

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner McGaffigan
Commissioner Diaz
Commissioner Merrifield

May 9, 2000

FROM: William D. Travers */RA/*
Executive Director for Operations

SUBJECT: A REVIEW OF AGENCY POLICY AS IT RELATES TO THE DEGREE
TO WHICH INFORMATION RELATING TO ALLEGERS, COMPILED
FOR ENFORCEMENT, MAY BE WITHHELD FROM PUBLIC
DISCLOSURE

In accordance with the Staff Requirements Memorandum on COMJSM-99-002/COMNJD-99-005 dated December 17, 1999 (Attachment 1), this memorandum provides the staff's views on whether any changes are necessary to the NRC's policy on the degree to which information relating to allegeders is withheld subsequent to a request under the Freedom Of Information Act (FOIA). On March 10, 2000, the Office of the General Counsel (OGC) provided the Commission a review of current FOIA case law concerning the extent to which the agency may withhold information concerning allegeders, compiled for law enforcement purposes (Accession Number ML003691782). OGC concluded that the agency's current policy is consistent with current case law. Nevertheless, OGC also concluded that the agency, in appropriate circumstances, does have the discretion to withhold from widespread public disclosure information that may have been previously released on a limited basis.

The staff reviewed current guidance on reviewing and releasing information related to allegeders in response to FOIA requests for consistency with the analysis. The current guidance is contained in Part I of Section J of Management Directive 8.8, "Management of Allegations." The staff believes the current implementing guidance in Management Directive 8.8 is consistent with OGC's analysis. Management Directive 8.8 states, "In cases where the NRC has disclosed the name of an allegeder to the licensee in furtherance of an investigation or because of an overriding safety issue, the NRC will continue to withhold the allegeder's name from release pursuant to a FOIA request, unless the allegeder's name is already widely publicly known in regard to the case at issue." Additionally, each FOIA response that contains allegation-related information is reviewed by the Agency Allegation Advisor or the Assistant Agency Allegation Advisor to ensure the information that could identify an allegeder is not inappropriately released.

However, given the policy considerations outlined in COMJSM-99-002/COMNJD-99-005, it is the staff's understanding that the Commission wishes to limit the release of information that could cause allegeders to be identified to the maximum extent permissible under the FOIA. With that in mind, the staff has drafted a revision to the guidance in Management Directive 8.8 (Attachment 2) that is consistent with the policy considerations expressed in COMJSM-99-002/COMNJD-99-005. Management Directive 8.8 provides for issuing an Allegation Guidance Memorandum (AGM) when it is necessary to revise guidance contained in the management

directive. The staff will issue an AGM that includes the guidance in Attachment 2 by June 16, 2000, and include the guidance in the next revision to Management Directive 8.8.

Attachment 1. SRM on COMJSM-99-002/COMNJD-99-005
2. Revised Section of MD 8.8 on FOIA Requests

cc: SECY
OGC
OPA
OCA
CIO
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Attachment 1. SRM on COMJSM-99-002/COMNJD-99-005
 2. Revised Section of MD 8.8 on FOIA Requests

cc: SECY
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DATE	5/5/00		5/5/00		5/4/00		5/8/00		5/9/00	

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December 17, 1999

Attachment 1

MEMORANDUM TO: William D. Travers
Executive Director for Operations

Karen D. Cyr
General Counsel

FROM: Annette L. Vietti-Cook, Secretary /s/

SUBJECT: STAFF REQUIREMENTS - COMJSM-99-002/COMNJD-99-005 - FOIA
REQUESTS

The Commission directs the staff to reexamine its practice relating to the release of the names of alleged harassers in harassment and intimidation cases in response to FOIA requests.

The Office of the General Counsel should review current FOIA caselaw and provide the Commission a memorandum discussing the degree to which information relating to alleged harassers, compiled for enforcement, may be withheld.

(OGC)

(SECY Suspense: 2/25/00)

The staff, in conjunction with OGC, should ensure that information is withheld consistent with FOIA law and the policy considerations outlined in COMJSM-99-002/COMNJD-99-005. The staff should inform the Commission of the process it will put in place to implement these changes.

(EDO)

(SECY Suspense: 4/24/00)

cc: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield
CIO
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REVISED DRAFT OF SECTION J
"FREEDOM OF INFORMATION ACT REQUESTS"
HANDBOOK 8.8, PART I
MANAGEMENT DIRECTIVE 8.8

Attachment 2

"MANAGEMENT OF ALLEGATIONS"

Freedom of Information Act Requests (J)

Information that may identify an alleged or a confidential source ~~may not need~~ **shall not normally** to be released in response to FOIA requests. There are two exemptions under the FOIA that may justify withholding information that would identify an alleged or a confidential source (see 5 U.S.C. 552(b)(6) and (b)(7)(C) and (D) and 10 CFR 9.17(a)(6) and (7)(iv)). This is a case-by-case decision that has to be made by the OAC, the Director, OI (for OI confidential sources), **the designated attorney in OGC**, or other designated individuals. Information that may lead to "fingerprinting" an alleged also should **normally** be redacted when responding to a FOIA request. The type of information that may lead to an alleged being fingerprinted includes, but is not limited to, job titles, organizational names, work report numbers, licensee ECP file numbers, and a combination of dates, times, and equipment that could be combined by the requestor or another individual to identify an alleged. Redact these types of information to protect the identity of an alleged. If there is any question in this area, discuss it with the appropriate allegation or FOIA coordinator; review MD 3.1, "Freedom of Information Act"; or contact the ~~AAA~~ **Agency Allegation Advisor, regional counsel, designated OGC attorney**, or the Freedom of Information Act/Privacy Act Section, Office of the Chief Information Officer. (1)

Disclosures may be necessary under this act; however, it is NRC policy to provide **the** maximum protection allowed by FOIA to protect the disclosure of the identity of alleged who have signed a confidentiality agreement and who thus have confidential-source status. FOIA Exemption 7(D) authorizes the protection of alleged and others who are defined as confidential sources. As such, the staff may withhold any information that has the potential for causing the identity of the confidential source to be revealed. This level of identity protection for confidential sources differs from that afforded to alleged who are not confidential sources. These non-confidential sources are protected under FOIA Exemptions 6 and 7(C) which protect from disclosure any information that could reasonably be expected to reveal their identify or constitute an unwarranted invasion of personal privacy. (2)

In cases where the NRC has disclosed the name of an alleged to the licensee in furtherance of an investigation or because of an overriding safety issue, the NRC will continue to withhold the alleged's name from release pursuant to a FOIA request, unless the alleged's name is already widely associated publicly with the allegation. Some ways in which an alleged's name can be widely associated publicly with the allegation include the alleged notifying the media, holding a press conference about the subject, or identifying himself or herself as the alleged at a public meeting. The purpose of this approach is to protect the alleged from public scrutiny, criticism, or ridicule that might arise if the alleged's identity were revealed. (3)

During review of an allegation, all documentation may be exempt from release under FOIA, in accordance with FOIA Exemption 7(A) and 10 CFR 9.17(a)(7), when release of information could reasonably be expected to interfere with law enforcement proceedings. However, a FOIA request received while a case is open will "freeze" those documents in the file (they cannot be destroyed) because they have been captured under a FOIA request. When the case is closed, allegation documentation may be subject to release under FOIA, with appropriate precautions to protect the identity of the alleged and/or confidential source and to avoid the release of privacy information, safeguards information, or proprietary information. In the absence of a FOIA request, management may freely review case files and, when an allegation is closed, retain only those documents

necessary to account for official action. (4)

When an allegor files a FOIA request seeking the documents from files on closed allegations he or she submitted, much of the allegor's case file is releasable, unless the documents would affect the personal privacy of another individual, the documents were covered by attorney/client privilege, or the release of a particular document met the harm criteria in that it would harm the NRC's investigation of the allegation. If a FOIA request captures an open allegation file, the contents of the open file may be withheld under Exemption 7(A) or 7(C), unless the allegor is the requestor. When an allegor files a FOIA request seeking the documents from his or her own open allegation file, the entire file may be withheld if disclosure would interfere with an ongoing investigation or proceeding. However, each record or category of records must be considered for disclosure on a case-by-case basis to determine whether Exemption 7A applies. When the allegor is the FOIA requester, normally his or her own statements and/or documents provided to NRC cannot be withheld unless release could interfere with the investigation or proceeding. If the allegor provides documents that were not his or hers, such as documents taken from the licensee, those may be more reasonable to withhold than his or her own documents. If a personal representative of an allegor requests the release of documents, a written authorization is needed from the allegor. (5)