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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

'84 APR 17 P4:21

In the Matter of	
CONSUMERS POWER COMPANY	Docket Nos. 50-329 OM & OL 50-330 OM & OL
(Midland Plant, Units 1 and 2)	

PETITION FOR REVIEW

Louis Clark, Thomas Devine, Billie Pirner Garde, and Lucy Hallberg, by and through their attorney, hereby petition the Nuclear Regulatory Commission (NRC), pursuant to the provisions of 10 C.F.R. Sec. 2.786(b)(1), for review of a decision and order of the Atomic Safety and Licensing Appeal Board (Appeal Board) in the above-captioned proceeding, on the ground that the action of the Appeal Board is erroneous with respect to important questions of law and policy.[1/]

1. Summary Of The Action Of Which Review Is Sought

Petitioners are all staff members of the Government Accountability Project (GAP), a private, non-profit organization which assists public and private employees, private citizens and community groups in exposing illegal, wasteful, improper or negligent actions by governmental or corporate bodies. In June, 1980, GAP was approached by a whistleblower who had been dismissed from his employment at the Zimmer nuclear power plant in Moscow, Ohio. As a consequence of GAP's ensuing success in assisting this whistleblower and others in exposing serious safety problems at the Zimmer plant, GAP began to receive requests for assistance with nuclear power safety problems from many other citizen groups and whistleblowers. Among those citizens organizations were groups located in Midland, Michigan, who

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[1/] The Appeal Board decision of which review is sought, which was dated March 30, 1984, and served on April 2, 1984, is appended hereto as Attachment A.

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had been contacted by a number of whistleblowers at the Midland nuclear power plant.[2/]

The Midland citizens groups did not know how to assist the whistleblowers; consequently, they sought advice from GAP's Citizens Clinic. GAP asked the citizens organizations to provide GAP with as much information as possible about alleged safety problems at the Midland plant, and after it became convinced that the problems were serious, GAP agreed to assist the whistleblowers who had contacted the Midland citizens groups about plant safety problems. Thereafter, GAP submitted six affidavits to the NRC prepared by persons who believe that there are major safety problems at the Midland plant. With only one exception, all of the Midland affiants requested that their information be supplied to the NRC on a confidential basis. Accordingly, GAP sought and obtained a guarantee from the Commission that the agency would protect the anonymity of these affiants.[3/]

In April, 1983, Consumers Power Co. (Consumers), the applicant in this operating license proceeding, served subpoenas duces tecum on the four GAP staff members who are the petitioners here; the schedule of requested documents, which was attached to each of the subpoenas, demanded production not only of the six affidavits, but also of GAP's entire files on the Midland controversy. The GAP staff members moved the Licensing Board to quash the subpoenas, asserting inter alia, a claim of privilege grounded on the First Amendment to the Constitution of the United States and correlative common law principles. After a hearing on July 26, 1983, the Licensing Board entered a limited protective order to safeguard the affiants' identities, but otherwise denied the motion to quash.[4/] See LBP-83-53, 18 NRC 282, reconsideration

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[2/] Affidavit of Louis Clark, attached as Exhibit A to Motion to Quash Subpoenas filed with the Atomic Safety and Licensing Board (Licensing Board) on June 27, 1983, paras. 4, 7 and 10.

[3/] Id., paras. 8, 10, 12 and Attachment 1 (letter of James G. Keppler to Billie Garde).

[4/] The Licensing Board did, however, grant a separate motion to quash the subpoenas to the extent that they sought testimony and documents concerning GAP's

(footnote continued on p. 3)

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denied, LBP-83-64, 18 NRC 766 (1983). The GAP staffers then appealed the Licensing Board's denial of their quashal motion to the Appeal Board.

The Appeal Board affirmed. Succinctly summarized, the Appeal Board rejected GAP's claim of First Amendment privilege on three grounds. First, the Appeal Board indicated that it was "loath to create a new testimonial privilege or to extend an existing one," because by their nature testimonial privileges operate to impede the efficiency of the adjudicative process. Memorandum and Order (March 30, 1984), p. 9. Second, the Appeal Board thought that the First Amendment testimonial privilege previously recognized by the courts [5/] ought to be strictly construed to protect only members of the traditional press; therefore, according to the Appeal Board, because GAP "does not purport to be part of the fourth estate" in the traditional sense, the privilege cannot be claimed by GAP in the present proceeding. Id., pp. 9-10. Third, the Appeal Board concluded that "[e]ven if GAP were within the ambit of this qualified privilege, the outcome here would be no different" in light of the protective order entered by the Licensing Board; as the Appeal Board saw it, the protective order was sufficient to vindicate what it perceived as the only significant interest at stake for GAP, viz., maintaining the anonymity of the affiants. Id., pp. 11-12; see also id., pp. 15-18 (adequacy of protective order).

The Appeal Board also rejected GAP's assertion of common law privilege. Again, the Appeal Board expressed its distaste for the recognition of supposedly "novel" privileges, id. at 13-14, and reiterated the view that protection of the affiants' identities was sufficiently accomplished by the protective order entered by the Licensing Board. Id., pp. 14-15.

(footnote continued from p. 2)
legal representation of two intervenors in the licensing proceeding. See 18 NRC at 284-286. This ruling, which rested on the attorney-client privilege, was not appealed by Consumers.

[5/] See, e.g., United States v. Cuthbertson (Appeal of CBS), 630 F. 2d 139 (3d Cir. 1980); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Garland v. Torre, 259 F. 2d 545 (2d Cir. 1958); cert. denied, 358 U.S. 910 (1958).

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For the reasons next discussed, petitioners submit that the decision of the Appeal Board should be reversed.

II. The Decision Of The Appeal Board Is Erroneous With Respect To Important Questions Of Law And Policy

Petitioners turn first to a discussion of the most fundamental flaws in the Appeal Board's anlaysis: its far too constricted view of the reach of the First Amendment,[6/] and its equally stinted characterization of the threat to GAP's First Amendment interests presented by Consumers' subpoenas. The First Amendment does not exist merely to protect the narrow interests of the press, as the Appeal Board apparently thought. To the contrary, its much larger purpose is to ensure the maximum degree of informational dissemination, for its Framers recognized (in Madison's words) that "a popular government without popular information or a means of acquiring it is but a prologue to a farce or tragedy or perhaps both." Democratic National Committee v. McCord (re Bernstein), 365 F. Supp. 1394, 1398 (D.D.C. 1973), quoting 6 WRITINGS OF JAMES MADISON 298 (Hunt ed. 1906). They believed, indeed, that the freedoms guaranteed by the First Amendment are "indispensable to the discovery and spread of political truth," and are therefore essential to both "stable government" and "political change." Whitney v. California, 274 U. S. 357, 375, 377 (1927) (Brandeis, J., joined by Holmes, J., concurring). GAP's very purpose, its institutional raison d'etre, is to promote "full and free flow of information on matters pending

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6/ As used in the text above, the term "First Amendment" refers to the full range of interrelated freedoms (other than those concerned with religion) which are protected by the Amendment. For purposes of the issues presented by this dispute, the First Amendment cannot be treated as if it were a collection of disparate and frangible rights, to the contrary, the Amendment must be synergistically applied, with the understanding that all of its constituent parts are meant to guarantee together precisely the right which GAP asserts: the freedom to disseminate information to the citizenry and to public bodies without undue interference.

We note, too, in this connection that the statement of the Appeal Board, at p. 8 n. 8 of its Memorandum and Order, that GAP "abandon[ed]" one of its First Amendment arguments, "i.e., that it serves as a conduit through which citizens can 'petition the Government for a redress of grievances,'" is simply mistaken. GAP has not abandoned this claim; throughout this controversy, GAP has always relied on the broad reach of the First Amendment in the sense just described.

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before governmental bodies and agencies which are of major concern to the American citizenry." 7/ That is the very activity that the First Amendment is meant not only to protect but encourage, and we accordingly think it plain that the Appeal Board erred in holding that GAP staffers are not within the purview of the Amendment's protections simply because they are not traditional journalists. It is not occupational labels which are dispositive, but rather function which controls; and by any reasonable measure, GAP's functions are squarely within the compass of the First Amendment.

The Appeals Board, of course, thought differently. The following passage from the Memorandum and Order of the Appeal Board reveals its dangerously narrow view of the scope of the First Amendment:

> "...despite GAP's suggestion to the contrary, the qualified privilege of the press has been consistently and strictly limited to those reasonably characterized as part of the media * * * GAP's reliance on a "scholar's privilege" an alleged outgrowth of the journalist's privilege--- is similarly without basis. GAP can no more be fairly characterized as part of the academic community than part of the media. More important, support for a recognized scholar's privilege cannot be found in the cases on which GAP relies. [Id. at 9, 10 n. 10.]

It is instructive to compare the Appeal Board's begrudging view with that of United States District Judge Jack B. Weinstein, who is perhaps the federal bench's foremost scholar of the law of evidence. In In Re Grand Jury Subpoena Dated January 4, 1984, E.D.N.Y. No. CV-84-0336 (April 9, 1984), 8/ a candidate for a doctoral degree moved to quash a subpoena, issued by a grand jury which was investigating possible criminal violations, compelling him to produce a journal he kept in preparation for writing his

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7/ Clark Affidavit, supra n. 2, para. 4. Indeed, even the Appeal Board concedes, at p. 10 of its Memorandum and Order, that GAP "does perform some information gathering and disseminating...."

8/ Because this decision has not yet been published, a copy is appended hereto as Attachment B.

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dissertation. Judge Weinstein recognized that "[t]here is a strong public interest in fostering the confidentiality of a journalist's work materials and sources in order to maintain the free flow of information to the public," slip op. at 6, and concluded that the same policies "also support a similar limited privilege for a researcher preparing a scholarly work. Compelled production of a researcher's notes may inhibit prospective and actual sources of information, thereby obstructing the flow of information to the researcher, and through him or her, the public." Id. "In each instance, Judge Weinstein continued, "the court balances the government's or opposing party's need for the material against the First Amendment and analogous interests implicated in the particular case. In the instant case the interests to be balanced are the public interest in affording a serious scholar the opportunity to maintain the confidentiality of his research notes against the interests of the government in having access to whatever information may be contained in those notes." Id., at 5-6. And in the case before him, Judge Weinstein had no difficulty in striking that balance in favor of nondisclosure, even though the subpoena at issue had been issued by a grand jury in furtherance of a criminal investigation. 9/

9/ Judge Weinstein characterized the privilege as "a limited federal common law privilege," which is "analogous" to a First Amendment privilege. Slip op. at 2, 5.

GAP, too, has argued throughout this proceeding that if it is not entitled to a privilege directly under the First Amendment, an equivalent privilege should be recognized under the common law. This would not mean as the Appeal Board thought, the recognition of some novel privilege which would somehow obstruct the search for truth; to the contrary, all that is involved is application of the traditional policy that undergirds all of the familiar privileges, i.e., that some kinds of information exchanges are not likely to occur at all absent confidentiality.

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Thus, unlike the Appeal Board in this case, Judge Weinstein realized that whether one is a "part" of a particular occupation, or whether the law reports reveal some previous case squarely on all fours, are questions which are beside the point. Rather, the point in cases like these is simply whether one who claims a privilege needs the protection it affords in order to further the dissemination of information to the public at large;[10/] if so, the privilege ought to be applied, as a matter of sound public policy.

Judge Weinstein was likewise more acute than the Appeal Board in recognizing that confidentiality must extend to more than the identities of sources and informants; as he repeatedly indicated, it is not only the identities of sources which require protection, but also "impressions," "observations and comments," "work materials," and even "hypotheses that [the information-gatherer] ultimately may reject." Slip op. at 2, 6, 7. Similarly here, GAP is, to be sure, concerned about protecting the anonymity of present and prospective sources; but just as Judge Weinstein (but not the Appeal Board) realized, the crucial concerns are much larger than that. For example, GAP has consistently maintained that Consumers' primary purpose has been and remains to inquire into the nature and methods of GAP's operations, and not to uncover information disclosed to GAP by its witnesses.[11/] And it is obvious that such inquiry would pose a major threat to GAP's organizational effectiveness--a threat which is not in the least attenuated by the entry of a protective order designed solely to protect the names of confidential sources.

[10/] Petitioners are truly mystified by the Appeal Board's comment that "it is particularly unfair to applicant and the adjudicatory system itself for GAP to reveal to the press the information 'confided' to it...while refusing to subject it to scrutiny in related litigation." The Appeal Board seems not to understand that what it describes is the very essence of privilege: some matters must remain confidential in order to guarantee the maximum dissemination of information to the public at large.

[11/] Consumers has never denied as much.

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Finally, petitioners observe that in contrast to GAP's present need for the protection of a privilege, Consumers has yet to demonstrate why it will be harmed absent immediate discovery from GAP staffers. Indeed, the information being sought in the GAP depositions is relevant (to the extent that it is relevant at all) to contentions which will not be litigated until 1985 or 1986. Currently the NRC staff is conducting investigations into the allegations of GAP's witnesses, and certainly no hearings on those issues will be scheduled until after the investigations have been completed. Under the circumstances, the Appeal Board clearly erred by not requiring Consumers to demonstrate a particularized need for discovery at this time. Compare Silkwood v. Kerr-McGee Corp., supra, 563 F. 2d at 438.

III. Conclusion

For the foregoing reasons, petitioners submit that this dispute plainly implicates important questions of law and policy. GAP, and other similar public interest organizations, are groups whose "work...has the unique potential to facilitate change through knowledge." Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388, 390 (N.D. Cal. 1976). Insuring the safety of nuclear power plants is a matter of first priority for the citizenry of this country, and petitioners think it not hyperbolic to suggest that the process of doing so will be immeasurably less effective if GAP and organizations like it are foreclosed as a practical matter from participating in the processes of the NRC. That, nevertheless, will be the likely result unless the NRC recognizes a qualified testimonial privilege for staff members of groups like GAP. Clearly, the NRC should grant the instant petition and schedule further briefing to resolve that important (and, for the NRC, novel) question of law and policy.

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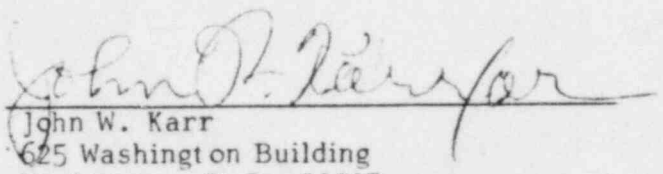
Respectfully submitted,



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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Dr. John H. Buck
Thomas S. Moore

March 30, 1984
(ALAB-764)

In the Matter of		
CONSUMERS POWER COMPANY	) Docket Nos.	50-329 OM & OL 50-330 OM & OL
(Midland Plant, Units 1 and 2)		

John W. Karr, Washington, D.C., for the appellants, Government Accountability Project employees Louis Clark, Thomas Devine, Billie Pirner Garde, and Lucy Hallberg.

David M. Stahl, Susan D. Proctor, and Sarah H. Steindel, Chicago, Illinois, for the applicant, Consumers Power Company.

Donald F. Hassell and Nathene A. Wright for the Nuclear Regulatory Commission staff.

MEMORANDUM AND ORDER

Four employees of the Government Accountability Project (GAP) have appealed the Licensing Board's refusal to quash subpoenas directed to them in this operating license proceeding. See LBP-83-53, 18 NRC 282, reconsideration denied, LBP-83-64, 18 NRC 766 (1983).[1] For the reasons stated below, we affirm the Licensing Board's decision.

[1] For ease of reference, we will refer to the four
(Footnote Continued)

I.

In July 1982, applicant Consumers Power Company (CPC) requested the Licensing Board to issue the four subpoenas here challenged. According to applicant, GAP submitted affidavits to the NRC alleging poor quality work at the Midland facility and gave similar information to the press. Applicant further asserted the relevance of this information to its pending licensing proceeding before the Licensing Board. CPC Application for Deposition Subpoenas (July 8, 1982) at 1, 2. The Board agreed as to the general relevance of GAP's allegations to certain matters already at issue in the proceeding and accordingly issued the subpoenas. Licensing Board Memorandum of July 8, 1982 (unpublished).[2]

Applicant, however, acceded to the NRC staff's request to defer serving the subpoenas while the staff conducted its own investigation of GAP's allegations. In March 1983, applicant informed the staff of its intention to proceed with discovery, and the staff did not object. Letter from

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(Footnote Continued)
appellants collectively as GAP. GAP is not a party to the operating license proceeding and thus may appeal now an otherwise interlocutory discovery order. Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), ALAB-550, 9 NRC 683, 686 n.1 (1979).

[2] See 10 C.F.R. § 2.720, which provides that a board may issue a subpoena upon a showing of only "general relevance" and "shall not attempt to determine the admissibility of evidence." See also 10 C.F.R. § 2.740(b)(1).

M.I. Miller to J.G. Keppler (March 22, 1983). Applicant subsequently served its subpoenas, and GAP moved to quash on essentially three grounds: (1) First Amendment privilege, deriving from GAP's information gathering and disseminating functions; (2) common law privilege; and (3) estoppel, resulting from the NRC's asserted promise of confidentiality. GAP Motion to Quash Subpoenas (June 27, 1983). As GAP explained, it "offers assistance to public and private employees, private citizens and community-oriented groups who pursue illegal, wasteful, improper or negligent actions by government or corporate bodies." Id. at 1. Citizens groups in Midland, Michigan, thus approached GAP, seeking assistance for "whistleblowers" at the Midland nuclear plant. GAP agreed to help and, serving as a conduit, submitted to the NRC staff six affidavits (five from persons who sought to remain anonymous) alleging poor quality work and safety problems at the plant. Id. at 2-3. Applicant's subpoenas, in GAP's view, are designed to determine the identities of the Midland whistleblowers and thereby deter others from coming forward in the future. Id. at 3.

The Licensing Board denied the motion. It concluded, in agreement with both applicant and the staff, that GAP's motion was "premised on the false notion that the Applicant is seeking to expose the identity of the confidential informants." LBP-83-53, supra, 18 NRC at 286. See CPC

Application for Deposition Subpoenas at 2-3, Schedule of Documents Requested at 2. It thus found it unnecessary to reach the question of privilege.[3] As for GAP's claim of estoppel, the Board noted that the Commission's "assurance . . . of nondisclosure" went only to the informants' identities. 18 NRC at 286. The Board did, however, take steps -- at the staff's urging and without objection by applicant -- to assure that the release of the contents of the affidavits will not inevitably or inadvertently lead to the disclosure of the affiants' identities, and so undermine GAP's credibility. Specifically, the Board entered a protective order providing that (1) the informants' identities, and any information that might reasonably lead to their disclosure, need not be provided on deposition or in the subpoenaed documents; (2) if such information is inadvertently disclosed, it shall be deleted from the transcript and not revealed by those present; (3) all information elicited is to be restricted to applicant's counsel, the NRC staff, intervenors, and, to the extent necessary, the Board itself; and (4) applicant, the

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[3] The Board did note, however, that the privileges asserted are not absolute and would require a balancing of the need for the information against the harm in revealing it. Under such a test, the Board "would not in any event quash the instant subpoenas on the basis of privilege." LBP-83-53, supra, 18 NRC at 288-89.

staff, and deponents may present to the Licensing Board for resolution any dispute over what constitutes protected information. Id. at 289-90. See 10 C.F.R. §§ 2.720(f), 2.740(c). The Board also repeated the direction of its Memorandum of July 8, 1982, that the scope of the depositions and documents sought under these subpoenas be

> limited to "[that information] relevant to the matters already at issue in the OL/OM (including admitted contentions) proceedings." In that connection, the manner in which GAP generally obtains information would not be relevant; the manner in which it obtained particular information relevant to particular contentions or issues might be relevant.

18 NRC at 287.[4] See LBP-82-118, 16 NRC 2034, 2047-50, 2057-61 (1982), for a description of the pertinent "matters already at issue" in this proceeding.

Still dissatisfied, GAP asked the Licensing Board to reconsider its denial of the motion to quash. The Board denied the motion for reconsideration but elaborated somewhat on its earlier decision. It pointed out that, although it found it unnecessary to decide if either asserted privilege applied, it did in fact undertake the balancing test employed where such a privilege is found to

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[4] In the same order, the Board granted a separate motion to quash the subpoenas to the extent they requested testimony and documents concerning communications between GAP and two intervenors in this proceeding. The Board based its decision on attorney-client privilege. See id. at 284-86. That matter is not before us in this appeal.

exist. LBP-83-64, supra, 18 NRC at 768-69. See note 3, supra. The Board emphasized the value of the protective order imposed and found GAP's expressed apprehension of a breach of that order baseless. 18 NRC at 769-70. The Board also stressed the limits on the scope of discovery permitted under the subpoenas and provided further guidance in that regard. Id. at 771-72.

GAP now appeals the Licensing Board's two orders denying its motion to quash the subpoenas.[5] Both applicant

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[5] GAP sought a stay of the Board's decision from both the Licensing Board and us. In each instance, the stay request was denied. See LBP-83-64, supra, 18 NRC at 768, 772, 773; Appeal Board Memorandum of October 6, 1983 (unpublished); Appeal Board Order of October 27, 1983 (unpublished). No party, however, has requested an expedited appeal.

When GAP failed on October 27, 1983, to produce the subpoenaed documents, applicant moved to compel and sought court enforcement of the subpoenas. CPC Motion to Compel and Application for Enforcement of Subpoenas (November 2, 1983). The GAP deponents responded that they "will not appear for depositions unless and until ordered to do so by a court of the United States." GAP Deponents' Response (November 4, 1983) at 2 n.*. See Solargen Electric Motor Car Corp. v. American Motor Corp., 506 F. Supp. 546, 552 (N.D.N.Y. 1981), where the court was "greatly bothered by the unreasonable refusal of the [subpoenaed persons] to even appear at their designated depositions. . . ." The Licensing Board granted applicant's motion and asked the NRC's General Counsel to seek court enforcement of the subpoenas. Memorandum and Order of November 8, 1983 (unpublished). See 10 C.F.R. § 2.720(g). Apparently further action in that regard has been deferred pending resolution of the instant appeal.

and the staff urge that we affirm the Board's decision.[6]

II.

On appeal, GAP renews two of the three arguments it made to the Licensing Board, specifically those concerning the "privileged" nature of the information solicited by the subpoenas.[7] Its principal argument is that the subpoenas impair "its First Amendment right freely to collect information from confidential sources about the safety problems at the Midland nuclear plants." GAP Memorandum in Support of Appeal (October 20, 1983) at 4. Because it gathers information from confidential sources and passes it on to the NRC for investigation, GAP claims that, like journalists and scholars, it is entitled to the qualified privilege -- footed in the First Amendment guaranty of a

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[6] Applicant has moved for leave to file corrected copies of its brief. The purpose of the motion is to provide the table of contents and table of authorities omitted from its original filing more than six weeks earlier. See 10 C.F.R. § 2.762(c). We grant the motion, although the proffered material came too late to be of any real value. In the future, we expect applicant's counsel, as well as the other parties, to conform their pleadings to the Commission's Rules of Practice. See 10 C.F.R. § 2.762(f).

[7] GAP no longer presses its "estoppel" claim. See pp. 3, 4, supra.

free press -- not to disclose its sources.[8] GAP's second and independent argument is that the subpoenas violate the common law principle of confidential communications. Id. at 9-10. See 8 Wigmore, Evidence § 2285 (J. McNaughton rev. 1961). We find no merit to either argument.

A. As noted, GAP draws an analogy between itself and the press, contending that "[t]he growing line of cases which protects journalists and news editors in their news-gathering and editorial functions clearly protects GAP's information-gathering which serves the public interest." GAP Memorandum in Support of Appeal at 5. That the press enjoys a qualified privilege not to reveal its sources in certain circumstances is beyond doubt. Branzburg v. Hayes, 408 U.S. 665, 709-10 (1972) (Powell, J., concurring); United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-37 (10th Cir. 1977); Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir.), cert. dismissed, 417 U.S. 938 (1974); Baker v. F&F Investment, 470 F.2d 778, 783 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973). We can find no basis, however, for expanding the press' qualified privilege to encompass GAP's activities.

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[8] GAP here abandons one of the First Amendment arguments it pressed before the Licensing Board -- i.e.,

(Footnote Continued)

First, courts traditionally have been loathe to create a new testimonial privilege or to extend an existing one, "since such privileges obstruct the search for truth." Branzburg, supra, 408 U.S. at 690 n.29 (plurality opinion). See Herbert v. Lando, 441 U.S. 153, 175 (1979). Further, all citizens have a "general duty . . . to provide evidence when necessary to further the system of justice." Wright v. Jeep Corp., 547 F. Supp. 871, 875 (E.D. Mich. 1982). See Branzburg, supra, 408 U.S. at 688 (plurality opinion).

Second, despite GAP's suggestion to the contrary, the qualified privilege of the press has been consistently and strictly limited to those reasonably characterized as part of the media. Compare, e.g., the following cases where the privilege has been recognized: Cuthbertson, supra (Columbia Broadcasting System); Silkwood, supra (free-lance documentary filmmaker); Baker, supra (journalist); Solargen, note 5, supra (television cameraman); In re Consumers Union of the United States, Inc. (Starks v. Chrysler Corp.), 32 Fed. R. Serv. 2d 1373 (S.D.N.Y. 1981) (publisher of Consumer Reports); Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975) (publisher of The Medical Letter on Drugs and Therapeutics); with Wright v. Patrolmen's Benevolent

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(Footnote Continued)
that it serves as a conduit through which citizens can "petition the Government for a redress of grievances." U.S. Const. amend. I. See GAP Motion to Quash at 4-6.

Ass'n, 72 F.R.D. 161 (S.D.N.Y. 1976) (journalist's privilege not extended to bar association that conducted investigation of transfer of judge from criminal to civil bench).[9] GAP does not purport to be part of the fourth estate, nor could it, given the description of its work provided by its Executive Director. See GAP Motion to Quash, Affidavit of Louis Clark (June 24, 1983) at 2-3. Moreover, although it does perform some information gathering and disseminating functions on a confidential basis, that alone is not enough to convert GAP into a branch of the media. By its own account, GAP is a public interest group that offers assistance to corporate and governmental whistleblowers. It does not place information directly into the public "marketplace of ideas." Apicella, supra, 66 F.R.D. at 84. By no reasonable measure can it be deemed "the press" for the purpose of invoking the qualified privilege of a journalist not to reveal confidential communications.[10]

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[9] Indeed, the plurality opinion in Branzburg speculated on the "practical and conceptual difficulties" of creating a broad and absolute privilege bottomed on the function of disseminating information. 408 U.S. at 703-05.

[10] GAP's reliance on a "scholar's privilege" -- an alleged outgrowth of the journalist's privilege -- is similarly without basis. GAP can no more be fairly characterized as part of the academic community than part of the media. More important, support for a recognized scholar's privilege cannot be found in the cases on which GAP relies.

(Footnote Continued)

Even if GAP were within the ambit of this qualified privilege, the outcome here would be no different. Where the courts have recognized a journalist's privilege, they have balanced "the potential harm to the free flow of information that might result against the asserted need for the requested information." Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596 (1st Cir. 1980) (footnote omitted). See Branzburg, supra, 408 U.S. at 710 (Powell, J., concurring); Cuthbertson, supra, 630 F.2d at 148; Carey, supra, 492 F.2d at 636-39; Solargen, supra, 506 F. Supp at 550. The principal factors considered are whether the requested information is relevant and goes to the heart of the matter at hand, and whether the party seeking the information has tried to obtain it from other possible sources. Silkwood, supra, 563 F.2d at 438; Baker, supra,

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(Footnote Continued)
In Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388, 389 & n.2, 390 (N.D. Cal. 1976), the court explicitly declined to decide if such a privilege exists, deciding the case on other grounds. Neither the majority nor concurring opinion in United States v. Doe (In re Popkin), 460 F.2d 328 (1st Cir. 1972), cert. denied, 411 U.S. 909 (1973), expressly recognizes a scholar's privilege. Finally, while United States v. Doe (In re Falk), 332 F. Supp. 938, 941 (D. Mass. 1971), might be read as according First Amendment rights to a professor, that case relied on a lower court opinion overturned in Branzburg and its rationale is thus suspect. On the other hand, more recent authority has clearly rejected the notion of a scholar's privilege. See Wright v. Jeep Corp., supra, 547 F. Supp. at 875-76. See also In re Dinnan, 661 F.2d 426, 427-31 (5th Cir. 1981), cert. denied, 457 U.S. 1106 (1982) (rejection of "academic privilege" against testifying).

470 F.2d at 783. Although the Licensing Board found it unnecessary to decide whether GAP was entitled to assert a First Amendment privilege, the Board in fact balanced these facts as if the privilege did apply.

In particular, the Board determined that the requested information is relevant to certain issues in this licensing proceeding[11] and noted applicant's inability to obtain the information elsewhere. LBP-83-53, supra, 18 NRC at 287, 288; LBP-83-64, supra, 18 NRC at 771-72. See LBP-82-118, supra, 16 NRC at 2047-50, 2057-61; CPC Application for Deposition Subpoenas at 2. See also Memorandum of CPC in Opposition to Appeal (December 9, 1983) at 13-14. The Board also concluded that the protective order it was imposing would eliminate the harm GAP perceived to its interest. LBP-83-53, supra, 18 NRC at 288; LBP-83-64, supra, 18 NRC at 768-69. See pp. 16-18, infra. It then weighed this factor against the others and -- quite reasonably, in our view -- denied the motion to quash. LBP-83-53, supra, 18 NRC at 288-89. See also LBP-83-64, supra, 18 NRC at 769, 771.

B. GAP also contends that the subpoenas should be quashed as a matter of the "common law of privilege." It

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[11] GAP conceded as much in its Motion to Stay Depositions (October 26, 1983) at 3.

refers us to no case authority, but relies on Wigmore's statement of the "four fundamental conditions . . . recognized as necessary to the establishment of a privilege against the disclosure of communications:"

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 Wigmore, Evidence § 2285 (J. McNaughton rev. 1961) (footnote omitted). GAP contends that it has satisfied all four factors, and thus the subpoenas for its testimony and documents should be quashed.

We note at the outset that Wigmore used these four conditions simply as a convenient framework for discussing already recognized privileges (e.g., attorney-client, spousal, government informer). Ibid.[12] In no respect did he suggest that new privileges should be lightly created,

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[12] The way courts have used this section of Wigmore bears this out. See, e.g., Somer v. Johnson, 704 F.2d 1473, 1479 n.6 (11th Cir. 1983); Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co., 593 F.2d 1030, 1050 n.67 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979).

even by statute. Indeed, Wigmore characterizes as "[t]he sounder attitude" several reports strongly disapproving the creation of so-called "novel privileges." Id., § 2286.

Be that as it may, GAP fails to meet three of the four conditions -- (1), (2), and (4) -- specified by Wigmore. First, the communications did not originate in a confidence that they would not be disclosed. On the contrary, GAP was requested to "act as an intermediary for the presentation of [the utility and construction workers'] information to the NRC." GAP Motion to Quash, Affidavit of Louis Clark at 4. GAP also discussed with the press some of the workers' specific allegations. CPC Application for Deposition Subpoenas, Attachment No. 1 at 2. See GAP Deponents' Motion for Reconsideration (September 30, 1983), Affidavit of Billie Pirner Garde (September 30, 1983) at 2, 5. Moreover, GAP's brief on appeal refers to its role in facilitating "the full and free flow of information to the NRC and to the public." GAP Memorandum in Support of Appeal at 9 (emphasis added). These statements and actions belie any notion that the communications were, or were intended to be, completely confidential. Only the informants' identities were intended to be kept anonymous. GAP Motion to Quash, Affidavit of

Louis Clark at 4, 6.[13] And, as discussed below, the Board's protective order is designed to accomplish that purpose.

By the same token, preserving the confidentiality of the information supplied to GAP could not possibly have been contemplated by -- and thus essential to the relationship between -- GAP and its informers. As noted, the information was intended for dissemination to at least the NRC, while only the informers' identities were meant to be protected. The last factor, injury to the relationship from disclosure greater than the benefit to the litigation, simply reflects the balancing test employed by the courts in the journalist's privilege cases discussed above. As we explained at pp. 11-12, supra, the Licensing Board correctly weighed the competing interests involved here in favor of disclosure. GAP has therefore failed to make a case for according it the "common law of privilege."

C. GAP's most significant shortcoming on appeal is its total failure to address the protective order imposed by the Licensing Board. We must presume, from the very prosecution of this appeal, that GAP regards that order as deficient in

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[13] Even then, the NRC explained that, while it was its policy not to divulge allegers' identities, it could not guarantee preservation of anonymity in all circumstances. GAP Motion to Quash, Affidavit of Louis Clark, Attachment 1 (Letter of J.G. Keppler to B. Garde).

some respect. Yet GAP has provided us with no explanation whatsoever of how it is inadequate. Protection of the identities of GAP's sources is the predominant theme of its motion filed with the Licensing Board. See GAP Motion to Quash at 3, 7, 8, 10, and Affidavit of Louis Clark at 4, 6. Accordingly, the most important feature of the protective order is its inclusion of precautions against even inadvertent breaches of anonymity. Disclosures are also to be limited both in scope and to only applicant's counsel, the NRC staff (which already has the information), intervenors (who are being counseled by GAP and are not likely to harass the informers), and the Licensing Board. Disputes over what constitutes protected material are to be presented to the Board for resolution. LBP-83-53, supra, 18 NRC at 289-91. GAP leaves us to ponder why these measures are not responsive to its fear of irreparable damage to its institutional integrity.[14]

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[14] The Licensing Board correctly pointed out that we assume protective orders will be obeyed unless a concrete showing to the contrary is made. See LBP-83-53, supra, 18 NRC at 287-88 and cases cited. In seeking reconsideration, GAP attempted but failed to do just that. See LBP-83-64, supra, 18 NRC at 769-70. The Licensing Board nonetheless pointed out that one who violates such orders risks "'serious sanction.'" Id. at 769. See 10 C.F.R. § 2.713. GAP does not pursue this on appeal, and we see no basis for contradicting the Board's conclusion that its protective order is unlikely to be violated.

The imposition of a protective order in the circumstances of this case is a sound and pragmatic action designed to facilitate essential discovery while protecting GAP's asserted interests -- interests that we have found not privileged. Moreover, the Licensing Board's order is fully consistent with the approach taken by the courts, even where a qualified privilege is found to exist. See, e.g., Bruno & Stillman, supra, 633 F.2d at 598, where the court describes various options available, including one of the measures employed here by the Licensing Board -- limiting attendance at and distribution of the depositions.[15]

In affirming the Licensing Board's denial of GAP's motion to quash, we do not denigrate the important role that GAP and similar organizations may play in uncovering possible wrongdoing and waste. Nor are we insensitive to informants' fears -- warranted or not -- of harassment and reprisal, should their identities become known. On the other hand, significant questions about quality assurance at

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[15] GAP relies on Machin v. Zuckert, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963), which involved the government's assertion of privilege with respect to a U.S. Air Force crash report. Although that case is not only inapposite but also probably superseded by the subsequent enactment of the Freedom of Information Act, we note that the court there found a protective order to be a useful tool in dealing with the controversy at hand. Id. at 340, 341.

applicant's facility have been raised in this litigation. GAP has information bearing on those issues, and applicant is entitled to learn the nature of it through reasonable discovery methods. See Herbert v. Lando, supra, 441 U.S. at 177; 10 C.F.R. § 2.740(b)(1).[16] We believe the Licensing Board's protective order successfully and fairly accommodates all of these competing interests.

The Licensing Board's denial of GAP's motion to quash is affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[16] We agree with the Licensing Board's observation that it is particularly unfair to applicant and the adjudicatory system itself for GAP to reveal to the press the information "confided" to it (see p. 14, supra), while refusing to subject it to scrutiny in related litigation. See LBP-83-64, supra, 18 NRC at 770-71.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

In Re	MEMORANDUM and ORDER
Grand Jury Subpoena Dated January 4, 1984.	CV-84-0336

A P P E A R A N C E S :

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WEINSTEIN, Ch. J.:

Attachment B

In this case of apparent first impression, Mr. Mario Brajuha a graduate student at the State University, Stoneybrook, Long Island, moves to quash a grand jury subpoena directing him to produce a journal he kept in preparation for his doctoral dissertation. Although a scholar does not have an absolute right to withhold a journal of his conversations with informants and of his impressions, he has a limited federal common law privilege to do so. Because the government has not shown any substantial need for the journal, the motion to quash must be granted.

I. FACTS

Mr. Brajuha is a candidate for a doctorate. He is preparing a dissertation on "The sociology of the American restaurant." His research led him to work as a waiter in "Le Restaurant" on Long Island from July 1982 until March 1983. While so employed, he kept a record of his observations and comments. He promised confidentiality to those of his fellow workers who acted as informants.

In March 1983, a suspicious fire broke out at Le Restaurant. The federal grand jury, convened to investigate the incident and other matters, subpoenaed Mr. Brajuha to testify and to produce his journal. The government concedes that Mr. Brajuha testified fully about his direct observations of events at the restaurant. The only issue before this court is whether he must produce the journal for grand jury inspection.

II. LAW

In Branzburg v. Hayes, 408 U.S. 665, 92 S. Ct. 2646 (1972), the Supreme Court held that a reporter does not have an absolute First Amendment right to refuse to appear before a grand jury. By analogy this ruling applies to any scholar collecting data with a view to publication. Nevertheless, as Justice Powell stated in his concurring opinion in Branzburg, the writer's needs should not be ignored, but must be balanced against those of the courts:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital

> constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710, 92 S. Ct. at 2671.

Following Justice Powell's standard, lower courts have applied a balancing test and have held that journalists have a qualified privilege not to reveal documents or confidential sources. See, e.g., Baker v. F & F Investment, 470 F.2d 778, 780-83 (2d Cir. 1972), cert. denied, 411 U.S. 966, 93 S. Ct. 2147 (1973); United States v. Burke, 700 F.2d 70, 76-77 (2d Cir.), cert. denied, 104 S. Ct. 72 (1983); United States v. Cuthbertson, 630 F.2d 139, 146-49 (3d Cir. 1980), cert. denied, 449 U.S. 1126, 101 S. Ct. 945 (1981); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-38 (10th Cir. 1977). See also In re Roche, 448 U.S. 1312, 1315, 101 S. Ct. 4, 6 (Brennan, Circuit Justice 1980: "I do not believe that the court has foreclosed news reporters from resisting a subpoena on First Amendment grounds."). Cf. Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78 (E.D.N.Y. 1975) (policy protecting news reporter's sources supports limiting discovery in some cases). But see In re Farber, 394 A.2d 330, 334 (N.J. 1978), cert. denied, 439 U.S. 997, 99 S. Ct. 598 (1978)

(relying on Branzburg in holding that "no weighing or balancing of societal interests" is required to determine that a journalist has no privilege to withhold information from a grand jury); Brown v. Virginia, 214 Va. 755, 204 S.E. 2d 429, 431 (1974), cert. denied, 419 U.S. 966, 95 S. Ct. 229 (1974) (journalist has privilege related to the First Amendment "which must yield to the government's right to investigate and indict by grand jury").

Some courts have relied exclusively on the First Amendment, see, e.g., United States v. Burke, 700 F.2d 70 (2d Cir. 1983), while others have relied on Rule 501 of the Federal Rules of Evidence, see, e.g., Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979); Lora v. Board of Education, 74 F.R.D. 565, 577 (E.D.N.Y. 1977), or state practice, see, e.g., Apicella v. McNeil Laboratories, Inc., 66 F.R.D. 78, 83-84 (E.D.N.Y. 1975). The results have been the same.

In each instance, the court balances the government's or opposing party's need for the material against the First Amendment and analogous interests implicated in the particular case. In the instant case the interests to be balanced are the public interest in affording a serious scholar the opportunity to maintain

the confidentiality of his research notes against the interests of the government in having access to whatever information may be contained in those notes.

There is a strong public interest in fostering the confidentiality of a journalist's work materials and sources in order to maintain the free flow of information to the public. Cf., e.g., United States v. Burke, 700 F.2d 70, 76-77 (2d Cir. 1983) (reporter); United States v. Cuthbertson, 630 F.2d 139, 146-49 (3d Cir. 1980) ("the compelled production of a reporter's resource materials can constitute a significant intrusion into the news gathering and editorial process"); Baker v. F & F Investment, 470 F.2d 778, 782 (2d Cir. 1972) ("Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information.").

Policies underlying a journalist's limited privilege also support a similar limited privilege for a researcher preparing a scholarly work. Compelled production of a researcher's notes may inhibit prospective and actual sources of information, thereby obstructing the flow of information to the researcher, and through him or her, the public. But cf. United States v. Doe, 460 F.2d 328, 333-34 (1st Cir. 1972),

cert. denied, 411 U.S. 909, 93 S.Ct. 1527 (1973) (political scientist who conducted classified Defense Department study); United States v. IBM Corp., 83 F.R.D. 92, 95 (S.D.N.Y. 1979) (basis for testimony of expert witness); United States v. Doe, 460 F.2d 328, 334 (1st Cir. 1972) (communications among scholars).

The intrusion presented by a grand jury poring over Mr. Brajuha's entire journal is substantial. See Dow Chemical Co. v. Allen, 672 F.2d 1262, 1274-77 (7th Cir. 1982) (affirming district court refusal to enforce administrative subpoena calling for researchers to turn over "virtually every scrap of paper and every mechanical or electrical recording" made during studies on the grounds that the subpoena presented substantial intrustion into academic freedom and threatened to chill First Amendment rights). We can assume that a young scholar entertaius a number of hypotheses that he or she ultimately may reject. It is undesirable toinhibit intellectual speculation by the threat of ridicule or misunderstanding of total strangers without a showing of overriding necessity. First Amendment protections for academic freedom, see Minnesota State Board v. Knight, 52 U.S.L.W. 4204, 4209 (Feb. 21, 1984); Sweezy v. New Hampshire, 354 U.S. 234, 250, 77

S.Ct. 1203, 1211 (1957); Gray v. Board of Higher Education, 692 F.2d 901 (2d Cir. 1982); Dow Chemical Co. v. Allen, 672 F.2d 1262, 1274-77 (7th Cir. 1982), counsel against routinely requiring a researcher to reveal his or her research notes. Serious scholars are entitled to no less protection than journalists.

Affording social scientists protected freedom is essential if we are to understand how our own and other societies operate. Recognized by cultural anthropologists since at least the turn of the century as a basic tool, fieldwork is used widely in other disciplines, particularly sociology and political science. In order to work effectively researchers must record observations, communications and personal reactions contemporaneously and accurately.

Thus fieldnotes and diaries have been treated by professionals as confidential for what Professor John Lofland, Professor and Chair, Committee on Professional Ethics, American Sociological Association, has termed "ethical, strategic and analytic" reasons. In a report filed with the court dated February 24, 1984, and uncontroverted by the parties, he writes:

At the level of sheer civility, indeed, it is rankly ungracious to expose to public view personally identified and inconvenient facts on people who have trusted one enough to provide such facts! Strategically, fieldwork itself would become for all practical purposes impossible if fieldworkers routinely aired their raw data--their fieldnotes--without protecting the people studied. Quite simply, no one would trust them. Analytically, fieldworkers in particular and social scientists in general are not muckrakers or investigative reporters (as important as these roles are). Their goal, as researchers, is not moral judgment or social change, but understanding. Concealment of specific identities helps everyone focus on whatever generic topic may be at issue, avoiding deflection into personalistic matters.

Resting on the above considerations, "raw" fieldnotes are simply never published by fieldworkers or otherwise exposed to public view. Instead, they are subjected to a process of analysis in which materials are arranged in terms of analytic questions and fieldnote data and extracts employed in this process are carefully scrutinized for violations of anonymity and confidentiality. Names of places and people are routinely changed and locales are obscured. Further, even fieldnotes used for the purpose of teaching fieldwork to trainees are carefully selected and edited in these terms. (There is, however, one circumstance in which fieldnotes are not held to be absolutely confidential: a second fieldworker working on the same

> setting as a first investigator has a presumptive right to inspect at least parts of the first fieldworker's fieldnotes. Both, nonetheless, are bound by the same rule of confidentiality.)

Emphasis in original.

Academic organizations consistently have emphasized the need for confidentiality in research work. For example, in a joint amicus brief of the American Anthropological Association, American Political Science Association and American Sociological Association filed in Popkin v. United States, cert. denied, 411 U.S. 909, 93 S.Ct. 1527, 36 L.Ed. 2d 199 (1973), it was noted:

> Scholars contribute information essential to the society and to the policy-making function of the government. For example, scholars have conducted research sponsored by a variety of government and private agencies in areas such as crime, civil disorder, pornography, health care, violence, immigration, population control, conduct and administration of elections, and the use of drugs. In many cases, researchers have uncovered information vital to the understanding of these problems which would not have been obtained had their sources not believed that the researchers could safely assure them of confidentiality. Such information is clearly necessary for the public interest in general and for the informed formation of national policy in particular.

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> The American Anthropological Association's Principles of Professional Responsibility provide that sources have a right to remain anonymous and that anthropologists should do everything within their powers to protect the privacy of the people being studied. Sociologists and political scientists are equally concerned that their sources be protected.

Brief in support of petition for writ of certiorari at 5. An American Civil Liberties Union policy statement reiterates the necessity for confidentiality in reasearch:

> The First Amendment privilege should protect researchers engaged in gathering, writing, editing and presenting materials for publication and other dissemination, when obtained under promise of confidentiality from individual or group respondents. The term researchers should include private persons, academic or research personnel of municipal, state and federal educational institutions, and those employees of the government conducting academic research projects involving individual respondents. This definition does not apply to the regular collection and distribution of information by government officials otherwise open to public access under freedom of information laws.
>
> Such persons shall not be compelled to disclose sources of material or any materials obtained in confidence, to any state or federal governmental agency, investigating committee, grand jury or court except that a court having jurisdiction of a criminal action or proceeding may, at the instance of a defendant, and after appropriate notice and hearing, direct such disclosure if it finds it to be essential for the protection of a substantial right of such defendant and provided the information cannot be obtained elsewhere.

FPI-WAR—1 30 80 250M 3563

Policy number 67 of June 1973. Finally, the Revised Code of Ethics of the American Sociological Association provides that:

> Confidential information provided by research participants must be treated as such by sociologists, even when this information enjoys no legal protection or privilege and legal force is applied.

American Sociological Association, Revised Code of Ethics, 10 Footnotes 9-10,§ I.E. 5 (March 1982).

Against societal interests in fostering scholarly research, must be balanced the public interest in obtaining information about possible criminal activities through the grand jury process. This public interest is strong and often compelling. See Branzburg v. Hayes, 408 U.S. 665, 686-88, 92 S.Ct. 2646, 2659-60 (1972). In this case, Mr. Brajuha appeared before the grand jury and testified fully to what he saw and heard while working at the restaurant. Cf. United States v. Doe, 332 F. Supp. 938 (D. Mass. 1971). There is no showing of any substantial government need to obtain

his journal in order to supplement this testimony. See Branzburg v. Hayes, 408 U.S. at 710, 92 S.Ct. at 2671 (Powell, J., concurring: "[I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash."). Since the witness has testified fully--and as the government concedes, accurately-- the subpoena for his journal is unnecessarily intrusive.

If a criminal indictment and trial grow out of the grand jury investigation, the balance struck between protection and production of the journal may well be different. For example, should Mr. Brajuha testify at a trial, the defendant may need the journal in order to be able to effectively cross-examine him. See United States v. Nixon, 418 U.S. 683, 711, 94 S.Ct. 3090, 3109 (1974); In re Farber, 78 N.J. 259, 394 A.2d 330, 336-67, cert. denied, 439 U.S. 997, 99 S.Ct. 598 (1978) (sixth amendment right to cross-examine overrides state reporter's shield law). At that point an in camera inspection or other inquiry may be

appropriate in connection with a specific focused need for information. This issue is one for the trial judge should the matter ever come to trial.

The subpoena is quashed.

Dated: Brooklyn, New York
April 5 , 1984.

Jack B Weinstein
Chief Judge, U.S.D.C.

C.M.

FPI—MAR—1 30 80-250M-3563

CERTIFICATE OF SERVICE

DOCKETED
USNRC

I hereby certify that copies of the foregoing were mailed this

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'84 APR 17 P4:21

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