

And with respect to the second point which was central to the analysis in Consumers Union -- i.e., that GAP's effectiveness will be substantially impaired by involuntary disclosures of confidential information -- there again can be no serious dispute. As the supplemental affidavits of deponents Clark and Garde (which are attached hereto as Exhibits A and B, respectively) make plain, GAP has entered into a covenant of confidentiality with persons who have come to it with information concerning nuclear power plants, exactly because such persons simply will not come forward with their information absent a clearly articulated and enforceable policy of confidentiality of GAP's part.

Moreover, in this case the GAP deponents can demonstrate an actual risk of harm to their witnesses as opposed to theoretical harm. Commonwealth Edison Co. (Byron Nuclear Power Station, Units 1 and 2), ALAB-735, 17 NRC \_\_\_\_ (slip op. at 10) (July 27, 1983). In a prior instance Mr. Brunner, Consumers' counsel, promised that a GAP witness' identity would be maintained within a small control group of two or three persons. Yet it was clear to the witness that this promise was not kept and his identity released to other workers. See Garde Affidavit at 2-4. In addition, Consumers insisted that MPQAD will handle workers' allegations in confidence. Yet when GAP informed Consumers in June 1982, that many workers distrusted the company's internal complaint process Consumers never bothered to answer GAP and the workers' concerns. See Clark Affidavit at 2-4. Instead Consumers came to the Licensing Board to ask for subpoenas of GAP staff members. Moreover, practically all the workers who came to GAP did so because they feared retaliation from Consumers or did so only after they had already been retaliated against by the

undermine GAP's organizational effectiveness,<sup>5/</sup> and would intrude into the special and confidential relationship that exists between GAP and those who come to it with information which they wish to put into the public domain. See, e.g., Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388, 390 (N.D. Cal. 1976) (discussing the public interest in protecting the confidential relationships which are essential for scholars and others whose "work ... has the unique potential to facilitate change through knowledge"). See also, e.g., Machin v. Zuckert, 316 F.2d 336 (D.C. Cir. 1963).

In short, Consumers has shown no particularized need for this discovery, while GAP has demonstrated a compelling interest in maintaining the confidentiality of its records, operations, and communications. Clearly, the subpoenas at issue should be quashed under the rationale of In re Consumers Union of the United States, Inc., supra.

Respectfully submitted,

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(footnote continued)

Morella, which occurred on July 19, 1983, after the oral argument on deponents' motion to quash subpoenas (attached hereto as Exhibit C). Over one-fourth of the deposition (41 of 151 pages) was concerned not with an effort to learn the substance of Ms. Morella's allegations of unsafe practices but rather with Consumer's efforts to discredit Ms. Morella because she sought assistance from GAP.

company. See Clark Affidavit at 4; Garde Affidavit at 4-7. Thus the applicant has its own internal complaint process to discover construction and quality assurance deficiencies which workers have disclosed to GAP. It is by Consumers' own retaliatory actions that this process has been discredited as a viable means to uncover safety problems at Midland.

Under the circumstances, the Board simply cannot avoid resolving GAP's claim of privilege. Furthermore, because GAP's privilege is of constitutional dimension, the Board must balance Consumer's need for the information sought through its subpoenas against the interests underlying the privilege. See, e.g., United States v. Cuthbertson (Appeal of CBS), 630 F.2d 139 3d (1980). That balance, we submit, is overwhelmingly in favor of preserving GAP's confidentiality.

On the one hand, Consumers is simply attempting to discover the substance of an NRC investigation into allegations of construction deficiencies at the Midland Plant while the investigation remains ongoing. According to NRC practice and procedure, discovery of this sort would not be permitted against the NRC staff until the conclusion of the investigation; consequently, by pursuing discovery against GAP while the NRC investigation is pending, Consumers is merely attempting to circumvent normal NRC procedures. Consumers will not be prejudiced in any way by adhering to the course normally followed in NRC proceedings.

On the other hand, the injury resulting from forced disclosure of the information sought by Consumers from GAP would substantially

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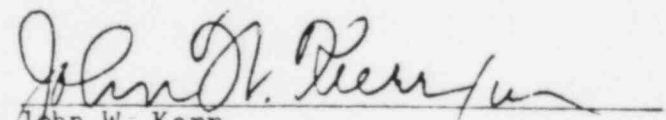
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