

October 12, 1983

UNITED STATE OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of)
LONG ISLAND LIGHTING COMPANY) Locket No. 50-322-OL-3
(Shoreham Nuclear Power Station, Unit 1)) (Emergency Planning Proceeding)

FEMA RESPONSE TO SUFFOLK
COUNTY MOTION TO COMPEL DISCOVERY

Suffolk County on September 19, 1983 filed a motion to compel discovery. Specifically, the County sought the production of three documents or series of documents 1/. As to these three documents, FEMA has agreed to produce and has provided to the County the memorandum from Frank Petrone, Regional Director to Louis O. Giuffrida and Jeffrey Bragg. Discussions with the County have indicated that they will also seek to compel the production of five additional documents 2/. In order to save the Board time we have decided to address all seven of these documents at this time.

Two of the documents specifically requested herein involve drafts of letters that were sent by the Federal Emergency Management Agency to the Nuclear Regulatory Commission in response to specific requests by the NRC. Copies of these letters were previously provided to all parties. It is evident to all parties that FEMA's policy and position is clearly enunciated in those letters as acknowledged by Suffolk County "these documents set forth FEMA's position ...". The drafts contain the thoughts and opinions of staff. The other five documents contain opinions of staff as well as proposed policy alternatives for the consideration of senior staff. (see Giuffrida affidavit).

The Federal Emergency Management Agency (FEMA) by its Director, Louis O. Giuffrida, asserts that the documents sought are subject to the provisions of executive privilege.

An agency has the right to seek its own counsel and to freely discuss its policy relative to a response to another agency without having those discussions examined before a hearing conducted by that other agency.

If it is not the intent of this hearing Board to review each and every policy deliberation of FEMA as well as staff opinions then it is obvious that this line of discovery will not lead to admissible evidence.

1/ All drafts of a memorandum for Edward L. Jordan of the N.R.C. from Richard W. Krimm, Assistant Associate Director Office of Natural and Technological Hazards, FEMA dated June 23, 1983 on the subject of FEMA support for NRC Licensing of Shoreham Nuclear Station; all drafts of a letter to William J. Dircks of the NRC from Jeffrey S. Bragg, Executive Deputy Director, FEMA dated August 29, 1983 and the memorandum from Frank Petrone to Jeffrey Bragg and Louis O. Giuffrida.

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The privilege against disclosure of intragovernmental documents containing advisory opinion recommendations, and deliberations is part of a broader executive privilege recognized by courts. The purpose of the privilege is to ensure that the decision makers in government are provided with candid and frank advice.

U.S. v. Capitol Serv. Inc.
89 F.R.D. 578, 582-583

There is a public policy involved in this claim of privilege for this advisory opinion the policy of open, frank discussion between subordinate and chief concerning administrative action.

Kaiser Aluminum & Chemical Corp v. U.S.
157 FS 946

The purpose of the privilege for predecisional deliberations is to insure that a decision maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. It follows that documents shielded by executive privilege remain privileged even after the decision to which they pertain may have been effected, since disclosure at any time could inhibit the free flow of advice, including analysis, reports and expression of opinion within the agency.

Federal Open Market Committee v. Merrill
443 U.S. 340, 359-360

The issue is a greater one than just whether Suffolk County shall have access to these seven documents. The question raises for the employees of this agency whether they can freely express their opinions, provide advice and participate in deliberations without fear that these expressions of opinion will become part of the public domain. It is of equal or even greater concern to those individuals in responsible decision making positions that they will receive the full broad range of possible alternative thought available to them. If every time a subordinate expressed an opinion, wrote a memorandum, drafted a letter he knew that these documents would be subject to public scrutiny he may determine not to take such actions. The chilling effect of such a position is untenable. The deleterious impact of such a chilling effect was recognized by Commissioners Ahern and Roberts in the matter of Indian Point.

We understand the concern of the judges on this Board that all relevant material be before the panel.

2/ Those sections of a Briefing Paper on Shoreham prepared by the staff of Region II for Frank P. Petrone, Regional Director detailing his staffs identification of issues and recommendations; Memorandum for Richard W. Krimm from Gary Johnson, Executive Officer in the Office of Natural and Technological Hazards dated June 7, 1983 concerning the response of FEMA to the NRC request of June 1, 1983; Draft letter, never mailed, prepared for signature of Louis O. Giuffrida by the staff of the Office of Natural & Technological Hazards in anticipation of a request by NRC for a FEMA review of the LILCO Transition Plan; Portions of Status Report on Shoreham Nuclear Power Plant dealing with opinions of staff; analysis of a hypothetical question concerning LILCO, New York State and Suffolk County response to an accident at the Shoreham Nuclear Power Station.

We agree, of course, that the deposition discovery rules are to be accorded a broad and liberal treatment. The deposition-discovery process serves to advance the stage at which disclosure can be compelled and thereby serves to reduce the possibility of surprise. But in regard to these two documents there is no surprise, as the agency has clearly stated its position in the two letters that were forwarded to the NRC and which have been provided to all the parties to this proceeding while the additional five documents contain the opinions and counsel of staff to senior policy makers.

Discovery, like all matters of procedure, has ultimate and necessary boundaries. As rule 26(b) provides, limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege.

The cases that do argue for compelling disclosure of intra-governmental memoranda rests on an examination of whether the production of the contested document would be injurious to the consultative functions of government that the privilege of nondisclosure protects. Therefore, only memoranda or parts of memoranda consisting of compiled factual material contained in deliberative memoranda and separable from its context would generally be available for discovery by private parties.

The demand for these documents seeks to lay bare the discussion and methods of reasoning of public officials. Nothing is alleged by the County to suggest any need for production of the documents to establish facts.

It cannot be "all communications to the head of department are to be produced and made public whenever a suitor in a Court of justice thinks that his case requires such production." *Beatson v. Skene*, 5 H. & N. Exch. Rep., at 851 4 Moore's Federal Practice 1175. *Walling v. Comet Carriers*, D.C. 3 F.R.D. 442; *Walling v. Richmond Schreww Anchor Co.*, D.C., 4 F.R.D. 265, 269; *United States v. Kohler Co.*, D.C., 9 F.R.D. 289, 291; *Pacific-Atlantic S.S. Co. v. United States*, 4 Cir., 175 F.2d 632, 637. Cf. *Bank Line v. United States*, 2 Cir., 163 F.2d 133; *Leen v. President of the Executive Council et al*, 1926 Irish Report 456, 462 et seq.

It is necessary therefore to consider the circumstances around the demand for this document in order to determine whether or not its production is injurious to the consultative functions of government that the privilege of non-disclosure protects.

The Government's present motion is hotly contested, but implicit in the claimants' position is the realization that production must be restricted to materials "not privileged". All parties recognize, too, that privilege for this purpose exists or not according to common acceptations in the law of evidence. Immunity from production based on privilege is neither broader nor narrower than it would be in the normal trial context.

All that needs to be decided, is that, as documents integral to an appropriate exercise of the executive's decisional and policy-making functions, they are immune from the disclosure the claimants seek.

"Executive privilege is a phrase of release from requirements common to private citizens or organizations" 3/ - an exemption essential to discharge of highly important executive responsibilities. While it is agreed that the privilege extends to all military and diplomatic secrets, its recognition is not confined to data qualifying as such. Whatever its boundaries as to other types of claims not involving state secrets, it is well established that the privilege obtains with respects to intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.

It is evident that the Agency, to function adequately, must depend heavily upon candid exchanges of ideas, not only among its own staff but also particularly because of the institutional nature of its decisions, with other agencies who interests are involved.

3/ - Kaiser Aluminum & Chemical Corp. v. United States, 157 F. Supp. 939, 944, 141 Ct. CL 38(1958).

18-"Government, operating as it does through a hierarchy of agents, must have the benefit of their full, free advices." U.S. v. Proctor & Gamble Co., 25 F.R.D. 485, 489 (D. N.J. 1960).

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena
40 F.R.D. 318

The judiciary, the courts declare, is not authorized "to probe the mental processes" of an executive or administrative officer. This salutary rule forecloses investigation into the methods by which a decision is reached, - 4/ the matters considered, 5 the contributing influences, 6 or the role played by the work of others-7 results demanded by exigencies of the most imperative character. No judge could tolerate an inquisition into the elements comprising his decision 8 - indeed, "[s]uch an examination of a judge would be destructive of judicial responsibility" 9 - and by the same token "the integrity of the administrative process must be equally respected".

We agree with the government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions.

Kaiser Aluminum & Chemical Corp v. U.S.
157 FS 946
Morgan v. U.S.
304 U.S. 1, 18

"Just as a judge cannot be subjected to such a scrutiny, compare Fayerweather v. Ritch, 195 U.S. 276, 306-307, 25 S. Ct. 58, 49 L. Ed 193, so the integrity of the administrative process must be equally respected. See Chicago Bd. Q. Ry. Co. v. Babcock, 204 U.S. 585, 593, 27 S. Ct. 326, 51 L. Ed 636. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other

U.S. v. Morgan
307 U.S. 183, 313 U.S. 409

The County clearly states in its motion that they seek "contrary views if any exist". The County is seeking that which executive privilege is specifically designed to protect, the advisory opinion and thought processes of the staff.

The cerebrations and mental processes of government officials, leading to admittedly proper exercises of power, can never be a factor in a judicial proceeding and, therefore, need not be disclosed." 10

The starting point is the Director's affidavit describing the general characters of the documents in dispute and expressing his view as to the harm consequent upon their exposure the Court can and should weigh, in the gravest manner possible, his considered judgment as to the impact of the production sought upon the public interest. 11

4 - United States v. Morgan, 313 U.S. 409, 422. Kaiser Aluminum & Chemical Corp. v. United States, supra note 12, 157 F.Supp. at 946-947.

5 - See Fayerweather v. Ritch, 195 U.S. 276, 306-307, 25 S.Ct. 58, 49 L.Ed. 193 (1904); DeCubra v. Rogers, supra note 23, 189 U.S. at 122, 23 S.Ct. 519.

6 - Chicago, B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593, 27 Ct. 326.

- 7 - United States v. Morgan, supra note 23, 313 U.S. at 422, 61 S.Ct. 999; Kaiser Aluminum & Chemical Corp. v. United States, supra note 12.
- 8 - See United States v. Morgan, supra note 23, 313 U.S. at 422.
- 9 - United States v. Morgan, supra note 23, 313 U.S. at 422, 61 S.Ct. at 1004
- 10 - Rosee v. Board of Trade, 36 F.R.D. 684, 689 (N.D.111.1965). See also Totten v. United States, supra note 13.
- 11 - Capitol Vending Co. v. Baker, 35 F.R.D. 510 (D.D.C.1964); Kaiser Aluminum & Chemical Corp. v. United States, supra note 12, 157 F.Supp. at 944; Pollen v. Ford Instrument Co., 26 F.Supp. 583, 585 (E.D.N.Y. 1939)

The claimants have had access to all of the Government's communications with outsiders, as well as to nearly all intra-government materials relating to the actual draft of the Argonne review.

What are retained are intra-government memoranda and interdepartmental communications composed wholly of opinions, recommendations and deliberations relating to legal and other determinations. There is an obvious distinction, in terms of necessity for inspection, between documents of this character and those which contain facts. 12

The basic fallacy in the claimant's approach results from the fact that they endeavor to exploit what they consider to be weaknesses in the Government's case without making any real case of their own. At best, the only position they can sustain is that, notwithstanding the strong showing made by the Government, there remains a speculative possibility that something to which they may legitimately be entitled is withheld. It is not, however, incumbent upon the government to negate all the possible uses production of the retained documents might serve; the requirement is that the claimants make a showing of necessity sufficient to outweigh the adverse effects the production would engender. 13

Disclosures would only result in an invasion of important interests, causing dire public consequences without any apparent discovery benefit to the claimants.

The claimants argue strenuously that the documents in questions should be submitted to the Court with a view to its determination through in camera inspection as to whether their production should be compelled. The Government, with equal vigor, contends that such a procedure would in the circumstances be unnecessary and improper, and urges that the privilege be sustained without further ado.

12 -O'Keefe v. Boeing Co. 38 F.R.D. 329, 336

13 - See United States v. Reynolds, supra note 7, 345 U.S. at 10-11, 73 S.Ct 528; Kaiser Aluminum & Chemical Corp. v. United States, supra note 12, 157 F.Supp. at 946-47.

As Reynolds holds, a court may not properly require an in camera inspection as a matter of course before accepting a claim of executive privilege. And neither Reynolds nor succeeding decisions can be read to support a contention that such an examination is to follow automatically in cases where no military or diplomatic secrets are involved. On the contrary, they make it clear that an in camera examination should be afforded only where a suitable occasion therefor sufficiently appears. 14

In camera inspection in executive privilege cases is appropriate where it appears with reasonable clarity that the party seeking production is entitled to access to some of the materials demanded. Examination in this type of situation enables the separation of what should be disclosed from what should be revealed. Again, it may be that the balance between competing needs for confidentiality and disclosure cannot be made without analysis of the disputed data. 15 Here the inspection enables the weighing to be done in the privacy of the judge's chambers. In each situation, however, a need actual or potential, for production adequately appears, and the examination affords the means for fulfilling that need.

In camera inspections of documents claimed under this privilege should be a last resort U.S. v. Reynolds 345 U.S. 8-11 U.S. v. Nixon 418 U.S. 714-15

We recognize, that balanced against this, is the Board's own duty to fulfill its own obligation. We have therefore provided these documents in a sealed envelope to the Board. It will be their determination if the facts call for in camera inspection.

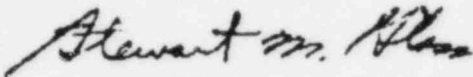
That no such occasion is presented in this case is amply demonstrated, without plowing old ground, by brief reference to previous discussion. The claimants have not shown that they are or could be entitled to the documents the Government still retains. The Government, on the other hand, has made a substantial showing that everything that is withheld falls well within the scope and protection of the privilege, and it satisfactorily appears that the balance on disclosure or secrecy is decidedly in its favor. It is clear, too, that the claimant's projected investigation into the Government's decisional and deliberative processes is legally impermissible.

14 - Kaiser Aluminum & Chemical Corp. v. United States, supra note 12; Walled Lake Door Co. v. United States, supra note 15. See also Capitol Vending Co. v. Baker, supra note 36.

15 - See Westinghouse Electric Corp. v. City of Burlington, 351 F.2d 762, 767-771 (D.C.Cir1965)

As the material the County is seeking is not relevant, subject to privilege and in that the County has not made the requisite showings for the production of these additional documents the County's motion should be denied.

Respectfully submitted


Stewart M. Glass
Regional Counsel

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before The Atomic Safety And Licensing Board

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In the Matter of :
Long Island Lighting Company :
(Shoreham Nuclear Power Station, Unit 1) :
-----:

AFFIDAVIT OF
LOUIS O. GIUFFRIDA
Director, Federal
Emergency Management
Agency

LOUIS O. GIUFFRIDA, hereby declares:

1. I am the Director of the Federal Emergency Management Agency (FEMA), an agency of the executive branch of the Federal government. I make this declaration in support of the Agency's Response to Suffolk County's Motion to Compel Discovery.

2. Executive Order 12148 charges the Director, FEMA, with establishing policy for and coordinating all civil emergency planning and assistance functions for Executive agencies. On December 7, 1979, the President, directed that FEMA assume lead responsibility for all offsite nuclear emergency planning and response.

Notwithstanding the procedures which may be set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings and determinations on the current status of emergency preparedness around particular sites may be requested by the NRC/FEMA Steering Committee and provided by FEMA for use as needed in the NRC licensing process. These findings and determinations may be based upon plans currently available to FEMA or furnished to FEMA by the NRC.

3. Pursuant to a request from the NRC dated June 1, 1983 FEMA arranged for a review of the LILCO Transition plan and transmitted the results of that review to the NRC by letter dated June 23, 1983.

4. Suffolk County seeks the production of the following documents:

- a) All drafts of a memorandum for Edward L. Jordan of the N.R.C. from Richard W. Krimm, Assistant Associate Director Office of Natural and Technological Hazards, FEMA dated June 23, 1983 on the subject of FEMA support for NRC Licensing of Shoreham Nuclear Station.
- b) All drafts of a letter to William J. Dircks of the N.R.C. from Jeffrey S. Bragg, Executive Deputy Director, FEMA dated August 29, 1983.
- c) Those sections of a Briefing Paper on Shoreham prepared by the staff of Region II for Frank P. Petrone, Regional Director detailing his staffs identification of issues and recommendations.
- d) Memorandum for Richard W. Krimm from Gary Johnson, Executive Officer in the Office of Natural and Technological Hazards dated June 7, 1983 concerning the response of FEMA to the NRC request of June 1, 1983.
- e) Draft letter, never mailed, prepared for signature of Louis O. Giuffrida by the staff of the office of Natural and Technological Hazards in anticipation of a request by NRC for a FEMA review of the LILCO Transition Plan.

- f) Portions of Status Report on Shoreham Nuclear Power Plant dealing with opinions of staff.
- g) Analysis of a hypothetical question concerning LILCO, New York State and Suffolk County response to an accident at the Shoreham Nuclear Power Station.

5. I have personally examined the above documents and have concluded that their production would be contrary to the public interest. These documents are being withheld from discovery at my direction as they consist of intra-departmental memoranda and communications containing opinions, recommendations and deliberations pertaining to decisions that the Federal Emergency Management Agency was required to make in response to requests from the Nuclear Regulatory Commission.

As the executive in charge of the overall operations of the agency, I assert that these documents are subject to the protection of executive privilege. The production of these documents will have a chilling effect on the ability of this agency to receive in written format the comments, concerns and opinions of our staff.

Louis O. Giuffrida, Director
Federal Emergency Management Agency

DATED: Washington, D.C.
October ,1983

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

Docket No. 50-322-OL-3
(Emergency Planning)

CERTIFICATE OF SERVICE

I hereby certify that copies of "FEMA RESPONSE TO SUFFOLK COUNTY MOTION TO COMPEL DISCOVERY" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by two asterisks by hand or telecopier, this 12th day of October, 1983:

James A. Laurenson, Chairman**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Ralph Shapiro, Esq.
Cammer and Shapiro
9 East 40th Street
New York, NY 10016

Dr. Jerry R. Kline**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard L. Blau, Esq.
217 Newbridge Road
Hicksville, NY 11801

Mr. Frederick J. Shon**
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

W. Taylor Reveley III, Esq.**
Hunton & Williams
P.O. Box 1535
Richmond, VA 23212

Jonathan D. Feinberg, Esq.
New York State Department of
Public Service
Three Empire State Plaza
Albany, NY 12223

Cherif Sedkey, Esq.
Kirkpatrick, Lockhart, Johnson
& Hutchison
1500 Oliver Building
Pittsburgh, PA 15222

Stephen B. Latham, Esq.
John F. Shea, III, Esq.
Twomey, Latham & Shea
Attorneys at Law
P.O. Box 398
33 West Second Street
Riverhead, NY 11901

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Spence Perry, Esq.
Associate General Counsel
Federal Emergency Management Agency
Room 840
500 C Street, S.W.
Washington, D.C. 20472

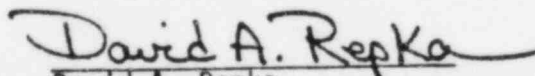
Herbert H. Brown, Esq.**
Lawrence Coe Lanpher, Esq.
Karla J. Letsche, Esq.
Kirkpatrick, Lockhart, Hill,
Christopher & Phillips
1900 M Street, N.W.
8th Floor
Washington, D.C. 20036

Eleanor L. Frucci, Esq.**
Attorney
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, D.C. 20008

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza
Room 1349
New York, NY 10278

Lucinda Low Swartz, Esq.
Pacific Legal Foundation
1990 M Street, N.W.
Suite 550
Washington, D.C. 20036


David A. Repka
Counsel for NRC Staff

COURTESY COPY LIST

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old County Road
Mineola, NY 11501

Mr. Brian McCaffrey
Long Island Lighting Company
175 East Old Country Road
Hicksville, New York 11801

Marc W. Goldsmith
Energy Research Group, Inc.
400-1 Totten Pond Road
Waltham, MA 02154

David H. Gilmartin, Esq.
Suffolk County Attorney
County Executive/Legislative Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

Ken Robinson, Esq.
N.Y. State Dept. of Law
2 World Trade Center
Room 4615
New York, NY 10047

Leon Friedman, Esq.
Costigan, Hyman & Hyman
1301 Franklin Avenue
Garden City, NY 11530

Mr. Jeff Smith
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road ;
Wading River, NY 11792

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, CA 95125

Hon. Peter Cohalan
Suffolk County Executive
County Executive/Legislative Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, NY 11787