



REQUEST REPLY BY: 8/11/03
UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

COMSECY-03-0036

July 17, 2003

Disapproved. See attached comments.
This vote supercedes my vote of
October 22, 2003.

Nils J. Diaz
Nils J. Diaz 4/29/04

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: William D. Travers
Executive Director for Operations

SUBJECT: UPDATE ON THE WITHHOLDING FROM PUBLIC DISCLOSURE OF
SENSITIVE, UNCLASSIFIED INFORMATION RELATED TO
POWER REACTORS

Following the events of September 11, 2001, the Nuclear Regulatory Commission (NRC) and other government agencies reviewed and revised policies related to the routine release of information to the public. The guidance developed by the NRC staff is described in COMSECY-02-0015, "Withholding Sensitive Homeland Security Information from the Public," dated April 4, 2002. The Commission approved the guidance and provided additional instructions to the staff in its staff requirements memorandum (SRM) dated May 28, 2002.

Selected staff in the Office of Nuclear Reactor Regulation (NRR) and other offices have used the guidance in COMSECY-02-0015, and the processes put in place to implement the guidance have generally worked well. Since issuance of the SRM, the staff involved with reviewing information and developing guidance have gained experience and refined review practices. The staff from different program offices have met routinely, before and after issuance of COMSECY-02-0015, to share experiences and discuss issues associated with the control of information. The staff has also discussed the control of information with representatives from other agencies, including the Environmental Protection Agency and Federal Energy Regulatory Commission, and followed activities related to the Critical Infrastructure Information Act of 2002 to determine if requirements or guidance issued by the Department of Homeland Security (DHS) would require changes to the NRC processes.

CONTACTS: William D. Reckley, NRR
301-415-1323

Margie Kotzalas, NRR
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CHAIRMAN REC'D
03 JUL 21 AM 10:36

COMMENTS OF CHAIRMAN DIAZ ON COMSECY-03-0036

I disapprove the staff's proposed clarifying guidance, subject to directing the staff to revise it and resubmit it so as to reflect recent developments and reconsideration of the criteria that guide withholding for sensitive, unclassified information, including information relating to nuclear power facilities and Category I fuel cycle facilities. Specifically, I recommend that the staff revise the withholding criteria, as set out in COMSECY-02-0015 and the pending proposed clarifying guidance for nuclear power plant licensees, by employing a "could be useful" or "could reasonably be expected" standard in place of the "would clearly" and "clear and significant" terminology. I believe that such revisions would afford a more appropriate and prudent degree of flexibility in making disclosure determinations and would help ensure the availability of the full measure of protection for sensitive but unclassified information. In addition, the proposed clarifying guidance needs to be modified to be consistent with the Interim Rule on Procedures for Handling Critical Infrastructure Information published by the Department of Homeland Security (DHS) on February 20, 2004 (69 Fed. Reg. 8074). I also recommend that the staff consider whether its proposed clarifying guidance should be modified or supplemented in light of experience in applying the withholding criteria since the development of the proposed guidance.



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Executive Director for Operations

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Commissioner McGaffigan's Comments on COMSECY-03-0036

I disapprove the proposed regulatory issue summary (RIS) and use this opportunity to reverse my previous vote on COMSECY-02-0015 regarding guidance on withholding sensitive homeland security information from the public.

Since our April 4, 2002 SRM on COMSECY-02-0015, there have been several significant developments across government with regard to withholding information of potential benefit to terrorists. The Federal Energy Regulatory Commission (FERC) on February 20, 2003 issued a final rule on critical energy infrastructure information (CEII). In that rule FERC defined "critical energy infrastructure information" as "information about proposed or existing critical infrastructure that : (i) Relates to the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful (emphasis added) to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552, and (iv) Does not simply give the location of the critical infrastructure." Similarly, the Department of Homeland Security (DHS) on February 18, 2004 announced the launch of the Protected Critical Infrastructure Information (PCII) Program, and on February 20, 2004 issued in the Federal Register an interim rule on PCII. That rule defines "critical infrastructure information" as "information not customarily in the public domain and related to the security of critical infrastructure or protected systems . . .". It outlines a procedure for designating certain critical infrastructure information voluntarily submitted to DHS as Protected Critical Infrastructure Information. Finally, the Transportation Security Administration (TSA) had previously issued a sensitive security information rule (49 CFR Part 1520) on February 22, 2002 that very broadly defined such information.

In light of all these developments, I am now convinced that NRC should more broadly define sensitive unclassified information than we did in April 2002. I would now support the position Chairman Diaz took at that time that the Commission with its "would clearly be useful" and "clear and significant" phrases was establishing too high a threshold for withholding information. I would instead today support a "could be useful" standard along the lines of FERC's rule. My vote is not entirely inconsistent with the April 2002 SRM in that the SRM envisioned the staff re-evaluating the guidance and criteria in light of developments elsewhere in our government.

I should note that I am convinced that we have been releasing sensitive information in ADAMS that we should clearly not be releasing. David Lochbaum of the Union of Concerned Scientists has sent several examples to the staff (particularly of emergency response details that in my view would even meet the existing "would clearly be useful" standard). The entire staff needs guidance on which information should be withheld and these examples of mistakes in the release of information in ADAMS need to be widely and promptly disseminated to staff (and licensees) so the mistakes are not repeated. To my knowledge this has not yet happened. I do not believe the RIS, as currently drafted, is adequate in the criteria and examples cited. An NRC or licensee staffer following the criteria would probably make public clearly sensitive emergency response information unless he or she were to broadly interpret the term "key barriers at nuclear facilities" to include emergency response. I would urge the RIS be redone as rapidly as possible and that this paper and the SRM on it be delayed in release until that RIS is issued so as not to confuse the public.





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*I approve subject to the
comments and edits of
Chairman Diaz.*

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: William D. Travers
Executive Director for Operations

[Signature]
10/28/03

SUBJECT: UPDATE ON THE WITHHOLDING FROM PUBLIC DISCLOSURE OF
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