints, the Board should construe it broadly to apply both to information that either party to the MOU identifies as sensitive, and to information that identifies itself as sensitive. The settlement agreement at issue does just that. The settlement agreement’s terms clearly indicate that both parties consider the material confidential, and will request confidential treatment of the information enclosed. This is not a unique or unexpected provision, and because the settlement agreement was disclosed to DOL in the context of an employment discrimination action, the Board should, if anything, afford that provision extra weight.<sup>13</sup> In sum, to the extent the MOU is relevant to this dispute, the Board should find that it enhances nondisclosure protections over the settlement agreement.

## **II. Conclusion**

The MOU is relevant insofar as it recognizes that NRC should maintain confidentiality of information shared by DOL. Read in context, the MOU does not abridge or modify underlying legal obligations detailed in TVA’s Motion, which counsel confidential treatment of the settlement agreement at issue. On the contrary, the Board should consider the MOU a separate and additional justification for preserving confidentiality of this document.

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<sup>13</sup> *Cf. Kowack v. U.S. Forest Serv.*, 766 F.3d 1130 (9th Cir. 2014) (recognizing substantial privacy interests pursuant to FOIA in a single employee’s settlement agreement).

Dated: Washington, DC  
March 24, 2021

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum Responding to Board’s March 17 Order have been served through the E-Filing system in the above-captioned proceeding this 24th day of March, 2021.

/Electronically signed by Alexander Duran/  
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