

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Alex S. Karlin, Chairman
Michael M. Gibson
Dr. Gary S. Arnold

In the Matter of
JAMES CHAISSON
(Enforcement Action)

Docket No. IA-14-025-EA
ASLBP No. 14-932-02-EA-BD01
October 27, 2014

PROTECTIVE ORDER
(Governing Personal Privacy Materials)

This protective order governs the mandatory disclosure, use, and dissemination of documents produced by Patricia Holihan, the Director of NRC Enforcement (Director), that she claims contain privileged Personal Privacy Material, as defined in section I(D).¹ Pursuant to this protective order, the Director shall disclose, and Mr. Chaisson will be permitted to access, such Personal Privacy Material upon the conditions set forth herein.

¹ This protective order is limited to documents designated Personal Privacy Material and does not extend to documents over which any other potential privilege might be asserted. For example, the protective order does not address (1) proprietary information, because the Director asserted that “it does not currently anticipate withholding from its disclosures any proprietary information,” NRC Staff’s Report of Consultation Between the Parties, at 2 n.2 (Oct. 10, 2014), or (2) security issues, because, while counsel for the Director indicated on the prehearing teleconference that there “may be redactions necessary . . . for security issues,” the Director has not proposed to extend this protective order to such materials. As such, the Board expects that the Director will not withhold any portion of any relevant documents from Mr. Chaisson on these grounds. Should the Director later wish to assert a privilege over additional materials, she must inform the Board of her intentions and provide support for her determinations by complying with the obligations to produce a privilege log and redact said documents as detailed in paragraph II(A)(2) of this protective order.

I. DEFINITIONS

For purposes of this protective order, the following definitions apply.

A. The term “party” means Mr. Chaisson and the Director.²

B. The term “document” means any audio tape or video tape recording or written matter of any kind, whether produced, reproduced, or stored on paper, cards, tapes, ribbons, disks, belts, charts, film, computer files, computer disks or diskettes, computer storage devices, or any other medium, and includes without limitation, documents, data compilations, computer models, books, reports, transcripts, studies, statements, speeches, notebooks, calendars, working papers, manuals, memoranda, notes, instructions, directions, records, correspondence, diaries, diagrams, drawings, lists, telephone logs, minutes, and photographs, and also includes, without limitation, originals, copies (with or without notes or changes thereon), and drafts.

C. The term “Personal Privacy Document” means any document that contains Personal Privacy Material as well as any derivative documents generated by a party that copy or contain Personal Privacy Material, such as notes of Personal Privacy Material. Unless otherwise specified or required by the context, the term “Personal Privacy Document” refers to a version of a document that has not been redacted to remove Personal Privacy Material.

D. The term “Personal Privacy Material” means any document that the Director claims is exempt from mandatory disclosure because it allegedly consists of “[r]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . [c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy,” as specified by 10 C.F.R. § 2.390(a)(7)(iii).

² Although the Director and the NRC Staff are covered by this protective order and the Director is required to make her disclosures in accordance herewith, the provisions of this order do not restrict the use by NRC counsel, witnesses, employees, consultants, and others representing the NRC Staff, of documents containing Personal Privacy Material. Rather, NRC’s use of such documents is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17, and 9.25.

E. The term “Non-Disclosure Declaration” shall mean the Declaration, as attached to this protective order. Mr. Chaisson and/or any other person working with him as a Reviewing Individual must sign a Non-Disclosure Declaration before being granted access to Personal Privacy Material. By signing it, the person shall certify his or her understanding that such access to Personal Privacy Material is provided pursuant to the terms and restrictions of this protective order, and that such person has read the protective order and agrees to be bound by it. When Mr. Chaisson or any other person working with him as a Reviewing Individual signs a Non-Disclosure Declaration, then he or she must serve a copy of it on counsel for the Director, as provided on the official service list for this proceeding.

F. The term “Reviewing Individuals” shall mean a person who has signed a Non-Disclosure Declaration and who is:

1. Mr. Chaisson;
2. counsel for Mr. Chaisson;
3. any person assisting Mr. Chaisson or counsel for Mr. Chaisson in the challenge of the NRC enforcement order applicable to Mr. Chaisson, including paralegal staff and any consulting or testifying expert witnesses;
4. any person who provides testimony at any deposition or hearing in this proceeding, but only to the extent that such person shall be permitted to review Personal Privacy Material during the course of such testimony and such person has signed a Non-Disclosure Declaration prior to being shown any Personal Privacy Material or such person is an NRC employee, contractor, or consultant, and therefore disclosure to that individual is governed by 10 C.F.R. §§ 2.390, 2.709, 9.17 and 9.25.

II. TERMS AND CONDITIONS OF PROTECTIVE ORDER

A. Obligations of the Director

1. Once Mr. Chaisson has signed and served the Non-Disclosure Agreement, the Director shall promptly disclose and produce Personal Privacy Documents and Personal Privacy

Material to Mr. Chaisson. The Director shall disclose and produce these materials separately from other mandatory disclosures and shall clearly mark each page “PERSONAL PRIVACY MATERIAL.” The Director shall not redact any information claimed to be Personal Privacy Material from her disclosures.

2. If the Director seeks to withhold any documents under claimed privileges not covered by this protective order, such as the attorney-client privilege or the deliberative process privilege, then the Director shall (a) produce a privilege log identifying the documents and provide “sufficient information for assessing the claim of privilege or protected status of the documents,” as required by 10 C.F.R. § 2.709(a)(6)(i)(B); and (b) produce a redacted version of the document that has been withheld. Any such redactions shall be kept to a minimum and shall only redact words or provisions that clearly qualify for the claimed privilege. See e.g., 10 C.F.R. § 9.19. Redactions shall be limited to segregating “(1) [i]nformation that is exempt from public disclosure . . . from nonexempt information; and (2) [f]actual information from advice, opinions, and recommendations in predecisional records unless the information is inextricably intertwined.” Id.³

3. In the event that the Director knows or has reason to believe that any previously designated Personal Privacy Material has been intentionally disclosed publicly such that the materials no longer qualify for protection under any applicable personal privacy privilege, the Director shall promptly notify Mr. Chaisson and shall withdraw the designation of such Personal Privacy Material, after which such Personal Privacy Documents shall no longer be subject to this protective order.

³ Similarly, the Freedom of Information Act, 5 U.S.C. § 552(b), mandates that “any reasonably segregable portion of the record shall be provided to any person requesting such record after deletion of the portions that are exempt.” See also South Texas Project Nuclear Operating Company (South Texas Project, Units 3 and 4), CLI-10-24, 72 NRC 451, 468 n.99 (2010).

B. Obligations of Mr. Chaisson, His Counsel, and Reviewing Individuals

1. Personal Privacy Material shall remain available to Mr. Chaisson, his counsel, and Reviewing Individuals until the later of (a) the date that an order terminating this proceeding is no longer subject to any appeal or judicial review, or (b) the date that any other Commission proceeding related to the Personal Privacy Material is concluded and is no longer subject to any appeal or judicial review. Within thirty (30) days of the last of these dates to occur, Mr. Chaisson, his counsel, and Reviewing Individuals shall return the Personal Privacy Documents to the Director, or shall destroy the Personal Privacy Documents. Counsel for Mr. Chaisson, however, shall be entitled to retain copies of filings, official transcripts, exhibits, pleadings, memoranda, notes and any documents filed in this proceeding that contain Personal Privacy Material, so long as counsel for Mr. Chaisson continues to maintain them in accordance with paragraph II(B)(2) below. Within the 30 day deadline specified above, Mr. Chaisson, his counsel, and Reviewing Individuals shall submit to the Director an affidavit stating that, to the best of his or her knowledge, all Personal Privacy Documents in his or her individual custody have been returned or destroyed or will be maintained in accordance with paragraph II(B)(2) below. If Personal Privacy Documents are not returned or destroyed, then they shall remain subject to this protective order.

2. Mr. Chaisson, his counsel, and Reviewing Individuals shall maintain all Personal Privacy Documents in their custody in a secure place. Access to those materials shall be strictly limited to Mr. Chaisson, his counsel, and Reviewing Individuals.

3. Personal Privacy Material shall be treated as confidential in accordance with the Declaration executed pursuant to paragraph II(B)(4) below. Except as otherwise ordered by the Board, Personal Privacy Material shall not be used except as necessary for the conduct of this proceeding, nor shall it be disclosed in any manner to any person except a Reviewing Individual.

4. A Reviewing Individual shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Personal Privacy Material pursuant to this protective order unless that Reviewing Individual has first executed a Non-Disclosure Declaration. A copy of each executed Non-Disclosure Declaration shall be provided to the Director prior to disclosure of any Personal Privacy Material to that Reviewing Individual.

5. Attorneys qualified as Reviewing Individuals are responsible for ensuring that persons under their supervision or control comply with this protective order.

6. Any Reviewing Individual may disclose Personal Privacy Material to any other Reviewing Individual as long as the disclosing Reviewing Individual and the receiving Reviewing Individual have both executed a Non-Disclosure Declaration. If any Reviewing Individual to whom the Personal Privacy Material is disclosed ceases to be engaged in these proceedings or ceases to qualify as a Reviewing Individual, access to Personal Privacy Material by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Declaration shall continue to be bound by the provisions of this protective order and the Non-Disclosure Declaration.

7. Personal Privacy Material shall not be disclosed to anyone other than in accordance with this protective order and shall be used only in connection with this proceeding. Any violation of this protective order and any Non-Disclosure Declaration executed hereunder shall constitute a violation of an order of the Commission. Any violation of this protective order may result in the imposition of sanctions as the Licensing Board or the Commission may deem appropriate.

C. Treatment of Personal Privacy Material During an Evidentiary Hearing

1. All copies of documents or pleadings containing Personal Privacy Material that are filed in this proceeding, including hearing testimony, the portion of exhibits, the portion of transcripts, the portion of pleadings, and the portion of documents that refer to Personal Privacy Material shall:

a. be filed through the NRC's Electronic Information Exchange (EIE) for service, but shall be excluded from the public docket for this proceeding by selecting the nonpublic "Protective Order" filing option on the EIE website;

b. be marked "PERSONAL PRIVACY MATERIAL," and shall specifically designate the portion of the pleading, testimony, exhibit, or correspondence, that contains Personal Privacy Material; and

c. be served only on the Board, the Board's law clerk, the NRC's Office of the Secretary, and persons authorized to receive Personal Privacy Material under this protective order.

2. Nothing herein shall preclude or restrict Mr. Chaisson or the Director from publicly filing versions of documents or pleadings that contain Personal Privacy Material and that have been duly redacted by the Director. The person making the filing shall be permitted to file the unredacted version containing Personal Privacy Material on the following day by selecting the nonpublic "Protective Order" filing option on the EIE website. The Board shall subsequently establish, by order or otherwise, any other specific procedures that will govern the disclosure or use of Personal Privacy Material at the evidentiary hearing in this proceeding.

D. Rights Unaffected by the Protective Order

1. The Board may alter or amend this protective order as circumstances warrant at any time during the course of this proceeding.

2. The Director or Mr. Chaisson may, by motion, seek an amendment, modification, or extension of this protective order. The Board shall resolve any disputes arising under or relating to this protective order. In any such dispute, the Director, as the party claiming a privilege, bears the burden of proving that the privilege properly applies.⁴ Prior to presenting

⁴ See, e.g., Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), ALAB-733, 19 NRC 1333, 1341 (1984); Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-82-82, 16 NRC 1144, 1153 (1982) (citing In re Fischel, 557 F.2d 209, 212 (9th Cir. 1977)).

any dispute under this protective order to the Board, counsel for the Director and Mr. Chaisson shall use their best efforts to resolve the dispute. See 10 C.F.R. § 2.323(b).

3. Nothing in this protective order shall be construed as or shall result in a waiver, limitation or restriction of any right (a) to challenge the designation of any documents or materials as Personal Privacy Material, or (b) to object to the admission or relevance of any Personal Privacy Material on any legal grounds.

4. Nothing in this protective order shall preclude a request that the Board, the Commission, or any other body having proper authority, find that this protective order should not apply to any or all information previously designated as Personal Privacy Material pursuant to this protective order.

5. Subject to the Director's obligations described in section II(A) above, nothing in this protective order prevents a request for public disclosure of information designated as Personal Privacy Material, in accordance with NRC procedures.

6. Nothing in this protective order shall be deemed to preclude a party from independently seeking, through discovery in any other administrative or judicial proceeding, information or materials produced in this proceeding under this protective order.

7. The right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Personal Privacy Material is not waived by this protective order.

8. If the Board finds at any time in the course of this proceeding that all or part of the Personal Privacy Material need not be protected, those materials shall, nevertheless, be subject to the protection afforded by this protective order for ten (10) days from the date of issuance of the Board's decision, and if there is an interlocutory appeal or request that the issue

be certified to the Commission, for an additional ten (10) days. The right to seek additional administrative or judicial remedies after the Board's decision respecting Personal Privacy Material or Reviewing Individuals, or the Commission's denial of any appeal, is not waived.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Alex S. Karlin, Chairman
Administrative Judge

Rockville, Maryland
October 27, 2014

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
JAMES CHAISSON)	Docket No. IA-14-025-EA
)	
(Enforcement Action))	ASLBP No. 14-932-02-EA-BD01

NON-DISCLOSURE DECLARATION

Under penalty of perjury, I hereby certify my understanding that (1) access to personal privacy materials is provided to me pursuant to the terms and restrictions of the Atomic Safety and Licensing Board's October 27, 2014 Protective Order in this proceeding; (2) I have been given a copy of and have read the protective order; and (3) I agree to be bound by it.

I understand that the contents of the Personal Privacy Material, any notes or other memoranda, or any other form of information that copies or discloses Personal Privacy Material shall not be disclosed to anyone other than in accordance with that protective order.

I acknowledge that a violation of this declaration or the protective order, which incorporates the terms of this declaration, constitutes a violation of an order of the Nuclear Regulatory Commission and may result in the imposition of sanctions as the Licensing Board or the Commission may deem appropriate.

WHEREFORE, I do solemnly agree to protect such Personal Privacy Material as may be disclosed to me in this NRC proceeding, in accordance with the terms of this declaration.

Name (printed):

Representing:

Title:

Date:

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of)
)
Mr. James Chaisson) IA-14-025-EA
)
(Enforcement Action))

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **PROTECTIVE ORDER (Governing Personal Privacy Materials)** have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Herald M. Speiser _____]
Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 27th day of October, 2014