

July 31, 2007

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RE: *Leon E. Whitney v. Suburban Hospital, et al.*, No. 279242V, Montgomery Co. (Md.)
Circuit Court;
NRC File No. TR-07-02.

Counselor:

The U.S. Nuclear Regulatory Commission has received your subpoena dated July 10, 2007, seeking the employment records of Mr. Leon E. Whitney, whom we assume to be either a current or former employee of the U.S. Nuclear Regulatory Commission (the subpoena does not explain his status) and a deposition of the "Custodian of Records" at the NRC to be held at your office. This subpoena is a "demand" for NRC records, which falls under the NRC's regulations at 10 C.F.R. § 9.200, *et seq.* Accordingly, it has been forwarded to the Office of the General Counsel in accordance with 10 C.F.R. §§ 9.201 and 9.202(a). This Office has assigned the processing number "TR-07-02" to your request; please refer to that number in any future correspondence related to this matter.

In accordance with those regulations, you must file a "statement or affidavit" describing (1) the nature of the case; (2) the precise information sought; (3) the relevance of that information to the issues in dispute in your case; and (4) why that information is not available elsewhere. See 10 C.F.R. § 9.202(b). The subpoena in this case is not supported by such an affidavit. If a requesting party does not comply with the agency's regulations governing these requests, the agency may deny the request. *Davis Enterprises v. EPA*, 877 F.2d 1181 (3d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Boron Oil Company v. Downie*, 873 F.2d 67 (4th Cir. 1989). In addition, if you truly seek the deposition of the NRC's "custodian of records," as opposed simply to obtaining the records themselves, you must explain the necessity of the deposition. Please be advised that, absent exceptional circumstances, the General Counsel will only approve a deposition of an NRC employee at the NRC's Offices.

In order to allow you to respond more thoroughly, we will treat any response as confidential and withhold your response from release under Exemption 4 of the Freedom of Information Act. You should address your affidavit to:

Karen D. Cyr, General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 2055
Attention: Charles E. Mullins, Senior Attorney

You may wish to fax a copy of the response to me at 301-415-3200.

In addition, your request seeks the individual's Official Personnel File ("OPF"), which belongs to the Office of Personnel Management ("OPM") and is covered by OPM regulations. If the employee is a current employee, the NRC is the custodian of the file; if the employee has retired, the file has been returned to OPM and is no longer in the possession of the NRC. Under OPM regulations (as well as the Privacy Act, which also covers the records subject to your request), we may release the records in response to a subpoena signed by a judge, not a general discovery subpoena. See *generally* 5 C.F.R. § 297.402. See *also* 5 U.S.C. § 552a. It is well-settled that a subpoena issued by a court clerk is not a "court order" within the meaning of either the regulation or a statute, and that only a subpoena signed by a judge will suffice. See, e.g., *Doe v. DiGenova*, 779 F.2d 74, 77-85 (D.C. Cir. 1985), *on remand*, 642 F. Supp. 624 (D.D.C. 1986), *aff'd in part and reversed in part*, 851 F.2d 1457 (D.C. Cir. 1988).

In the alternative, you may submit a release signed by the employee authorizing the NRC to release the information you seek from his personnel file. You may forward either the signed subpoena or the release to the same address as the affidavit.

Please feel free to call me with any questions at (301) 415-1607 or you may e-mail me at cem@nrc.gov.

Sincerely,

/RA/

Charles E. Mullins
Senior Attorney
Office of the General Counsel