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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of THE REGENTS OF THE UNIVERSITY OF CALIFORNIA (UCLA Research Reactor)	Docket No. 50-142 (Proposed Renewal of Facility License Number R-71) June 7, 1984

UNIVERSITY'S MOTION TO COMPEL FURTHER ANSWERS TO INTERROGATORIES

DONALD L. REIDHAAR
GLENN R. WOODS
CHRISTINE HELWICK
590 University Hall
2200 University Avenue
Berkeley, California 94720
Telephone: (415) 642-2822

Attorneys for Applicant

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA

I. THE MOTION

University hereby moves the Board, pursuant to 10 CFR §2.740(f), for an order compelling CBG to provide forthwith further written answers to Questions 6 and 7 of "University's Interrogatories to CBG Concerning Security Contention", dated May 25, 1984. Alternatively, University requests that the Board exclude all evidence which should have been revealed by CBG in response to University's legitimate discovery requests but which was not so revealed.

II. DISCUSSION

University propounded its interrogatories on May 25, 1984 in accordance with the schedule established by the Board during the conference call of May 24, 1984 and memorialized in the Board's Order of May 25, 1984. CBG filed its answers to those interrogatories, "Committee to Bridge the Gap's Answers to Applicant's Interrogatories Regarding Contention XX", on June 1, 1984.

University's Question 6 asks the following:

> Do you intend to offer any documents as evidence at the security contention hearing? If so: (a) identify each such document and if the document is a UCLA document so state; (b) specify the particular information in the document on which you intend to rely; and (c) explain how you are relying on the information.

CBG's attorneys objected to answering this interrogatory on the grounds that it called for information within the attorney work-product privilege, citing Hickman v. Taylor and FRCP 26(b)(3). CBG's attorneys also objected on the grounds that the question exceeded the scope or

subject matter to be covered in the interrogatories. Without waiving its objections, CBG's attorneys stated that CBG "intends to offer as vidence at the security hearing the documents identified above."

CBG's objections to answering Question 6 are without merit. In the first place, the information which CBG purports to provide about the documents it intends to introduce at hearing is unsatisfactory. CBG's response does not clearly identify, and not in the manner specified in the introduction to University's interrogatories, the documents "identified above" to which it refers. More importantly, CBG fails to specify what other documents (other than "UCLA documents" and other than documents related to the testimony of Dr. Plotkin and Mr. Cornwell) CBG intends to offer as evidence in this proceeding.

Secondly, CBG's assertion of privilege is mistaken. University's question asking CBG to identify documents to be introduced as evidence is no more concerned with attorney's "work-product" than the corollary and unexceptionable question asking CBG to identity the witnesses and the substance of their testimony to be offered at the hearing. University's question did not seek the disclosure of the "strategy and the approach to be taken by [CBG's] attorneys" as CBG's attorneys have asserted in response to the question. The attorney's "work-product" doctrine is concerned with protecting the mental impresssions, conclusions, opinions, and legal theories <u>of the attorney</u> and by extension, in some cases, the agents and consultants of the attorney. More specifically, under FRCP 26(b)(3) the "trial preparation materials" that may be privileged under the work-product

doctrine consist of documents and tangible things "prepared in anticipation of litigation or for trial". The Commission's formulation of the doctrine is nearly identical to the federal rule: documents and tangible things "prepared in anticipation of or for the hearing". 10 CFR §2.740(b)(2).

In any case, whatever privilege a party might be able to assert, the privilege is waived with respect to evidence the party does intend to introduce at a proceeding. A party cannot use the work-product privilege as a shield to protect against disclosing during discovery documents or other evidence that the party in fact intends to introduce at hearing. Moreover, the "work-product" privilege is conditional, not absolute. "Trial preparation materials" can be obtained where there is "substantial need of the materials" by the requesting party and the materials cannot otherwise be obtained "without undue hardship". Id. However, the documents which University is requesting that CBG identify are not documents concerned in any way with the "work-product" or trial preparation materials of CBG's attorneys or representatives. CBG's attorney has so obviously misconstrued the scope of the "work-product" privilege as codified in FRCP 26(b) and 10 CFR §2.740(b)(2) as to pose a serious question whether his objection has been raised in bad faith and in order to deliberately hinder University in the preparation of its case or to force a continuance of this proceeding.

University's Question 7 asks CBG to identify the witnesses who CBG proposes to testify at the security contention hearing and with respect to those witnesses to provide the following information:

> . . .(d) the substance of the testimony to be provided by the witness; (e) identify each document on which the witness intends to rely; and (f) specify the particular information in each such document on which the witness intends to rely.

CBG does not raise any objection to the question nor does it seek a protective order. Yet CBG fails to answer these parts of University's question. As a result, University will be unable to prepare a case in response to any testimony to be provided by the witnesses identified in CBG's response to Question 7.

It is true that both Questions 6 and 7 seek information about CBG's case beyond that represented by the information contained in the depositions of Dr. Plotkin and Mr. Cornwell. However, it should be obvious that University is now seeking that information because CBG, at the eleventh hour, has changed its case from what it earlier represented. CBG is now proposing three, perhaps four, new witnesses to testify to matters respecting which University has had no discovery whatsoever. The Board and parties have been recently informed that the two witnesses who were to testify on the "sabotage threat" are now going to testify on the "theft threat". Under the circumstances, the questions which University's attorneys have propounded are the minimun that could be asked during this most abbreviated of discovery periods short of ignoring those new aspects of CBG's case altogether. CBG has no cause to complain because the questions seek information going beyond the opinions of Dr. Plotkin and Mr. Cornwell.

CBG's failure to fully answer Questions 6 and 7 of University's May 25, 1984 interrogatories has seriously prejudiced University's ability to adequately prepare for the upcoming hearing on the security contention. As presently scheduled, written testimony is to be prefiled on June 15, 1984, which means it will be received on June 18, 1984, assuming express mail service. The hearing is scheduled to ommence on June 21, 1984, in Bethesda, Maryland, which requires that University's attorneys travel on June 20, 1984. Wholly aside from other factors which bear on the reasonableness of the discovery and hearing schedule which has been established, CBG's failure to respond fully to University's interrogatories means that University's attorneys will have one day, June 20th, to evaluate and review with UCLA's staff prior to presenting its case CBG's prefiled testimony, with whatever documents, whatever witnesses, whatever new testimony CBG then reveals. University wishes to note that as of this date, two weeks before the scheduled beginning of the hearing on the security contention, the only information about CBG's case of which University is aware is the information contained in the depositions of Dr. Plotkin and Mr. Cornwell.

III. CONCLUSION

For the reasons above, University respectfully requests that the Board direct CBG to respond fully and forthwith to University's Questions 6 and 7. Alternatively, University requests that the Board exclude all evidence which should have been revealed but was not

revealed in a timely fashion in reponse to University's legitimate discovery requests.

Dated: June 7, 1984.

DONALD L. REIDHAAR
GLENN R. WOODS
CHRISTINE HELWICK

By _____
WILLIAM H. CORMIER
Representing UCLA

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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THE REGENTS OF THE UNIVERSITY OF CALIFORNIA	)	(Proposed Renewal of Facility License Number R-71)
	)	
(UCLA Research Reactor)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached: UNIVERSITY'S MOTION TO COMPEL FURTHER ANSWERS TO INTERROGATORIES

in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class, postage prepaid, addressed as indicated, on this date: JUNE 7, 1984.

* John H. Frye, III, Chairman
Administrative Judge
ATOMIC SAFETY AND LICENSING BOARD
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Dr. Emmeth A. Luebke
Administrative Judge
ATOMIC SAFETY AND LICENSING BOARD
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Mr. Glenn O. Bright
Administrative Judge
ATOMIC SAFETY AND LICENSING BOARD
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* Counsel for the NRC Staff
OFFICE OF THE EXECUTIVE LEGAL DIRECTOR
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555
Attn: Ms. Colleen P. Woodhead

Chief, Docketing and Service Section (3)
OFFICE OF THE SECRETARY
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

* EXPRESS MAIL
** BY MESSENGER

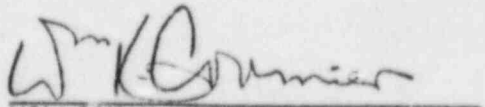
** Mr. Daniel Hirsch
Cte. to Bridge the Gap
1637 Butler Avenue, #203
Los Angeles, CA 90025

* Mr. John H. Bay, Esq.
Chickering & Gregory
Three Embarcadero Center
Suite 2300
San Francisco, CA 94111

Mr. Daniel Hirsch
Box 1186
Ben Lomond, CA 95005

** Nuclear Law Center
c/o Dorothy Thompson
6300 Wilshire Blvd., #1200
Los Angeles, CA 90048

Ms. Lynn G. Naliboff
Deputy City Attorney
City Hall
1685 Main Street
Santa Monica, CA 90401



WILLIAM H. CORMIER
Representing UCLA

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OF CALIFORNIA