

August 21, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DAVID GEISEN)	Docket No. IA-05-052
)	
)	ASLBP No.06-845-01-EA
)	

NRC STAFF'S ANSWER TO DAVID GEISEN'S MOTION TO COMPEL

INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Staff of the Nuclear Regulatory Commission (Staff) herein files its Answer to "David Geisen's Motion to Compel the Production, Or Alternatively the *In Camera* Inspection, of an Unredacted Copy of the Office of Investigations Report Dated August 22, 2003" (Motion), filed by Mr. Geisen on August 11, 2006. For the reasons set forth below, the Staff respectfully submits that the Motion should be denied. However, the Staff has no objection to the Board conducting *in camera* inspection of an unredacted copy of the August 22, 2003, Office of Investigations Report (OI Report).

BACKGROUND

On May 19, 2006, the Atomic Safety and Licensing Board (Board) denied the Staff's request to hold Mr. Geisen's proceeding in abeyance pending the outcome of Mr. Geisen's criminal proceeding.¹ On June 5, 2006, having informed the Board that it did not need the 30 days allotted by 10 C.F.R. § 2.336 to meet its 10 C.F.R. § 2.336(b) disclosure obligations, the Staff served on the Board and Mr. Geisen, an index of the Staff's 10 C.F.R. § 2.336(b) disclosures and privilege logs. Among the 13,000-plus documents produced by the Staff on

¹ See *David Geisen*, LBP 06-13, slip op. (May 19, 2005).

June 5th, was a redacted copy of the OI Report and the OI Report exhibits.² On July 28, 2006, fifty-three days after the Staff made its initial disclosures, Mr. Geisen filed his initial disclosures, which did not include production of any documents or privilege logs.

DISCUSSION

This enforcement proceeding is conducted pursuant to Subpart G of the Commission's regulations.³ Specifically, § 2.709(d) provides that when a motion is filed to compel the Staff to disclose a document the Staff has refused to disclose, the document must be produced upon the request of the presiding officer for *in camera* inspection to determine: 1) the relevancy of the document; 2) whether the document is exempt from disclosure under § 2.390; 3) whether disclosure of the document is necessary to a proper decision in the case; and 4) whether the document or the information contained therein is reasonably obtainable from another source. 10 C.F.R. § 2.709(d)(1)-(4). Although the burden is on the Staff to demonstrate that the requested material is privileged, once that showing is made, the burden is on the requesting party to show that the privileged material is relevant and necessary to a proper decision. 10 C.F.R. § 2.709(e); *See also, Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), ALAB-773, 19 NRC 1333, 1341 (1984).

For the reasons set forth below, the Staff properly withheld the Agent's Analysis and the allegations contained in the OI Report there were not substantiated by the Staff when deciding to issue individual orders because: 1) the redacted portions of the OI Report are not relevant; 2) the redacted portions are exempt from disclosure under §§ 2.390(a)(5) and 2.390(a)(7)(iii);

² The Staff provided 273 of the 274 exhibits with its initial disclosures on June 5, 2006. The Staff later discovered that Exhibit 140 was not included on June 5. The Staff provided Exhibit 140 on June 29, 2006. See Letter to Administrative Judges from Counsel for NRC Staff Providing Staff's 3rd Supplement to Mandatory Disclosures (June 29, 2006).

³ Licensing Board Memorandum and Order Summarizing Conference Call (Granting All Hearing Requests, Setting Oral Argument on Staff's Abeyance Motion, and Addressing Related Matters) (March 27, 2006).

3) the redacted portions are not necessary to a proper decision; and 4) the information Mr. Geisen seeks is reasonably obtainable from other sources, such as the redacted OI Report and the OI Report exhibits. Consequently, Mr. Geisen is not entitled to disclosure of an unredacted copy of the OI Report.⁴

The redacted OI Report is bates number 30000-30232. The Staff's Deliberative Process and Personal Privacy Privilege logs refer to the unredacted OI Report, bates number 30235-30468.⁵ The OI Report at issue here is unusual in that it is a single report discussing numerous allegations against multiple individuals related to the reactor vessel head degradation event at Davis-Besse. Parts I, II, and IV discuss the OI agent's investigation of other facets of the reactor vessel head degradation event at Davis-Besse and not Davis-Besse's response to NRC Bulletin 2001-01 (Bulletin).⁶ The allegations contained in the Order against Mr. Geisen concern Davis-Besse's responses to the Bulletin, which are discussed only in Part III. The Subparts of Part III discussing substantiated allegations against Mr. Geisen are: 1) III-1: Deliberate Failure to Provide Complete and Accurate Information to the NRC in the September 4, 2001, Response (Serial 2731) to NRC Bulletin 2001-01; 2) III-2: Deliberate Failure to Provide Complete and Accurate Information to the NRC in the October 17, 2001, Response (Serial 2731) to NRC Bulletin 2001-01; and 3) III-3: Deliberate Failure to Provide Complete and Accurate Information

⁴ Mr. Geisen is mistaken in his belief that the "Protective Order Governing Disclosure of Proprietary Materials" entered by the Board on June 1, 2006, applies to Deliberative Process and/or Personal Privacy materials. See Motion at 18, 20. That Protective Order only applies to disclosure of proprietary material, as defined in Paragraph B.3(a)-(e) of that document. The Board's entry of a protective order governing proprietary materials neither constitutes a waiver by the Staff of any other privileges nor entitles Mr. Geisen to disclosure of documents he is not otherwise entitled to under 10 C.F.R. §§ 2.336(b), 2.709.

⁵ The Staff thought that it would be helpful to bates stamp the unredacted and redacted OI Reports separately. It has now become clear that rather than reduce confusion, bates stamping them separately has added confusion. Attachment A is a chart listing the Staff's redactions by bates number of the Redacted OI Report. The information contained in Attachment A has been provided to Mr. Geisen.

⁶ For purposes of comparison, the allegations contained in each Part of the OI Report are identified in Attachment A.

to the NRC in the October 30, 2001, Responses (Serials 2741 and 2744) to NRC Bulletin 2001-01.

Mr. Geisen exaggerates the nature of the redactions to the OI Report. The Staff redacted the Agent's Analysis sections throughout the OI Report. The Staff also redacted unsubstantiated allegations. Unsubstantiated allegations include allegations investigated but not substantiated by the OI agents who conducted the investigation *and* allegations substantiated by the investigating OI agents, but not substantiated by the Staff. Although the allegations discussed in Part I, II, IV, discuss other facets of the head degradation event, the Staff did not redact these portions of the OI Report entirely. The Staff did not redact the topic of the allegation or the "conclusion,"⁷ so that the reader may determine whether the allegation pertains the Order against Mr. Geisen.

In Part III (3083-30205), the only portion of the report discussing Davis-Besse's Bulletin responses, the Staff redacted the Agent's Analysis, OI Agents' analysis and conclusion on an allegation not substantiated by the Staff (30201-30205), and, from the "conclusion" sections only, the names of individuals against whom the Staff did not substantiate allegations.

I. The Agent's Analysis and the Unsubstantiated Allegations are Not Relevant

Pursuant to 10 C.F.R. § 2.709(d)(1), the first factor for the Board to examine is whether the requested document is relevant to the proceedings. Neither the Agent's Analysis nor the unsubstantiated allegations are relevant to the subject matter of this proceeding.

The Agent's Analysis of the OI Report is not relevant to this proceeding. The Agent's Analysis represents the subjective evaluation of the evidence developed during the investigation by the OI agents who authored the OI Report. All of the information evaluated in the Agent's

⁷ The Staff did redact the conclusions on Allegations I-2 (30064) and Summary Allegation III (30205), and Allegation IV (30208) because there was no way to avoid disclosure of names of individuals whom the agency did not take action against based upon that allegation without redacting the entire conclusion section.

Analysis comes from the OI Report exhibits that have been produced. Furthermore, because the Agent's Analysis is predecisional and deliberative in nature, it does not necessarily reflect the Staff's final analysis of the evidence accumulated during the investigation. The Staff's final analysis of the evidence in support of the Order against Mr. Geisen is contained not in the Agent's Analysis of the OI Report, but in the January 4, 2006, Order itself.⁸ Mr. Geisen is mistaken in his belief that the primary basis for the Order against him is the OI Report. See Motion at 3, 17. The basis for the Order is the evidence underlying the OI Report, not the OI Report itself.

The unsubstantiated allegations⁹ contained in the OI Report do not involve the subject matter of this proceeding, i.e., whether Mr. Geisen, individually, engaged in deliberate misconduct. Therefore, the unsubstantiated allegations of deliberate misconduct against other individuals are not relevant to this proceeding. Similarly, unsubstantiated allegations unrelated to Davis-Besse's Bulletin response, such as Allegation II-2: Deliberate Failure to Accurately and/or Completely Document the 2002 Refueling Outage (12RFO) Quality Assurance Audit Activities Relative to the BACC Program," are clearly irrelevant to this proceeding. See OI Report at 30081-82. Mr. Geisen does not even attempt to show (based on the title of the allegation and the conclusion, which were not redacted) how disclosure of this allegation (or any of the Allegations in Parts I, II, and IV) is relevant to his order. Consequently, neither the Agent's Analysis nor the unsubstantiated allegations are relevant to this proceeding.

⁸ David Geisen; Order Prohibiting Involvement in NRC-Licensed Activities (Effective Immediately), 71 Fed. Reg. 2571 (Jan. 17, 2006).

⁹ Unless otherwise specified, the term "unsubstantiated allegations" refers to allegations not substantiated by the Staff in the decision to issue individual enforcement orders.

II. The Agent's Analysis and the Unsubstantiated Allegations
are Exempt from Disclosure under § 2.390

A. The "Agents Analysis" of the OI Report is Protected
by the Deliberative Process Privilege

The Agent's Analysis is protected by the Deliberative Process Privilege because the document is deliberative and predecisional in nature, the Staff complied with procedural requirements for invoking the privilege, and Mr. Geisen has not shown a compelling need for the Agent's Analysis.¹⁰

1. The Deliberative Process Privilege Applies to
the "Agent's Analysis" of the OI Report

The deliberative process privilege is uniformly recognized and upheld in NRC adjudicatory proceedings, pursuant to 10 C.F.R. § 2.390(a)(5). *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), CLI-94-5, 39 NRC 190, 197 (1994) (discussing former 10 C.F.R. § 2.790(a)(5)). As the Commission indicated in *Vogtle*, the privilege may be invoked in NRC adjudicatory proceedings, and protects "intraagency communications 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Id.* (quoting *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975)). See also *Shoreham*, 19 NRC at 1341. The agency may invoke the privilege to protect documents that are at once both *predecisional* and *deliberative*. See

¹⁰ The Staff has not and does not assert the Deliberative Process Privilege on the "Agent's Notes." The "Agent's Analysis" and the "Agent's Notes" are separate and distinct sections of the OI Report. The "Agent's Notes" are explanatory footnotes. Furthermore, Mr. Geisen is mistaken to suggest that the Staff waived the Deliberative Process Privilege by not asserting the privilege only as to the Agent's Analysis. See Motion at 18. First, 10 C.F.R. § 2.390(a)(5) (the NRC's equivalent to 5 U.S.C. § 552(b)(5)), "permits the agency to withhold from disclosure documents that would be privileged in the civil discovery process." *Mehl v. EPA*, 797 F. Supp. 43, 47 (D. D.C. 1992) (citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975)). Second, § 552(b) requires that the agency produce "any reasonably segregable portion of a record . . . after deletion of the portions which are exempt." This allows the agency not only to release non-exempt portions of a document while withholding exempt portions, it also allows the agency to voluntarily "disclose a portion of an exempt document without waiving the exemption for the entire document." *Id.* Any rule that would not allow the government to withhold portions of documents without waiving applicable privileges would encourage the sort of expansive privilege assertions the Mr. Geisen presumably does not desire.

Vogtle, 39 NRC at 197. “A document is predecisional if it was prepared *before* the adoption of an agency decision and specifically prepared to assist the decisionmaker in arriving at his or her decision.” *Id.* (emphasis in original; citations omitted). A document is “deliberative” if it reflects a consultative process. *Id.* at 198. As the Commission explained in *Vogtle*:

Protected documents can include analysis, evaluations, recommendations, proposals, or suggestions reflecting the opinions of the writer rather than the final policy of the agency. Deliberative documents “relate[] to the process by which policies are formulated.” However, a document need not contain a specific recommendation on agency policy to qualify as deliberative. A document providing “opinions or recommendations regarding facts” may also be exempt under the privilege.

Id. (internal citations omitted). Although the deliberative process privilege does not protect purely factual material, factual material is protected “if facts are ‘inextricably intertwined’ with the opinion portion, or otherwise would reveal the deliberative process of the agency . . .” *Id.* (citing *Hopkins v. Dep’t of Housing and Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991)).

The purpose of the privilege is to “encourage frank discussions within the government regarding the formulation of policy and the making of decisions.” *Shoreham*, 16 NRC at 1164. The privilege “protects creative debate and candid consideration of alternatives within the agency.” *Vogtle*, 39 NRC at 198.

The Commission’s decision in *Vogtle* is instructive on the issue raised by Mr. Geisen. Although the Commission did not reach the precise issue at hand in *Vogtle* because the Staff sought to withhold the entire OI report, including exhibits, only until an enforcement decision was made, the Commission recognized that the Deliberative Process Privilege may prevent the release of portions of an OI report after enforcement decisions are made. *Id.* at 200. In *Vogtle*, the Commission recognized the predecisional and deliberative nature of an OI report. An OI report is predecisional because “the report is a step in the process leading to an agency decision on enforcement action. Based on the report, the NRC will determine, in part, whether to

take enforcement action. However, the report's conclusions are neither precedential nor binding upon the NRC Staff or the Commission." *Id.* at 199. An OI report is deliberative because the report contains the Office of Investigation's (OI's) evaluative and subjective evaluations of the reliability and significance of evidence accumulated in the course of the investigation. *Id.* And, those "subjective evaluations constitute a significant part of the deliberations that will lead to an agency enforcement decision." *Id.*

The Deliberative Process Privilege applies to the Agent's Analysis of the OI Report. The Agent's Analysis is both predecisional and deliberative. The Agent's Analysis is predecisional because it was prepared prior to an agency decision on enforcement action and the analysis contained therein was neither precedential nor binding on the Staff.¹¹ Consequently, the Agent's Analysis is predecisional in nature.

The Agent's Analysis of the OI Report is also deliberative. As the Commission observed in *Vogtle*, OI reports contain subjective evaluations of the evidence accumulated during the investigation. 39 NRC at 199. In the OI Report at issue here, it is the Agent's Analysis portions of the report that contain the OI agents' subjective evaluations of the accumulated evidence. The Agent's Analysis is the OI agents' distillation and analysis of evidence to assist the Staff in evaluating the enormous amount of evidence accumulated during the investigation. The selection of and distillation of evidence only reflects the opinions of the OI agents who authored the document,¹² and the facts analyzed therein are inextricably intertwined with their opinion and analysis of the accumulated evidence. See *Montrose Chem. Corp. v. Train*, 491 F.2d 63, 68 (D.C. Cir. 1974) (noting that the selection and distillation of facts can reveal the deliberative

¹¹ The predecisional nature of a document is not altered by the fact that the agency has subsequently made a final decision. *Federal Open. Mkt. Comm. V. Merrill*, 443 U.S. 340, 360 (1979).

¹² That is to say, the opinions and analysis in the Agent's Analysis do not even reflect the opinions or analysis of the Office of OI as a whole.

process).

2. The Staff Satisfied Procedural Requirements for Asserting the Deliberative Process Privilege for the Agent's Analysis

In NRC proceedings, the Staff's decision to assert the Deliberative Process Privilege for a document must "be made by a person, such as the head of the department or division, having both expertise and an overview-type perspective concerning the balance between the agency's duty of disclosure versus its need to conduct frank internal debate and deliberation without the chilling effect of public scrutiny." *Entergy Nuclear Vermont Yankee, LLC*, (Vermont Yankee Nuclear Power Station), LBP 05-33, 62 NRC 828, 846-47 (2005). The decision to invoke the Deliberative Process Privilege must be made before the document is withheld under 10 C.F.R. § 2.336(b)(3). However, an affidavit supporting the assertion of the privilege is only required if a motion to compel is filed. *Id.* at 850 n.40.

The Staff satisfied the procedural requirements for asserting the Deliberative Process Privilege for the Agent's Analysis of the OI Report. Prior to listing the Agent's Analysis on its Deliberative Process Privilege Logs in the *Miller* and *Moffitt* proceedings,¹³ the Director of the OI, Guy P. Caputo, personally reviewed the OI Report and decided to invoke the Deliberative Process Privilege for the Agent's Analysis. Although an affidavit attesting to his decision to invoke the Deliberative Process Privilege for the Agent's Analysis was not required at that time, Mr. Caputo signed, and the Staff filed, an affidavit certifying his review of the OI Report and assertion of the Deliberative Process Privilege for the Agent's Analysis of the OI Report.¹⁴ Prior

¹³ See Dale L. Miller, Docket No. IA-05-053, ASLBP No. 06-846-02-EA; Steven P. Moffitt, Docket No. IA-05-054, ASLBP No. 06-847-034-EA (Other proceedings related to Davis-Besse's responses to Bulletin 2001-01.).

¹⁴ Mr. Giesen has taken issue with the statement in Mr. Caputo's affidavits in the *Miller* and *Moffitt* proceedings that the deliberative process material is "concentrated in portions of the Report entitled 'Agent's Analysis.'" The purpose of this statement is to indicate that, while the privilege could be asserted on other portions of the OI Report, Mr. Caputo, based upon his review of the OI Report, is only asserting the Deliberative Process Privilege on the Agent's Analysis.

to the Staff's filing of privilege logs in this proceeding, Mr. Caputo stated his intention to invoke the Deliberative Process Privilege for the same portions of the OI Report he invoked the privilege upon in the *Miller* and *Moffitt* proceedings. Because a motion to compel has been filed in this proceeding, the Staff has attached to an affidavit from Mr. Caputo to certify his review and assertion of the Deliberative Process Privilege on the Agent's Analysis in this proceeding. See Affidavit of Guy Caputo, Attachment B.

Section 2.336(b)(5) requires that the Staff list privileged documents and provide sufficient information for assessing the claim of privilege. The Staff's Deliberative Process Privilege log contained sufficient detail to allow counsel for Mr. Geisen to assess the Staff's claim of privilege. This is evident from the table on pages 5-7 of Mr. Geisen's Motion.

Consequently, the Staff has complied with the procedures for assertion of the Deliberative Process Privilege articulated by the Atomic Safety and Licensing Board in *Vermont Yankee*.

3. Mr. Geisen Has Not Demonstrated A Compelling Need

Once the Staff has shown that the Deliberative Process Privilege applies to the Agent's Analysis of the OI Report, the burden shifts to Mr. Geisen to show "an overriding need or special circumstances in order to overcome a valid claim of privilege." *Shoreham* 19 NRC at 1334. Mr. Geisen does not even attempt to demonstrate a compelling need for the Agent's Analysis. See Motion at 19.¹⁵ Neither the desire to use predecisional deliberative materials to impeach a witness, or to find weaknesses in the opposing party's case, *id.* at 1343-1344, nor the incorporation of the deliberative material into a final public document, demonstrates a "compelling need for the material." *Id.* at 1346. To show a compelling need, Mr. Geisen must

¹⁵ Mr. Geisen appears to be arguing that he has a compelling need for the Agent's Analysis of unsubstantiated allegations in order to know the details of if "allegations failed because certain witnesses were not credible or certain information was not reliable." See Motion at 19.

show that currently available resources are inadequate to permit a genuine probing of the evidence supporting the Order against him. See *Id.* at 1343.

Mr. Geisen has not shown a compelling need for Agent's Analysis because the facts distilled and analyzed in the Agent's Analysis have already been disclosed to Mr. Geisen, either in the OI Report exhibits or in the redacted OI Report released by the Staff. Requiring the Staff to disclose the Agent's Analysis would not provide Mr. Geisen with any new information other than particular OI agents' mental processes in making preliminary recommendations to the Staff on the evidence accumulated during the investigation.

B. Unsubstantiated Allegations in the OI Report Are Exempt from Disclosure Under Section 2.390(a)(7)(iii)

Section 2.390(a)(7)(iii) of the Commission's regulations¹⁶ authorizes withholding of "[r]ecords or information compiled for law enforcement purpose,¹⁷ but only to the extent that the production of such law enforcement records or information . . . (iii) [c]ould reasonably be expected to constitute an unwarranted invasion of personal privacy."¹⁸ Section 2.336(b)(5) simply requires that the Staff list privileged documents and provide sufficient information for assessing the claim of privilege. The Staff has complied with procedural requirements for asserting the Personal Privacy Privilege of 10 C.F.R. § 2.390(a)(7)(iii) for unsubstantiated allegations by listing the OI Report on the Personal Privacy Privilege Log served on

¹⁶ Section 2.390(a)(7)(iii) is the Commission's equivalent of Freedom of Information Act (FOIA) exemption 7(c)--5 U.S.C. § 552(b)(7)(C).

¹⁷ The instant report, as all other OI Reports was compiled for law enforcement purposes. See *King v. U.S. Dept. of Justice*, 586 F. Supp. 286, 292 (D.C. Cir. 1983).

¹⁸ The Personal Privacy Privilege of 10 C.F.R. § 2.390(a)(7)(iii) is broader than the Personal Privacy Privilege of 10 C.F.R. § 2.390(a)(6), which protects personal information the release of which "would constitute a *clearly* unwarranted invasion of personal privacy." See *United States Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 755-56 (1989). Congress amended exemption 7(C) in 1974, removing the phrase "would constitute" and replacing it with "could reasonably constitute." *Id.* n.9. This amendment was a considered effort by Congress to lower the standard for invoking exemption 7(C). *Id.* Thus, the Staff does not need concrete or specific evidence that release of unsubstantiated allegations *would* constitute an unreasonable invasion of personal privacy.

June 5, 2006, and identifying the redacted portions as unsubstantiated allegations.

Mr. Geisen's table on page 5-7 of his Motion demonstrates the sufficiency of the information provided by the Staff.

The unsubstantiated allegations in the OI Report are exempt from disclosure. To determine whether a document protected by exemption 7(C) (10 C.F.R. § 2.390(a)(7)(iii)) must nevertheless be released in response to a Freedom of Information Action (FOIA) request, the "court must balance the privacy interests implicated by the request against the public interest in disclosure." *SafeCard Servs., Inc., v. Securities & Exch. Comm.*, 926 F.2d 1197 (D.C. Cir. 1991). The balancing test involves the following: 1) a determination of whether a personal privacy interest is involved; 2) a determination of whether a public interest is involved; 3) a determination of whether the public interest qualifies for consideration; and 4) a balancing the personal privacy interest against any qualifying public interest. See *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 763, 771-776 (1989).

Individuals identified in the OI Report as potential wronger-doers but against whom allegations were not substantiated by the Staff have a strong privacy interest in non-disclosure of those allegations to either Mr. Geisen or the general public.¹⁹ "There is little question that disclosing the identity of targets of law enforcement investigations can subject those identified to embarrassment and potentially more serious reputational harm." *SafeCard*, 926 F.2d at 1205 (quoting *Senate of Puerto Rico v. Dep't of Justice*, 832 F.2d 574, 586 (D.C. Cir. 1987)). See also, *Metropolitan Edison Co. (Three Mile Island Nuclear Station)*, LBP 81-50, 14 N.R.C. 888, 892 (1981) (finding that § 2.790(a)(7) (now § 2.390(a)(7)(iii)) clearly protected the names of individuals in an OI report subject to allegations of cheating on a licensing examination, but that disclosure was necessary because the question of operator competence was of great interest to

¹⁹ Again, the OI Report at issue here is unusual in that it discusses multiple allegations against multiple individuals in a single report.

the community surrounding the reactor that would be affected by restart of the facility following the incident there). Furthermore: “Exemption 7(C) ‘affords broad[] privacy rights to suspects, witnesses, and investigators.’ *SafeCard*, 926 F.2d at 1205 (quoting *Bast v. Dep’t of Justice*, 665 F.2d 1251, 1254 (D.C. Cir. 1981)) (alterations in original). Consequently, the individuals identified in the OI Report and against whom allegations were not substantiated have a substantial privacy interest in non-disclosure of the unsubstantiated allegations against them.

Mr. Geisen has not asserted a *public* interest in disclosure of the unsubstantiated allegations. The existence of a valid public interest does not turn on either the purpose of the request or the identity of the requester. *Reporters Committee*, 489 U.S. at 771. Instead, the existence of a valid public interest turns “on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny.” *Id.* (internal quotation omitted). Therefore to be a valid public interest there must be a showing that the requester seeks to discover something about the agency’s conduct. *Id.* at 773. To the extent that Mr. Geisen claims he needs access to the redacted unsubstantiated allegations to defend himself in this proceeding, he is one private citizen seeking information about other private citizens.²⁰

Assuming *arguendo* that Mr. Geisen can proffer a valid public interest, the personal privacy interests of the individuals subject to the unsubstantiated allegations should outweigh any public interest Mr. Geisen may proffer given the strong emphasis the courts have placed on broadly protecting the interests of private citizens whose names and identifying information appear in a law enforcement record. See *Reporters Comm.* 489 U.S. at 774-75, 780; *SafeCard* 926 F.2d at 332-33. Mr. Geisen’s request for access to unsubstantiated allegations against

²⁰ Mr. Geisen misstated the NRC discovery standard in stating that he can obtain otherwise privileged materials if it is “reasonably calculated to lead to the discovery of admissible evidence.” Motion at 20. NRC proceedings allow discovery of any material, *not* privileged that is *relevant*. See 10 C.F.R. § 2.705(b)(1). Moreover, discovery against the Staff is governed by 10 C.F.R. § 2.709, not § 2.705(b).

private citizens in a document compiled for law enforcement purposes can reasonably be expected to invade those citizens' privacy. Therefore, Mr. Geisen is not entitled to disclosure of the unsubstantiated allegations in the OI Report.

III. Disclosure of the Agent's Analysis and the Unsubstantiated Allegations Is Not Necessary to a Proper Decision in this Proceeding and the Information Contained Therein Is Reasonably Obtainable from the Redacted OI Report and the OI Report Exhibits

Disclosure of the Agent's Analysis and the unsubstantiated allegations is not necessary to a proper decision in this proceeding. Neither the Agent's Analysis nor the unsubstantiated allegations are relevant to the subject matter of this proceeding. See, *supra* Section I. Therefore the requested materials are not necessary to a proper decision in this proceeding. Furthermore, Mr. Geisen has not met the applicable standards for compelling disclosure of materials protected by the Deliberative Process and Personal Privacy Privileges, respectively. As to the Agent's Analysis protected by the Deliberative Process Privilege, Mr. Geisen has not shown a compelling need. See *supra* Section II.A.3. As to the unsubstantiated allegations protected by the Personal Privacy Privilege, Mr. Geisen has not shown a public interest in disclosure that outweighs the substantial personal privacy interests of the individuals targeted as potential wrongdoers in the OI Report. See *supra* Section II.B. Finally, all of the facts contained in the OI Report, including facts related to unsubstantiated allegations, come from the 274 exhibits attached to the Report disclosed by the Staff.²¹ Mr. Geisen has received every piece of factual information in the Staff's possession.²²

CONCLUSION

²¹ These exhibits are identified as such in the "Full Name" column of the Staff's document indexes. However, Exhibits 1 and 54 are not properly labeled. Exhibit 1 is bates number 02150-02151. Exhibit 54 is bates number NRC004-0948-NRC004-0950. Although Exhibit 71, Report of Interview of Hengge, was completely redacted, document 21074-21075 is the same document and is not redacted.

²² The Staff has made and will continue to make supplemental disclosures as required by 10 C.F.R. § 2.336(d).

For the reasons set forth above, the Agent's Analysis of the OI Report is protected by the Deliberative Process Privilege contained in 10 C.F.R. § 2.390(a)(5), and the unsubstantiated allegations redacted from the OI Report are protected by the Personal Privacy Privilege of 10 C.F.R. § 2.390(a)(7)(iii). Consequently, Mr. Geisen's motion to compel disclosure of an unredacted copy of the OI Report should be denied.

Respectfully submitted,

/RA by Mary C. Baty/

Sara E. Brock
Mary C. Baty
Michael A. Spencer
Counsel for the NRC Staff

Dated at Rockville, Maryland
This 21st day of August, 2006

ATTACHMENT A

	Deliberative Process Privilege Redactions (Agent's Analysis)	Personal Privacy Privilege Redactions
Synopsis		30003-30005
Table of Contents		30007-30010, 30017
Details of Investigation		30030-30031
Allegation I-1: Willful Failure to Take Adequate Corrective Action to Implement a Modification and Assure No pressure Boundary Leakage was Occurring	30052-30053	30042-30053
Allegation I-2: Willful Failure to take Corrective Action to Determine the Cause of the Red/Brown Boric Acid Residue on the Reactor Vessel Flange	30063	30064
Allegation I-3: Willful Failure to Take Adequate Corrective Actions to Determine the Cause of Corrosion Products in Radiation Element Filters and Containment Air Coolers	30074	30064-30074
Allegation II-1: Deliberate Failure to Accurately and/or Completely Document the As-Left RVH Condition and Work Deliberately Performed without Approved Work Order	30080	
Allegation II-2: Deliberate Failure to Accurately or Completely Document the 2000 Refueling Outage (12RFO) Quality Assurance Audit Activities Relative the BACC Program	30082	30081-30082
Allegation III-1: Deliberate Failure to Provide Complete and Accurate Information to the NRC in the September 4, 2001, Response (Serial 2731) to NRC Bulletin 2001-01	30101-30102; 30105-30106; 30124-30126; 30130-30131; 30134-30135	30135

Allegation III-2: Deliberate Failure to Provide Complete and Accurate Information to the NRC in the October 17, 2001, Response (Serial (2735) to NRC Bulletin 2001-01	30174-30178; 30185-30186; 30193; 30195; 30197	30197
Allegation III-3: Deliberate Failure to Provide Complete and Accurate Information to the NRC in the October 30, 2001, Responses (Serials 2741 and 2744) to NRC Bulletin 2001-01	30200-30201	30201
Summary of Allegation III		30201-30205
Allegation IV: Deliberate Failure to Provide Complete and Accurate Information in Response to an NRC Subpoena	30208	30206-30208

August 17, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DAVID GEISEN)	Docket No. IA-05-052
)	
)	ASLBP No.06-845-01-EA
)	

AFFIDAVIT OF GUY P. CAPUTO

I, Guy P. Caputo, being first duly sworn, do hereby state as follows:

1. I am employed as Director of the Office of Investigations (OI) of the Office of the Executive Director for Operations (EDO). My supervisory responsibilities include oversight of the NRC staff's investigation of allegations of wrongdoing by employees of FirstEnergy Nuclear Operating Company (FENOC) at the Davis-Besse Nuclear Power Plant.

2. I have personally reviewed the Office of Investigations Report dated August 22, 2003 (Case No. 3-2002-006) produced by the Region III OI Field Office, and have determined, in accordance with the guidance in Management Directive 3.4, that it contains pre-decisional information concerning the Staff's investigation of wrongdoing by FENOC employees at the Davis-Besse Nuclear Power Plant. The Report of Investigation was prepared as part of the process leading to an agency decision on enforcement action against FENOC and FENOC employees. It was prepared prior to an agency decision on enforcement action against FENOC or FENOC employees. Therefore, the Report of Investigation contains the Staff's analyses, recommendations, opinions, evaluations, and may not necessarily reflect the final agency position with respect to matters discussed therein. This material is concentrated in sections of the Report entitled "Agent's Analysis." The "Agent's Analysis" sections of the report comprise part of the deliberative process necessary to the Staff's review of the allegations of wrongdoing

by FENOC employees at Davis-Besse Nuclear Power Plant.

3. In my review, I further determined that disclosure of the "Agent's Analysis" sections of Report of Investigation could result in harm to the agency, in that it would (a) disclose the preliminary views of individual Staff members and/or the Staff prior to reaching a final agency decision, and could thus create confusion as to the actual policy and views of the NRC staff; (b) hinder the efficiency of the Staff, in that forced disclosure of their internal discussion could serve to chill future deliberations and could interfere with its ability to engage in free exchange of opinions and analyses prior to publishing our final decisions; and (c) imply or suggest incorrectly that the opinions of Staff members involved in these communications were actually final decisions of the agency.

4. On April 25, 2006, I signed affidavits attesting to the fact that I personally reviewed Report of Investigation dated August 22, 2003 (Case No. 3-2002-006) and invoked the deliberative process privilege with respect to the sections of the Report of Investigation entitled "Agent's Analysis." Those affidavits were served as part of the Staff's 10 C.F.R. § 2.336 disclosures in the Dale L. Miller and Steven P. Moffitt proceedings before this board.

5. On May 26, 2006, I informed counsel for the NRC Staff that I wanted to invoke the same privileges for the Report of Investigation in the David Geisen proceeding as I had in the Dale L. Miller and Steven P. Moffitt proceedings.

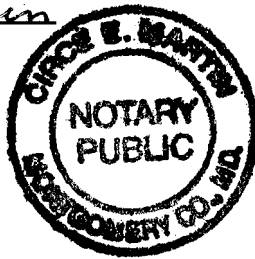
6. In light of David Geisen's Motion to Compel, I hereby reaffirm and reinvoke my previously stated intention to invoke the Deliberative Process Privilege with respect to sections of the Report of Investigation entitled "Agent's Analysis."

7. I hereby certify that the foregoing is true and complete to the best of my knowledge, information, and belief.

Guy P. Caputo
Guy P. Caputo

Subscribed and sworn to before me
this 17 day of August, 2006

Circe E. Martin
Notary Public



My Commission Expires:

CIRCE E. MARTIN
NOTARY PUBLIC STATE OF MARYLAND
My Commission Expires March 1, 2007

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of)	
)	
DAVID GEISEN)	Docket No. IA-05-052
)	
)	ASLBP No.06-845-01-EA
)	

NOTICE OF APPEARANCE

Notice is hereby given that the undersigned attorney enters an appearance in the above-captioned matter. In accordance with 10 C.F.R. § 2.314(b), the following information is provided:

Name:	Mary C. Baty
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Admissions:	State of Iowa
Name of Party:	NRC Staff

Respectfully submitted,

/RA/

Mary C. Baty
Counsel for the NRC Staff

Dated at Rockville, Maryland
this 21st day of August, 2006

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

DAVID GEISEN

)
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)
)
)

Docket No. IA-05-052

ASLBP No. 06-845-01-EA

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S ANSWER TO DAVID GEISEN'S MOTION TO COMPEL" and "NOTICE OF APPEARANCE" for Mary C. Baty in the above captioned proceeding have been served on the following persons by deposit in the United States Mail; through deposit in the Nuclear Regulatory Commission internal mail system as indicated by an asterisk (*); and by electronic mail as indicated by a double asterisk (**) on this 21st day of August, 2006.

Michael C. Farrar * **
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
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Washington, D.C. 20555

E. Roy Hawken * **
Chief Administrative Judge
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Nicholas G. Trikouros * **
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Office of the Secretary * **
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/RA/

Mary C. Baty
Counsel for the NRC Staff