

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Allison M. Macfarlane, Chairman
Kristine L. Svinicki
George Apostolakis
William D. Magwood, IV
William C. Ostendorff

_____)	
In the Matter of)	NRC Investigation
)	Case No. 2-2013-001
THE SHAW GROUP INC.)	
_____)	

MEMORANDUM AND ORDER

CLI-13-05

I. INTRODUCTION

This matter is before us on a motion to quash a subpoena issued by the NRC Office of Investigations (OI). The Shaw Group Inc. (Shaw) asks us to quash the subpoena based upon its concerns regarding possible future public disclosure of the compelled records in response to a Freedom of Information Act (FOIA) request. As discussed below, we decline to quash the subpoena. The inquiry is within the scope of the agency's authority, the subpoena is neither too broad nor too indefinite, and the compelled information is relevant to the NRC's investigation. Moreover, production of the records does not unduly interfere with Shaw's employee concerns program or safety conscious work environment, and the alternative that Shaw proposes is not an adequate substitute for the production of the documents compelled by the subpoena.

II. BACKGROUND

Shaw Modular Solutions (SMS), a fabrication and assembly facility in Lake Charles, Louisiana, is currently fabricating and assembling structural modules for four nuclear facilities

currently under construction—Vogtle Electric Generating Plant, Units 3 and 4, and Virgil C. Summer Nuclear Station, Units 2 and 3. SMS is a division of Shaw, of Baton Rouge, Louisiana. The NRC is investigating alleged violations of NRC quality assurance requirements, including falsification of records, at SMS.

As part of that investigation, the NRC Staff sent Shaw a Request for Information related to these allegations.¹ Shaw's response indicated that it had conducted an internal investigation of the allegations under the auspices of its Employee Concerns Program (ECP)² and had taken corrective action.³ Shaw's response, however, did not contain the ECP investigation file. Thereafter, the NRC Staff issued a second Request for Information asking that Shaw provide a copy of the complete ECP investigation report, including the names of the individuals with knowledge of violations.⁴ Shaw provided the names of the individuals, but did not produce the ECP investigation file, citing confidentiality concerns that could arise if the material were subject

¹James, Lois M., NRC, letter to Joseph L. Ernst, Shaw Modular Solutions, Re: Request for Information with Regard to an Allegation Relating to Shaw Modular Solutions (July 6, 2012) (non-public).

²One of the underlying principles of a robust nuclear safety culture is an environment where personnel feel free and are free to raise safety concerns without fear of retaliation, often referred to as a "safety conscious work environment." See Final Safety Culture Policy Statement, 76 Fed. Reg. 34,773, 34,777 (June 14, 2011); Freedom of Employees in the Nuclear Industry to Raise Safety Concerns Without Fear of Retaliation; Policy Statement, 61 Fed. Reg. 24,336 (May 14, 1996). NRC guidance for maintaining a safety conscious work environment suggests a number of practices for problem identification and resolution that contribute to a safety conscious work environment. See *generally* Regulatory Issue Summary 2005-18, "Guidance for Establishing and Maintaining a Safety Conscious Work Environment" (Aug. 25, 2005) (ADAMS accession no. ML052220239). For organizations large enough to support such a process, the NRC suggests maintaining an alternative process for employees who prefer not to report safety concerns to line management or through the corrective action program. *Id.*, Att. 1, at 9. These are generally referred to as Employee Concerns Programs or "ECPs."

³Ernst, Joseph L., Shaw Modular Solutions, letter to Lois M. James, NRC, Re: Request for Information with Regard to an Allegation Related to Shaw Solutions, Allegation NRO 2012-A-0006 (Aug. 7, 2012) (non-public).

⁴James, Lois M., NRC, letter to Joseph L. Ernst, Shaw Modular Solutions, Re: Request for Information with Regard to an Allegation Relating to Shaw Modular Solutions (Oct. 17, 2012) (non-public).

to public release in response to a FOIA request.⁵ OI then served a subpoena on Shaw, compelling production of the internal investigation file.⁶ Shaw sought, and received, an extension of time of one week to file a motion to quash the subpoena to allow time to “continue discussions concerning resolution of the conflict.”⁷

Shaw has now moved to quash the subpoena pursuant to 10 C.F.R. § 2.702(f).⁸ Shaw argues that production of the investigation file would compromise its ECP by potentially subjecting the information contained in the file to public disclosure as an official agency record under FOIA.⁹ In lieu of complying with the subpoena, Shaw renews an earlier offer to “make the ECP Report, exhibits and related records available to NRC Staff and OI at a date and location convenient to them, and to make such documents available for subsequent review if needed.”¹⁰ For the reasons that follow, we deny the motion to quash.

II. ANALYSIS

Section 161c. of the Atomic Energy Act of 1954, as amended (AEA), provides the NRC authority to conduct any investigations it deems necessary and proper to the administration or enforcement of its authority, which includes any regulations or orders issued pursuant to the

⁵ Ernst, Joseph L. Shaw Modular Solutions, letter to Lois M. James, NRC, Re: Request for Information Allegation NRO 2012-A-0006 (Nov. 7, 2012) (non-public). As an alternative, Shaw offered to make the ECP investigation report and exhibits available to NRC for its review at a Shaw facility. *Id.* at 2.

⁶ *Subpoena duces tecum in the Matter of the U.S. Nuclear Regulatory Commission Office of Investigations Case No. 2-2013-001*, issued to the Shaw Group Inc. (Nov. 15, 2012) (non-public).

⁷ *Motion for Extension of Time* (ML12334A306) (Nov. 28, 2012); Order of the Secretary (Granting Motion for Extension of Time to Respond to Subpoena) (ML12339A037) (Dec. 3, 2012).

⁸ *Motion to Quash Subpoena Duces Tecum* (ML12355A504) (Dec. 4, 2012) (Motion).

⁹ *Id.* at 6.

¹⁰ *Id.* at 8.

AEA.¹¹ In carrying out this authority, the NRC is authorized to issue any necessary subpoenas.¹² As a general matter, an administrative subpoena duces tecum is judicially enforceable where: (1) the inquiry is within the authority of the agency; (2) the demand for production is neither too indefinite nor unreasonably broad nor burdensome; and (3) the information sought is reasonably relevant to the authorized inquiry.¹³ NRC subpoenas have previously been quashed or limited where the subpoena was not closely drawn, or the NRC did not consider alternative means for obtaining the requested information “to avoid unnecessary infringement of [First Amendment] associational rights.”¹⁴ But, “under the appropriate circumstances . . . [the] First Amendment rights would give way to the compelling government interest in nuclear safety.”¹⁵

In this instance, we find no legal basis to quash the subpoena. Shaw contests neither the NRC’s authority to issue the subpoena, nor the relevance of the requested information to the investigation. Shaw also does not contend that the request is too indefinite or unreasonably broad or burdensome. Indeed, Shaw acknowledges the NRC’s need for the information.¹⁶

¹¹ 42 U.S.C. § 2201(c). See also *In re Richard E. Dow*, CLI-91-9, 33 NRC 473, 478 (1991).

¹² 42 U.S.C. § 2201(c). See also *U.S. v. Comley*, 890 F.2d 539, 542 (1st Cir. 1989) (“Congress has vested the NRC with the authority to issue subpoenas in conjunction with investigations that the NRC deems necessary to protect public health or to minimize danger to life or property in matters involving nuclear materials.”).

¹³ See, e.g., *United States v. Oncology Serv. Corp.*, 60 F.3d 1015, 1020 (3d Cir. 1995) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)); *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986).

¹⁴ *United States v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987). See also *Dow*, CLI-91-9, 33 NRC at 479.

¹⁵ *Garde*, 673 F. Supp at 606. See also *Dow*, CLI-91-9, 33 NRC at 479. In at least one instance, an NRC subpoena was upheld notwithstanding assertion of First Amendment freedom of association rights, where the subpoena was narrowly tailored to documents supporting specific allegations. *Comley*, 890 F.2d at 545.

¹⁶ Motion at 4.

Further, Shaw does not claim that the subpoena violates First Amendment rights or assert that any other legally protectable interest (including the right to be free from an unduly burdensome subpoena) has been infringed. The absence of even an allegation to this effect obviates the need to evaluate the agency's need for the information at issue or the existence of a less restrictive alternative for obtaining it.¹⁷

Instead, Shaw asks that we quash the subpoena of this single ECP investigation file based on its concern that the file, once in the NRC's hands, might be subject to a future FOIA request and then be released publicly in response to that request.¹⁸ Shaw argues that such disclosure would undermine its ECP and damage the safety conscious work environment at the SMS facility.¹⁹ Shaw asserts that it "cannot risk a determination that an ECP Report, or any portion thereof, will be released to the public."²⁰ For the reasons explained below, we decline to quash the subpoena on this basis.

We agree with Shaw that confidentiality is a cornerstone of an ECP, and that stakeholder confidence is essential for an effective program. However, Shaw's concerns about the NRC's administration of FOIA cannot overcome the agency's duty to investigate alleged violations²¹ and its statutory obligation to protect the public health and safety.²² FOIA requires all agencies to, among other things, make available certain records to members of the public upon specific request for those records except to the extent that the records (or portions of them) are exempt from public disclosure by one of the nine enumerated exemptions or are

¹⁷ See *Comley*, 890 F.2d at 544-45.

¹⁸ Motion at 4.

¹⁹ *Id.*

²⁰ *Id.* at 7.

²¹ 42 U.S.C. § 2201(c).

²² 42 U.S.C. § 2232(a).

excluded from disclosure.²³ NRC regulations encompass the FOIA exemptions as well as instructions for outside entities who might submit non-public information to the NRC.²⁴ The NRC protects allegation and investigation information from release consistent with FOIA.²⁵ These requirements and exemptions reflect a balancing of public disclosure with confidentiality that Congress struck when enacting FOIA.²⁶ This balancing does not, however, affect the NRC's authority to obtain the requested information.

The cases that Shaw cites to support its arguments do not persuade us otherwise. Shaw cites to a FOIA case in which the NRC reconsidered an initial decision to disclose ECP records (with names and identifying information of alleged redacted).²⁷ Shaw claims that this case is evidence of a real risk of public disclosure of its ECP investigation file. But, as Shaw

²³ 5 U.S.C. § 552.

²⁴ 10 C.F.R. § 2.390.

²⁵ If a FOIA request for this material were received, we expect that the agency would consider whether Exemption 7 would prevent public disclosure of such information. See 5 U.S.C. § 552. See generally U.S. Nuclear Regulatory Commission Management Directive 3.1, Freedom of Information Act (DT-11-07) (June 6, 2011) (ML110050002), which outlines special procedures for processing allegations records, as well as investigatory information to be withheld under Exemption 7. Shaw may provide the NRC with two copies of the ECP investigation file—the first redacted, and the second bracketed to indicate the information that Shaw believes should be withheld if it were ever the subject of a FOIA request. 10 C.F.R. § 2.390(b). Guidance used within the nuclear industry also recommends a similar approach. See Nuclear Energy Institute “Nuclear Power Plant Personnel—Employee Concerns Programs—Process Tools in a Safety Conscious Work Environment,” NEI-97-05, Rev. 2, at F-4 (available at http://www.nei.org/corporatesite/media/filefolder/NEI_97-05_-_Nuclear_Power_Plant_Personnel-Employee_Concerns_Program-Process_Tools_In_A_Safety_Conscious_Work_Environment_Rev_2.pdf). We have no reason to assume that the NRC will fail to abide by applicable law, or fail to consider Shaw's proposed redactions, when responding to a FOIA request for the information at issue.

²⁶ *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

²⁷ Motion at 7-8 (citing FOIA/PA Case No. 2009-0017A (non-public)).

acknowledges, ultimately no ECP investigative records were publicly released in response to the FOIA request.²⁸

Shaw also argues that the Atomic Safety and Licensing Appeal Board's decision in *South Texas Project* supports the proposition that "ECP confidentiality is of paramount importance," such that Shaw is compelled to withhold ECP information from the NRC.²⁹ In that case, the intervenors sought disclosure of the names of power plant employees who provided the NRC with information during the course of its investigation.³⁰ The Appeal Board held that it would be inappropriate to identify informants to the intervenors, even with a protective order in place. The Appeal Board relied on the Supreme Court holding that recognized the Government's privilege:

to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of the law. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.³¹

Shaw also cites to a case management order issued by the Pre-Application Presiding Officer Board in the *Yucca Mountain* proceeding for the same proposition.³²

²⁸ *Id.* at 8.

²⁹ *Id.* at 5-6 (citing *Houston Lighting & Power Co.* (South Texas Project, Units 1 and 2), ALAB-639, 13 NRC 469 (1981), *reconsideration denied*, CLI-81-28, 14 NRC 933 (1981)).

³⁰ *South Texas Project*, ALAB-639, 13 NRC at 477.

³¹ *Id.* at 473 (citing *Roviaro v. U.S.*, 353 U.S. 53, 59 (1957)).

³² See *U.S. Department of Energy* (High Level Waste Repository Pre-Application Matters), Revised Second Case Management Order (Pre-License Application Phase Document Discovery and Dispute Resolution), at 17-20 (July 6, 2007) (unpublished) (ML071900146). There, the Board instructed that NRC and Department of Energy ECP records, which would otherwise have been subject to disclosure, not be placed on the Licensing Support Network and thus not be made public. Parties could request redacted copies of ECP documents, upon stating their need for the information. Access would only be granted after the party signed a non-disclosure agreement.

We agree with Shaw that care should be taken not to disclose unredacted ECP reports and allegers' identities. However, the cited *South Texas Project* and *Yucca Mountain* decisions do not support withholding information from the NRC in the first instance. Moreover, the informant's privilege recognized in *South Texas Project*—which addressed information already in the hands of the NRC—makes no mention of the privilege being available to any entity outside the government. The mere fact that the government may have the right to withhold the names of its confidential informants for law enforcement purposes does not mean, as Shaw suggests, that a subpoena recipient has an absolute right to withhold this information from an agency conducting an investigation that is within the scope of its authority. Further, even if Shaw had shown the infringement of a legally protectable interest and it were therefore appropriate to consider the possible impact of enforcing the subpoena upon Shaw's safety conscious work environment, we do not agree that enforcement would unduly burden Shaw's program or that the alternative Shaw presents is an acceptable solution.

In lieu of producing the ECP investigatory file, Shaw proposes to allow the NRC Staff to review the file at Shaw's site or at another location convenient to the NRC.³³ Shaw relies on *Garde* to assert that the NRC must accept this proposal as an alternative means of obtaining the information sought.³⁴ But *Garde* does not support this proposition. Rather, *Garde* requires an agency to use alternative means for obtaining information "to avoid unnecessary infringement of [First Amendment] associational rights."³⁵ Shaw does not claim that First Amendment rights or any other protectable interests are implicated here, nor do we find any such infringement. Further, we find unpersuasive Shaw's comparison between investigations

³³ Motion at 8.

³⁴ *Id.* at 9 (citing *Garde*, 673 F. Supp. at 607).

³⁵ *Garde*, 673 F.Supp. at 607. See also *Dow*, CLI-91-9, 33 NRC at 479.

and inspections to establish that, as a matter of policy, its proposed accommodation should be accepted here. While inspections may identify potential wrongdoing, investigations differ from inspections in that they are directed at gathering facts and evidence pertinent to an allegation of wrongdoing. Facts and evidence collected by OI must be authenticated and their validity tested in an unbiased and independent manner. Taking possession of and evaluating evidence and subsequently including it as exhibits to the investigation report ensures that it can be reviewed by OI throughout the duration of the investigation and by other law enforcement organizations with an interest in the investigation. The NRC is concerned with collecting and preserving evidence of wrongdoing in such a way that it is admissible in any subsequent legal proceeding.³⁶ Shaw's offer to allow OI to review the ECP investigation file would not serve as an adequate substitute for the underlying document.³⁷

Again, we recognize the importance of confidentiality for an effective employee concerns program. Our decision today is not intended to undermine the importance of confidentiality. Under certain circumstances, however—like those presented here—a licensee or vendor might

³⁶ In accordance with the Memorandum of Understanding between the NRC and the Department of Justice, the NRC is required to refer all cases in which it substantiates willful wrongdoing for possible criminal prosecution. Memorandum of Understanding Between the Nuclear Regulatory Commission and the Department of Justice, 53 Fed. Reg. 50,317 (Dec. 14, 1988). For this reason, OI seeks to collect and maintain evidence in a manner consistent with the "best evidence rule," which provides that an original or duplicate writing, recording, or photograph is required in order to prove its content unless an evidentiary rule or federal statute provides otherwise. See Fed. R. Evid. 1002–1003. See also *Gordon v. United States*, 344 U.S. 414, 420-21 (1953) ("The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description . . .").

³⁷ We note that Shaw does not explicitly offer to allow OI to take notes, only to review. Motion at 8. Allowing OI to review, but not take notes is incompatible with OI's obligation, as discussed above, to validate facts and marshal and preserve evidence for use in subsequent legal proceedings. Further, if the investigator were allowed to prepare notes or other documents reflecting the substance of the reviewed subpoenaed file, such documents could also be the subject of a request under FOIA. Therefore, it is not apparent how Shaw's proposed approach would mitigate or resolve its concerns about adverse impacts on its employee concerns program or its goal of fostering a safety conscious work environment.

be required to disclose confidential ECP information (including the identity of a concerned individual) at the behest of a government agency (including the NRC), or in response to a subpoena.³⁸ Such disclosures are limited by the NRC's request, and, unless they are the subject of a FOIA request and do not fall within an exemption or an exception, are not and will not become public. We therefore do not expect such document requests to unduly burden, or otherwise create a chilling effect on, a facility's effort to promote a safety conscious work environment.

In short, requiring the NRC Staff to consent to Shaw's proposal could hinder significantly the agency's ability to conduct this and future investigations. We decline to find that the confidentiality of ECP documents and associated concerns about NRC's administration of FOIA overcome the NRC's obligation under the AEA to conduct investigations to ensure nuclear safety, or justify quashing an otherwise legally valid subpoena.

III. CONCLUSION

For the foregoing reasons, we *deny* Shaw's motion to quash. The subpoena remains in force with a new return date of April 9, 2013.

IT IS SO ORDERED.

For the Commission

NRC SEAL

/RA/

Annette L. Vietti-Cook
Secretary of the Commission

Dated at Rockville, Maryland
this 2nd day of April 2013

³⁸ Moreover, guidance used by the nuclear industry acknowledges such potential disclosures. See NEI-97-05 at C-7, C-23, E-2, F-2.