OFFICE OF INVESTIGATIONS

INVESTIGATIVE PROCEDURE MEMORANDUM NO. 82-010

SUBJECT: MIRANDA WARNINGS

OBJECTIVE

To inform investigators about when to give the Miranda warnings to interviewees.

BACKGROUND

Persons interviewed during the course of NRC investigations may have committed criminal as well as civil violations of statutes or NRC regulations. Consequently, the question arises as to whether such persons need be given the warnings required to be furnished to criminal suspects by the Supreme Court decision in the case of Miranda v. Arizona (384 U.S. 436 (1966)) and related rulings (commonly known as "Miranda warnings").

GENERAL POLICY

Miranda warnings will not be furnished by OI investigators to persons interviewed during the course of OI investigations unless (1) the interviewee is in custody or (2) OI management directs that such warnings be given because of some special circumstance which exists. A person is in custody if incarcerated, under arrest, or otherwise significantly deprived of freedom for any reason, even if it is not related to the matter being investigated. As OI investigators normally do not interview persons who are in custody, Miranda warnings are rarely required. Any questions regarding this area that arise during an investigation should be directed to OI:HQ for resolution.

Enclosure 4

ENCLOSURE 1

NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

April 11, 1983

Earl J. Silbert, Esq.
Schwalb, Donnenfeld, Bray & Silbert
Suite 400
2828 Pennsylvania Avenue, N.W.
Washington, D.C. 20007

Re: NRC Advisory Committee on Rights of Employees Under Investigation

Dear Mr. Silbert:

The Commission believes that in order to aid the Advisory Committee in its deliberations it would be advisable to delineate exactly what questions the Advisory Committee should address. Those questions are as follows:

1. Should the NRC as a matter of policy apprise all interviewees prior to an interview that they have a right to have an attorney present?

   (a) Should there be different policies for those merely being questioned to obtain information and for those being personally investigated, i.e., "suspects"?

   (b) If the NRC should advise interviewees of their right to an attorney, what form should that advice take, i.e., published rule, oral advice, signed acknowledgement, etc.?

2. May, and, if so, should the Commission limit an interviewee's choice of counsel by excluding from the interview any attorney who also represents the entity being investigated?

3. Should the NRC allow interviewees to tape record the interview and/or should the NRC record the interview at the request of an interviewee?

   (a) If so, should the NRC advise of this right prior to the interview, and, if so, what form should that advice take?

Enclosure 1

(b) Under what circumstances should the interviewee be allowed to keep the tape or a copy of the tape?

(c) If the interviewee records the interview but the NRC does not, should the NRC insist on having a copy of the tape?

4. Should the NRC give all interviewees express grants of confidentiality?

(a) What limitations, if any, should be placed on grants of confidentiality by the NRC?

(b) Should there be different policies for different types of interviewees, e.g., those who come forward on their own, and those whom the NRC has to seek out?

(c) Should the NRC grant confidentiality in the absence of a request for confidentiality?

(d) Should the NRC advise witnesses of the availability of confidentiality, and, if so, what form should this notification take?

I hope this further guidance will assist the Committee in its task. The Commission would, of course, welcome any other comments which the Committee might have on these subjects.

Sincerely,

Nunzio J. Palladino

Treated as Chairman Correspondence
Ref.-CR-83-51

Originating Office: OGC

Office	SECY	OGC					
Name	TCombs/RG	JMcGarrett					

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

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(c) If the interviewee records the interview but the NRC does not, should the NRC insist on having a copy of the tape?

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Nunzio J. Palladino

ENCLOSURE 3

U.S. Department of Justice

Criminal Division

Assistant Attorney General

Washington, D.C. 20530

FEB 16

Mr. Nunzio Palladino
Chairman
Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Chairman Palladino:

The Criminal Division has reviewed the report of the Advisory Committee created by the NRC to comment upon its policies and procedures in investigations of the Commission's licensees. While the report does not articulate what is meant by the term "licensees", presumably the recommendations in the report would apply to investigations of builders and operators of nuclear power plants, as well as other persons and entities handling nuclear material whose activities are directly or indirectly subject to regulations and licenses granted by the NRC. The report then recommends implementing certain procedures for NRC investigators to follow when interviewing employees of the licensees.

The four questions which the Committee was asked to address concerning interviews of the employees, are:

(1) Should the NRC apprise all interviewees prior to an interview that they have a right to have an attorney present?

(2) May, and if so, should the Commission limit an interviewee's choice of counsel by excluding from the interview any attorney who also represents the entity being investigated?

(3) Should the NRC allow interviewees to tape record the interview, and/or should the NRC tape record the interview at the request of the interviewee?

(4) Should the NRC give all interviewees express grants of confidentiality?

This letter will address those Committee recommendations with which we disagree or believe need further amplification.

Enclosure 3

Question No. 1

At pages 7-8 of its report, the Committee recommends that an interviewee be advised of his right to counsel when the investigator has reasonable grounds to believe that he has committed a criminal offense and the focus of the investigation shifts from information gathering to developing further evidence of the person's criminal liability. For a number of legal and practical reasons, we believe that such a requirement would be unsound and contrary to the public interest in the safe operation and construction of nuclear plants.

To begin with, the judicial cases which have decided this very issue, including those by the Supreme Court, have uniformly held that a person need not be advised of a right to counsel, or a right to remain silent for that matter, until that person has been taken into or placed in custody for the alleged crime. The whole purpose of Miranda warnings is to afford some safeguard against coerced or compelled confessions of guilt while the person is in custody. Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977); United States v. Beckwith, supra, 425 U.S. 341, 345-46 (1976). Absent such circumstances, there is a preeminent public interest in finding out the truth about what occurred. Furthermore, as the Supreme Court has recognized, it is not only permissible but desirable for society to find this out from the suspects themselves, since they usually know the most about what occurred. See United States v. Washington, 431 U.S. 181, 186-87 (1976); United States v. Wong, 431 U.S. 174, 179-180 n.8 (1976); United States v. Mandujano, 425 U.S. 564, 573-574 (1975). If there is any area where a paramount concern must be finding out the truth, investigations of activities involving or which could affect the safe use of nuclear materials must certainly be one of them.

For example, the NRC may have information revealing that certain data may have been concealed or falsified, such as important safety tests, welding x-rays alleged to be bogus, or defective and inferior building materials falsely reported as being of higher quality. See 42 U.S.C. §§2272 & 2273(b); 18 U.S.C. §1001. 1/ If not discovered, these kinds of defects and the potential for harm that they may create, could be hidden under concrete, or could otherwise go undetected. Even where some of the misconduct is discovered, it is equally essential to find out who was responsible in order to determine the total extent of the conditions contributing to the potential danger,

1/ We perceive no societal interest nor constitutional or legal basis supporting a more preferential policy for those who are suspected of such criminal violations, which may directly or indirectly affect the safety of a nuclear facility, than for employees or outsiders suspected of violations of 42 U.S.C. §2284 (destroying or causing physical damage to a nuclear facility), for example.

and to prevent or discourage repetition of similar types of conduct when the NRC is not aware of it.

The Committee, at page 8 of their report, acknowledges that the primary goal of NRC investigators is to get to the bottom of allegations of violations of NRC requirements which may have potential for causing great harm to the public. The Committee further acknowledges the adverse or chilling affect upon the NRC's ability to get this information from warning a person that he has a right to an attorney -- part of the Miranda warnings given upon arrest of an individual. The preeminent consideration of the NRC, then, must be to get this information without violating constitutional rights, rather than creating restrictions not required by law that could impair or discourage this flow. Indeed, the more likely that a person has committed such violations, the more critical it is for the NRC to obtain the information, and the greater the responsibility of the agency to obtain it.

Furthermore, in most investigations of this sort, the determination of whether the purpose of questioning is to obtain information that will be used against that person in a prosecution, is not made, nor should it be made by an NRC investigator. This kind of determination usually would not be made until the prosecutor decides that a crime did in fact occur, and that a specific person probably will be charged with the crime, i.e., that he is a target of the investigation.

Another very important fact, as noted in previous correspondence, is that employees (or ex-employees) have been the primary source of information concerning violations that can affect the safe operation and construction of nuclear facilities. Since the employees perform their tasks at their superior's direction, and maintain their jobs by performing in conformance with such direction whether it is proper or improper, not only is the investigator not the person to decide whether the employee will probably be prosecuted, but warning him could chill a valuable source of information to the advantage of those who are actually responsible for causing the violations to occur. Even in an unusual case where a subordinate committed criminal violations of his own accord, the NRC has an intense interest and duty in discovering this, not only with respect to existing violations, but to prevent those which can occur in the future if the wrongdoer is not ferreted out and prosecuted. 2/

2/ This potential for harm, of course, is not present with respect to violations of the Internal Revenue Code, referred to by the Committee, which only involves a recoverable loss of money from an individual taxpayer. It is interesting to note that not only does no other agency to our knowledge follow or use the IRS guideline as an example, but the IRS itself has been observed not following these guidelines without disapproval from the Courts. (Footnote continues on following page).

While the Committee report states that fairness and decency requires that such warnings be given, if this were so, the Supreme Court and numerous other Federal courts when faced with this issue, would have required the warnings. Certainly all of these courts could not have been insensitive to requirements of fairness and decency. To the contrary, if the NRC without violating constitutional rights uses all lawful means at its disposal to discover violations of regulations, many of which can have extremely dangerous or harmful consequences to the public, and ferrets out those responsible for them, that is the fair and decent thing. While persons who may authorize or commit violations may believe this is unfair, the NRC is not obligated to implement procedures such persons might find advantageous. Indeed, there are unsettling implications of premature concerns expressed to the Committee about future investigations inasmuch as the criminal sanctions would only apply to intentional and deliberate efforts to circumvent NRC's safety rules and regulations.

Accordingly, we would request and advise that these recommendations not be adopted.

Question No. 2

Question 2 deals with potential conflicts of interest arising from the presence at an interview or testimony of an employee, of an attorney who also represents the company. At page 16 of the report, the Committee recommends that the NRC should seek a court order of exclusion of the attorney only where the witness has been ordered to testify and there is concrete evidence that the chosen representative of that witness is in such a position that his participation as counsel would seriously prejudice the investigation.

There are several reasons why the NRC should not adopt these recommendations: (1) The recommendation seeks to have declared by policy that which has not yet been settled by the courts, i.e., the circumstances under which an attorney paid for by potential subjects of an investigation may be disqualified when he also seeks to represent their subordinates; (2) No policy statement is necessary since the NRC has no power itself to exclude an attorney, but must seek a court order; (3) There is no valid reason, therefore, why the NRC, in advance, should limit the circumstances under which it may seek aid of the Court.

2/ (Footnote continued from previous page.) See United States v. Jackson, 578 F.2d 1162, 1163 (5th Cir. 1978); United States v. Nuth, 605 F.2d 229, 231-34 (6th Cir. 1979). It would therefore be anomalous to adopt the least aggressive enforcement policy in an area of such significant public concern and interest, and use the isolated exception as the model, rather than continuing to follow the general rule.

The view that a policy is needed is also dubious because if sufficient circumstances do otherwise exist, the Court, which decides such matters, will disqualify the attorney; and, if the grounds do not exist, the Court will not order disqualification. Thus, the purpose and effect of such a policy would be to deprive the Government of its day in Court to seek disqualification, or, to gratuitously serve as a bootstrap for arguments by those opposing disqualification.

Both the Department of Justice and the NRC are familiar with the adverse affect upon the ability to ascertain the truth which can occur simply by the fact of multiple representation, e.g., when an attorney, who has been hired and paid for by those who may have authorized, or are accountable for violations, also represents employees who may have information damaging to their superior's interests.

As previously discussed, since the attorney represents the company and/or its management, he owes his undivided loyalty to them and must act in their interests at all times. Therefore, at all times he would seek to minimize their exposure. If an employee may have information damaging to his superior's interests, it would not be in their interests to have this fully disclosed to the NRC. Thus, there is an inherent incentive to impair or dilute this flow of information by a number of subtle methods which, although not illegal in themselves, can impede the ability to discover such information. At a very minimum, where the employee may have information about violations committed at the behest of, or with the knowledge of management, said attorneys would not be acting in the latter's interests by encouraging employee-witnesses to disclose the whole truth. Further, the fact that the attorney represents management means that he will report everything that the employee says back to them, as the employee well knows, and simply the fact of management's representative being present is an intimidating factor, as was acknowledged by the Committee at page 12 n.1 of their report.

Moreover, company attorneys are, in reality, usually chosen for the employee, and not independently by them. The so-called "offer" of a company's attorney for an employee is one which is very difficult to refuse, inasmuch as a rejection in favor of a personally selected counsel over whom management has no control, would convey a signal to an employee's superiors that he, as a prospective witness, is going to look out solely for his own interests.

In the foregoing regard, we believe that two candid observations by well known attorneys on the issue of multiple representation may be instructive. In an article published in the National Journal of Criminal Defense, Volume II, No. 2, Fall 1976, entitled, "Time for a Change: Multiple Representation

Should Be Stopped," the author 3/ observes, among other things, that multiple representation of persons in an investigation offers an opportunity, with a little ingenuity, of "stopping an investigation dead in its tracks." The author goes on to state,

> "Reliance upon the right to select counsel is not a very persuasive factor in this context. There are more than enough good defense lawyers to go around. Though multiple representation does permit some saving in fees, it does not appear that this factor is the principal motivation in the many cases in which this conduct occurs.
>
> A more realistic analysis of these situations suggests that multiple representation is more often prompted by the desire to keep certain persons in 'friendly' hands. What better way can there be for an attorney to learn what a witness or co-defendant will say or do than by representing such a person? Indeed, by representing him, an attorney not only will know what he will say or do; he will even be able to guide him. Such a witness will remain "friendly", because his attorney will keep him that way." (emphasis added).

In an address given by the United States Attorney for the District of Columbia 4/, he advised the members of the Federal Bar Association that one of the most serious obstacles jeopardizing and seriously undermining the Government's ability to ferret out white collar crime, organized crime and official corruption was multiple representation by one lawyer or a law firm, of persons in an investigation who have actual or potential conflicting interests. Consequently, the United States Attorney spoke approvingly of successful and increasing efforts to disqualify counsel.

As previously noted, the law in this area with respect to the showing that must be made in order to have an attorney disqualified, is not yet settled.

The term "concrete evidence" (that the attorney's representation of the employee and participation in the interview

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3/ Alan Cole, Esquire: Partner, Cole & Groner, Wash., D.C.; President-Elect of the National Association of Criminal Defense Lawyers; Chairman of the Criminal Justice Section of the American Bar Association.

4/ Address of Earl J. Silbert to the Federal Bar Association, September 15, 1976, reprinted in the Federal Bar News, Fall Ed. 1976, at pp. 280-285.

could seriously prejudice the investigation), suggests a requirement of some direct evidence, such as a statement or testimony of overt efforts to cover-up the truth. This kind of evidence is not only extremely difficult to get, even when it does occur, because the events usually take place in secret between cooperating persons (willingly or unwillingly), but more importantly, the same impeding results can occur as a result of more subtle methods, as discussed above. Since any prejudice to an investigation can be serious, the public interest dictates that the Government must be free to have its day in Court to disqualify attorneys whenever there are circumstances which could warrant disqualification, and not just when the Government can prove by "concrete" evidence that an attorney's participation would seriously prejudice the investigation.

Contrary to a requirement of concrete evidence that the dual representation will substantially prejudice an investigation, there are discussions by Courts in various jurisdictions revealing that the possibility of a conflict of interest can warrant disqualification. The joint representation of the employer and employee was discussed in United States ex rel Hart v. Davenport, 478 F.2d 203, 209-211 (3rd Cir. 1973):

> . . . Moreover, in a case of this type, particularly, a conflict arises long before the trial. That conflict is referred to in Justice Weintraub's opinion in In re Abrams, 56 N.J. 271, 266 A.2d 275 (1970). Abrams is a disciplinary proceeding against an attorney for undertaking at the behest and expense of an employer in a gambling enterprise the representation of an underling employee. That is precisely what the attorney did in this case for it is not disputed that the Batterbys, employers, retained and paid the common attorney. In Abrams Justice Weintraub wrote:
>
> "But, accepting the premise that respondent had no prior commitment to Pickett's organization, we nonetheless think it was improper for respondent to have accepted the organization's promise to pay his bill, for such an arrangement has the inherent risk of dividing an attorney's loyalty between the defendant and the gambler-employer who will pay for the services. Obviously, it is to the interest of the defendant's employer that the defendant shall not turn him in. That is why the employer is willing to pay. As the Pennsylvania Supreme Court said in Salus [In re Salus], supra [321 Pa. 106] 184 A. [70] at 71:

'It is the latter [the bankers of the syndicate] who are anxious to protect the numbers writers so that they will have no cause for dissatisfaction and no occasion to disclose the operations of the system or the identity of parties by whom they are engaged.' It is of course to the advantage of the convicted defendant to seek leniency by aiding the State in its pursuit of his employer. State v. DeStasio, 49 N.J. 247, 256-258 [229 A.2d 636] (1967), cert. denied, 389 U.S. 830, 88 S.Ct. 96, 19 L.Ed.2d 89 (1967). It is the duty of the defendant's attorney to advise him of that opportunity. An attorney is hardly well situated to discharge that duty when he has agreed to look to the syndicate for the payment of his fee.

A conflict of interest inheres in every such situation. It is no answer that Canon 6 of the Canons of Professional Ethics permits the representation of conflicting interest 'by express consent of all concerned given after a full disclosure of the facts,' or that Canon 38, restated in affirmative terms, would permit the acceptance of compensation from others with 'the knowledge and consent of his client after full disclosure.' Neither rule is relevant when the subject matter is crime and when the public interest in the disclosure of criminal activities might thereby be hindered. It is inherently wrong to represent both the employer and the employee if the employee's interest may, and the public interest will be advanced by the employee's disclosure of his employer's criminal conduct. 56 N.J. at 275, 276, 266 A.2d at 278."
(emphasis added)

There are other cases, as well, not requiring the Government to prove by concrete evidence that joint representation would substantially impair an investigation, and ordering disqualification because of the conflict inherent in the nature of the joint representation, or because of the clear potential for a conflict of interest: In re Michigan Grand Jury Proceedings, 428 F. Supp. 273 (E.D. Mich. 1976) (noting that the fact of joint representation of subjects and non-subject witnesses presents an actual, non-waivable conflict); In re Texas Grand Jury, 446 F. Supp. 1132, 1136n.4 - 1140 (N.D. Tex. 1978)

(potential conflict alone arising from multiple representation may warrant disqualification, since the Court has responsibility to nip any potential conflict of interest in the bud and need not sit back and wait for a probability to ripen into a certainty in order to restrain conduct having such potential); In re Ohio Grand Jury, 480 F. Supp. 162, 168-171 (N.D. Ohio 1979) (joint representation of targets and non-targets constitutes a non-waivable conflict of interest warranting disqualification, since purported waivers are simply a device to facilitate non-targets' stonewalling grand jury investigation, and conflicts with the public's right to every man's evidence as declared by the Supreme Court); In re Lynchburg Grand Jury, 563 F.2d 652, 657-658 (4th Cir. 1977) (when attorney represented non-targets who may have had damaging information to provide against targets also represented by same attorney, conflict of interest existed since professional ethics prevented him from taking steps to have damaging information about his client targets disclosed to prosecutor or grand jury); In re Gopman, 531 F.2d 262, 264-268 (5th Cir. 1978) (attorney engaged in joint representation disqualified where disclosure by one client might lead to or result in divulging damaging information against the other client). 5/

Accordingly, we would request and advise that this recommendation not be adopted.

Question No. 3

We believe the Committee's response to Question #3 accurately reflects the prerogatives of the parties when the interviewee requests that the interview be tape recorded. However, we would note for future reference and guidance that enforcement agencies, including the NRC, should not tape record or agree to tape recorded interviews during an investigation, except in the most extraordinary circumstances. 6/

5/ See also, Federal Rule of Criminal Procedure 44(c), shifting the burden to those desiring joint representation to show that no conflict would be likely to arise. While the Rule shifting the burden is for a post indictment procedure, it may well be additional authority for future cases in the investigative stage, particularly in view of the above reported cases, and the admonition in Hart v. Davenport that steps to preclude a conflict should be taken at the earliest opportunity in the criminal process. 478 F.2d at 211.

6/ In such unusual circumstances, if the interviewee requests to tape record the interview, the NRC should not agree unless it is agreed in writing that the NRC will promptly receive a copy of the tape. Civil or criminal charging decisions should not, if at all possible, be made in a situation where the witnesses have copies of their verbatim statements, but the NRC does not. (Footnote continued on following page).

Finally, if employees and agents of licensees are insisting upon tape recording interviews, it is essential for the NRC to contact the prosecutor who is working with the NRC on the matter, or, if there is none, to contact a supervisor in the General Litigation and Legal Advice Section of the Criminal Division prior to the interview, for consultation and guidance as to procedures to follow, as well as consideration of the option of sworn grand jury testimony which may assure a more accurate and relevant account of events from hostile or potentially hostile witnesses. See United States v. Washington, supra, 431 U.S. at 187-88. 7/

Question No. 4

Lastly, the Committee recognizes that decisions as to whether or not to give grants of confidentiality to all interviewees present difficult and complex questions, not readily capable of blanket, universal rules. This issue is controlled primarily by the stage of the investigation at which the request is made, as well as the circumstances of the industry itself. Therefore, we agree with the Committee that the NRC should not have a blanket policy of granting confidentiality to every witness who requests it. 8/

6/ (Footnote continued from previous page). Conversely, the NRC need not and should not provide copies of tapes or any other interview reports to the witness or subjects of investigation. If criminal or civil charges are brought, witness statements may be made available to the witness in preparing their testimony or to the defendants through the legal discovery procedures. If no charges are brought, the statements have no litigation consequences and are privileged as the Government's work product, prepared in anticipation of possible litigation. On the other hand, providing such statements prior to the initiation of charges can unnecessarily afford the opportunity for collusion and tailoring of testimony.

7/ It is unlikely that cooperative witnesses willingly revealing violations or possible violations to the NRC would insist upon having tape recordings made of their interviews.

8/ Although a promise of confidentiality is not equivalent to a grant of immunity, if a request is also made for the latter, the same considerations which favor affording confidentiality would be similarly taken into account by the Department of Justice in deciding whether to grant immunity also. While enforcement agencies do not gratuitously initiate or suggest offers of or a need for immunity, if a request for immunity is made by the witness or circumstances indicate that they will not cooperate without it, the General Litigation and Legal Advice Section of the Criminal Division should be contacted immediately to obtain a decision.

The types of witnesses and the stage of the investigation in which the issue of granting confidentiality will arise generally are:

(1) Those who will report a violation, the existence of which is unknown to the NRC.

(2) Those who, in the early stages of an investigation, can give leads to the NRC after a potential violation is known to the agency, which would assist the investigator in finding out how it occurred and/or who may have been responsible.

(3) Those who, after the NRC discovers the violation and the probable identity of those who may have been responsible, can provide further information to confirm or corroborate this.

There are circumstances under which affording confidentiality may be particularly important. This arises from the fact that the construction and operation of a nuclear facility does not occur in public view. Consequently, only those who are involved in its construction or operation would ordinarily be privy to a deviation from requirements, as well as how and why it occurred. Therefore, as previously mentioned, the employees themselves are the most likely source of information as to the existence of violations and the identity of those who may have been responsible for them. However, the livelihood of these employees is subject to the control of those who would not appreciate having violations disclosed to the NRC. Therefore, there are substantial inherent factors which inhibit or discourage those who have knowledge of offenses from reporting them, without some assurance of anonymity to avoid retaliation. See McCray v. Illinois, 386 U.S. 300, 308 (1967).

Since one of the most important functions and services which the NRC performs is to discover the existence of violations, we believe that the NRC should not implement procedures which could discourage anonymous or confidential disclosure of violations from those who may voluntarily seek to do so, especially where the violations have not previously been under investigation by the NRC. 9/

The third category, i.e., where the NRC has identified the violations and the persons probably responsible for them, is the

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9/ Indeed, we understand that a proposal has been made at the NRC to establish a hotline or post office box for reporting violations, as has already been implemented by other agencies. We believe this proposal has considerable merit.

one least requiring grants of confidentiality. Further, potential witnesses who would be within the zone of occurrences underlying the violation could probably be identified by the NRC, and immunized by the Department of Justice if their testimony is necessary.

Decisions about whether to grant confidentiality are more difficult with respect to the second category, that is, where the NRC has identified a violation, but is having or may have some difficulty establishing how it occurred, and/or who was responsible. A grant of confidentiality may be necessary depending upon the circumstances of the case.

With respect to circumstances where confidentiality is appropriate, we disagree with not only the format of the suggested written agreement at pages 21-22 of the Committee report, but the language as well. Noteworthy is the fact that the language could be intimidating and frightening, rather than reassuring, inasmuch as no effort is made to list the mechanisms and steps the NRC and Justice Department would take to preserve confidentiality, but only describes circumstances under which their identity may be disclosed. Further, the language as to when identity may be disclosed is so general, and incorrect in some instances, as to convey the impression of virtually no assurance of confidentiality at all.

There is a well developed body of law which protects the identities of persons who confidentially provide information to the Government about possible violations of law. The privilege from disclosure of information which could expose their identities was summarized in McCray v. Illinois, supra, 386 U.S. at 308-09:

> "A genuine privilege, on . . . fundamental principle . . . , must be recognized for the identity of persons supplying the government with information concerning the commission of crimes. Communications of this kind ought to receive encouragement. They are discouraged if the informer's identity is disclosed. Whether an informer is motivated by good citizenship, promise of leniency or prospect of pecuniary reward, he will usually condition his cooperation on an assurance of anonymity--to protect himself and his family from harm, to preclude adverse social reactions and to avoid the risk of defamation or malicious prosecution actions against him. The government also has an interest in non-disclosure of the identity of its informers. Law enforcement officers often depend upon professional informers to furnish them with a flow of information about criminal activities. Revelation of the dual role played by such

> persons ends their usefulness to the government and discourages others from entering into a like relationship.
>
> That the government has this privilege is well established, and its soundness cannot be questioned." (Footnotes omitted.) 8 Wigmore, Evidence § 2374 (McNaughton rev. 1961).

Perhaps with the well developed body of law surrounding this privilege in mind, the Committee report mistakenly creates a distinction between persons who confidentially provide information, and an "informant"--which is the nomenclature typically used by the Government and in judicial decisions to describe such persons. According to the report, "informers" are those who have essentially contracted with an agency and can receive money, a new job, or a new identity.

We believe that this distinction, under which the report then offers new guidelines suggesting less protection of identity to those who volunteer information out of civic responsibility or conscience, than to those who exact some economic quid pro quo, is erroneous, particularly as to the basic obligation of preserving confidentiality. We are aware of no authority supporting such a distinction, and the report cites none.

The purpose of the privilege is to encourage citizens to report information, and we perceive no coherent reason for affording more preferential treatment in this regard to some because they required more of an economic inducement to provide it than others, or less to those who did not demand more than the protection of their identities. In fact, in many if not most circumstances the Government does not give jobs, new identities or other economic inducements to persons who confidentially furnish information about possible violations of law. If there is any distinction which can be made, it is not material here.

The first suggested term of an agreement, which would surely make apprehensive and discourage a person seeking to confidentially disclose information is:

> "That the interviewee's identity may be communicated to other public agencies if necessary to fulfill their statutory responsibilities."

Since this is stated as a general proposition, leaving a person to speculate that there is no end to the hands in which his identity may fall, the basic response is that an agent and the prosecutor with whom the agent is or will be working, do not have to disclose the identity of their informant.

Moreover, where possible violations of law are confidentially reported, they are usually susceptible of independent verification. Thus, other agencies, if they have need of the information, can simply be apprised of the reported violation rather than information which would disclose the informant's identity. As the Court said in Wirtz v. Continental Finance and Loan Company, 326 F.2d 561, 563 (5th Cir. 1964): "What possible difference does it make who reported to the Secretary that violations occurred? It is entirely possible that the Secretary's (of Labor) entire case could be proved by the use of a single witness such as a bookkeeper or a supervisor. However, it may be that ten or twelve employees may have reported or informed as to alleged violations. In such circumstances the only conceivable need for the names of the informers would be the desire of the employer to know who had informed on it."

Another proposed condition in the report, at page 21, is that the interviewee may waive confidentiality by taking action inconsistent with confidentiality, such as disclosing his or her identity, or providing information to another person that contradicts the information provided to the NRC.

Providing contradictory information to another should not constitute an ipso facto waiver, since an employee, for example, may be questioned by his employer or co-workers and, for the same reason he sought confidentiality in the first instance, would not want them to be aware of what he knows and is capable of providing.

Interestingly enough, if the employee, for example, did mislead his employer to protect himself, that would constitute a waiver under the proposal; yet, if he truthfully replied that he talked to the NRC and what he had said, that too could constitute a waiver under the proposal. Further, revelation of his identity may not necessarily, as the report indicates, be inconsistent with confidentiality. See Hodgson v. Charles Martin Inspectors of Petroleum, Inc., 459 F.2d 303, 306 (5th Cir. 1972) (knowledge of identity of employees who gave statements to Government does not constitute a waiver of informer's privilege, since only identity and contents of statement would reveal whether information was given reluctantly or voluntarily, and whether it was favorable or unfavorable, thus revealing him as an informer).

The third condition in the proposed agreement is that the NRC may have to disclose his/her identity in response to an order of a hearing board or a Court. The language of this proposal

conveys the impression that preservation of anonymity is something over which the Government has no control, and disclosure of identity can, and often does occur whenever there is a Court case and someone demands it. Although a hearing board may request disclosure, we are unaware of authority vesting in a administrative agency hearing board the authority to compel disclosure of informant's identities, and indeed believe they do not have such power. E.g., United States v. White, 332 U.S. 694 (1944); Comm'r v. Brinson, 154 U.S. 447 (1894); Reisman v. Caplin, 375 U.S. 440 (1964); United States v. Matras, 487 F.2d 1271, 1275 (8th Cir. 1973); United States v. Harrington, 388 F.2d 520, 523 (2d Cir. 1968).

Moreover, the circumstances in which disclosure occurs at the U.S. District Court level are extremely rare, and even then, under very restrictive circumstances. Simply because an informant has provided information concerning a crime, or for that matter was a witness to it, or even a participant in it, does not warrant compelled disclosure of either the information or his identity. United States v. Alonzo, 571 F.2d 1384 (5th Cir.), cert. denied, 439 U.S. 847 (1978); United States v. Oliver, 570 F.2d 397 (1st Cir. 1978); United States v. Morris, 568 F.2d 396 (5th Cir. 1978); Simpson v. Krieger, 565 F.2d 390 (6th Cir.), cert. denied, 435 U.S. 946 (1978); United States v. Russ, 562 F.2d 843 (2d Cir.), cert. denied, 385 U.S. 923 (1966); Hodgson v. Inspectors, supra; Machin v. Zuchert, 316 F.2d 336, 339 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963). Indeed, even where an informant's information provided the basis for a search warrant, disclosure of his identity was not required when defendants sought to challenge the validity of the warrant. Jones v. United States, 362 U.S. 257, 271-72 (1960); see also, United States v. Bazzano, 677 F.2d 971, 981 (3rd Cir. 1982).

Disclosure has only been required where it is clearly essential to defend the case, and where this need outweighs the public's interest in assuring and promoting enforcement of the law by protecting the identity of persons who confidentially report violations. Roviaro v. United States, 353 U.S. 53, 59 (1957). 10/ Thus, disclosure will not be ordered unless: (1) there is an absence of significant independent evidence establishing the crime; and, (2) the testimony of the informant would be essential to the defense because it would be exculpatory, and represents the only likely source of such exculpatory information. United States v. Suarez, supra, 582 F.2d 1007 (5th Cir. 1978); see also, United States v. Doe, 525 F.2d 878, 880 (5th Cir. 1976); United States v. Morris, 568 F.2d 396, 399-400 (5th Cir. 1978).

10/ "Public policy forbids disclosure of an informer except where it is essential to the defense." United States v. Scher, 305 U.S. 251, 254 (1938). United States v. Toombs, 497 F.2d 88, 92 (5th Cir. 1974).

Furthermore, in the kinds of investigations which the NRC conducts, the attorneys should be able to gauge well in advance whether there is sufficient evidence of the alleged offense independent of the informer's testimony, or whether the case would both hinge on the informer's testimony and whether this testimony would be exculpatory.

If there is no case, of course, there is no risk of disclosure since public policy would forbid it. Furthermore, even in litigation where there is a possibility of disclosure, before deciding whether to order disclosure the Court would take the informer's information in camera, to determine whether he would be capable of exonerating the accused by the information he had. United States v. Suarez, supra, 582 F.2d at 1011-1012; United States v. Doe, supra, 525 F.2d at 879-880. And, even if the Court finds that disclosure is appropriate, if protection of identity remains essential, among other things the case can be dismissed, or, the informer by then may be willing to testify voluntarily if he learns that it is essential to the case.

Thus the possibility that an informer's identity may be disclosed is quite remote, and in view of the obligations and efforts of the enforcement agencies and the judiciary to assure protection of their identities, disclosure has occurred only in a miniscule minority of cases. As previously noted, however, rather than assuring the person who confidentially provides information of the ability and efforts available to protect his identity, the proposed agreement suggests unlimited potential for disclosure over which there is no control. Accordingly, we request and advise that the NRC not implement the proposed agreement. We will, however, be glad to work with agency representatives to develop satisfactory procedures for dealing with such persons. In this regard, we would also call upon other enforcement agencies, which have had a good deal of experience in these matters, to provide their input and advice.

Sincerely,

STEPHEN S. TROTT
Assistant Attorney General
Criminal Division

ENCLOSURE 4

ENCLOSURE 2

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1983 SEP 15 PM 2 01

OFFICE OF INVESTIGATIONS
HEADQUARTERS

September 13, 1983

HAND DELIVERED

Honorable Nunzio J. Palladino,
Chairman
Honorable James K. Asselstine,
Commissioner
Honorable Frederick M. Bernthal,
Commissioner
Honorable Victor Gilinsky,
Commissioner
Honorable Thomas M. Roberts,
Commissioner
Nuclear Regulatory Commission
1717 H Street, N.W.
Room 1149
Washington, D.C. 20555

cc: ALB Regional Dir. 9/20/83

Dear Commissioners:

I have the privilege of presenting to you the Report of the Advisory Committee for Review of Investigation Policy on Rights of Licensee Employees Under Investigation.

As reflected in the Introduction to the Report, in response to the charter and specific questions the Commission requested us to address, the Committee considered a broad range of testimony and documents from interested persons and entities. All persons who wished to be heard were given an opportunity to do so in person and/or in writing.

9/14..To OGC for Appropriate Action..Cpys to: Chm,Cmrs,OI,OIA,EDO,SECY OPE...83-2255

~~83111050~~

2pp.

Enclosure 2

All members of the Committee have appreciated the opportunity to serve on this committee. We hope that this report will benefit the Commission. We are most grateful for the invaluable assistance given us by Richard Levi, Esq. of the General Counsel's office. Mr. Levi made himself available at all times, arranged for the two days of public hearings we held, contacted witnesses who wished to be heard, assured compliance with the procedures of the Federal Advisory Committee Act, and provided us with most helpful background material on the issues we were asked to address.

We are looking forward to our meeting with you on September 27, 1983.

Sincerely,

Earl J. Silbert

Earl J. Silbert

EJS:gs
Encl.

cc: James A. Fitzgerald, Esq.
Oscar M. Ruebhausen, Esq.
Joseph M. Scott, Esq.
Professor Ralph S. Spritzer

REPORT OF THE ADVISORY COMMITTEE FOR REVIEW OF INVESTIGATION POLICY ON RIGHTS OF LICENSEE EMPLOYEES UNDER INVESTIGATION

Submitted to the
Nuclear Regulatory Commission
September 13, 1983

Earl J. Silbert, Esq.
Chairperson
James A. Fitzgerald, Esq.
Oscar M. Ruebhausen, Esq.
Joseph B. Scott, Esq.
Professor Ralph S.
Spritzer, Esq.

Report of The Advisory Committee For Review of Investigation Policy on Rights of Licensee Employees Under Investigation

Introduction

The Advisory Committee For Review of Investigation Policy on Rights of Licensee Employees Under Investigation (hereinafter "Advisory Committee"), was created by the Nuclear Regulatory Commission (hereinafter "NRC" or the "Commission"). Its charter, attached as Exhibit 1, became effective on February 25, 1983. Subsequently, by letter dated April 11, 1983, attached as Exhibit 2, the Commission delineated "exactly what questions the Advisory Committee should address."

In addressing these questions, the Advisory Committee has sought and considered a wide variety of documentary and testimonial input. It has held two full days of hearings open to the public. Notice of the meetings, pursuant to the Federal Advisory Committee Act, was published in the Federal Register. All witnesses who wished to be heard had an opportunity to present their views at the hearings. Others made submissions in writing. In addition, the views of some individuals and organizations were actively solicited by the Advisory Committee. Thus the Committee heard from federal investigators and from representatives of industry, unions, and the "public interest." Included among these were the Director of the Commission's Offices of Investigations and his chief assistants, a number

of attorneys representing licensees or vendors who appeared individually and/or in behalf of the Atomic Industrial Forum, investigators of other federal agencies, representatives of the International Brotherhood of Electrical Workers and their counsel, a representative of the Professional Reactor Operators Society, and the Legal Director of the Government Accountability Project (GAP) of the Institute for Policy Studies.

Among the written materials reviewed by the Committee were the following: letter dated August 13, 1982, from Gerald Charnoff, Esq. and J. Patrick Hickey, Esq. to the Chairman of the NRC; Inspection and Enforcement: Conflict or Cooperation, an address by Messrs. Charnoff and Hickey to the 1982 Annual Conference of the Atomic Industrial Forum; letters from Richard Littel, Esq. dated May 25, 1983 and June 3, 1983; a letter from James B. Burns, Esq. dated June 3, 1983; a proposed "Advice to Interviewees" presented by Gerald Charnoff, Esq. by letter dated June 3, 1983; a statement of Paul Shoof, International Representative of the International Brotherhood of Electrical Workers; memorandum dated March 4, 1983, to Ben B. Hayes, Director of the NRC's Office of Investigations, from the Secretary of the NRC, pertaining to policies of the Office of Investigations; and a letter dated July 16, 1982 from the NRC Chairman to the then Acting Director of the Office of Investigations, James A. Fitzgerald (a member of the Advisory Committee) delegating certain authority.

Despite the large volume of this testimonial and documentary information and pertinent legal materials considered by the Advisory Committee, the Advisory Committee has concluded that a comparatively brief report to the NRC which focuses solely on the specific questions the Commission wished addressed would be most consistent with the mandate of the Committee.

Question 1. Should the NRC as a matter of policy apprise all interviewees prior to an interview that they have a right to have an attorney present?

Initially, it is important to note that employees of licensees have no "right" to have counsel present during interviews conducted by NRC investigators when the employee has not been subpoened. The Committee understands, however, that the Commission permits counsel to be present at such interviews upon request. The question before the Committee is whether, as a matter of policy, notice of this opportunity to be accompanied by counsel should routinely be given to a prospective interviewee before an interview is conducted.

The Committee has concluded that the NRC should not adopt such a policy. The Committee believes that there are no persuasive policy reasons for adopting such a notice requirement and that there are important policy considerations which support rejection of this proposal.

The primary arguments presented to the Committee in support of routinely providing notice of an opportunity to be accompanied by counsel were that not providing such notice would (1) disadvantage those who are unsophisticated and ignorant of their rights and therefore most in need of this advice, and (2) deter employees from willingly assisting in the investigative process. The Committee believes these arguments must be considered in two separate situations: (1) in the usual interview in which the purpose of the OI investigation is to discover and assemble information to determine whether safety regulations or

procedures have been violated and, if so, by whom; and (2) in the unusual case in which the investigation changes from information- gathering to a focused effort to establish the criminal liability of a particular witness.

Most of the interviews conducted by NRC's Office of Investigations (OI) involve persons who are not themselves suspected of wrongdoing, malfeasance or the like. They are being interviewed solely for the information they may have and OI investigators do not have a reasoned basis for believing that their responses will expose them to potential criminal liability. Under these circumstances, the need for advice about counsel appears minimal. Moreover, rather than enhancing the willingness of employees to assist in the investigation, the Committee believes that there is a risk that adopting a mandatory notice policy could impede the investigative process. Regardless of how it is formulated, such notice may convey to interviewees a false impression of personal vulnerability and thereby cause them to resist providing assistance that might otherwise be forthcoming. In addition, providing such notice could unnecessarily formalize the investigator/interviewee relationship with a resulting adverse affect on the flow of information to NRC.

Importantly, the Committee is unaware of any other federal agency with such a policy or practice, despite suggestions to the contrary by several of the Committee's witnesses. If the policy of giving interviewees this notice encouraged cooperation

of witnesses, one would expect that other agencies would have adopted such a policy. That they have not indicates that they are at least doubtful that providing the notice would be helpful. The importance of NRC's mission and the fact that the public interest is directly implicated in most NRC investigations suggest that the NRC should not adopt a policy, apparently unique, that might impede its investigations. We therefore recommend against a policy for notice in the normal interview situation.

The Committee has also considered whether notice with respect to counsel should be given when the investigator has reasonable grounds to believe that the interviewee has engaged in wrongdoing, malfeasance or some other dereliction of duty for which the individual could be personally, but not criminally, accountable.

As a practical matter, it would frequently be very difficult for an NRC investigator to know whether or not the individual being questioned could be held civilly accountable for his or her conduct. The Committee believes that malfeasance and dereliction of duty are so imprecise and that potential civil liability so varied that a notice rule linked to these concepts would be unworkable. Even in those situations in which the risk of a civil sanction is clear, i.e., loss of an operator's license, the Committee believes that OI's need to obtain information that concerns its safety-related functions

outweighs any policy reasons for the OI investigator to give notice of the opportunity to consult with counsel.

There remains the situation where the important information-gathering function of OI becomes secondary to the effort to establish criminal liability of an interviewee whom OI already has reasonable grounds to believe has committed a crime. In this narrow instance, the Committee recommends that notions of fairness and decency which lie at the heart of all governmental conduct warrant the "target" being advised of his opportunity to consult with counsel.

Although existing law does not require this notice in noncustodial situations, the Committee does not intend this nor consider it as a substantive departure from existing practice. For example, Special Agents of the Internal Revenue Service by internal rules routinely advise taxpayers under investigation of the so-called Miranda rights whether or not the person is in custody and even at a preliminary phase of their investigation when the basis for the investigation is mere suspicion. Other investigative agents, from the testimony before the Committee, have given advice of Miranda rights in the past or presently as a matter of individual practice. That they are criminal investigators is relevant but not dispositive. OI investigators have overlapping responsibilities. They may, for instance, be considered criminal investigators under 18 U.S.C. § 1510 for purposes of persons obstructing a criminal investigation.

Information they obtain may be referred to the Department of Justice and form the basis for a criminal prosecution.

The Committee recognizes that the primary goal of OI investigators is to get to the bottom of allegations of violations of NRC requirements which may have a potential for causing great harm to the public. There is, accordingly, a strong public interest in the NRC's obtaining necessary information from all possible sources. The notice requirement recommended by the Committee should not unduly interfere with this primary OI function since it is applicable only when the OI already has reasonable grounds to believe that the interviewee has committed a criminal offense and its focus shifts to obtaining further evidence of that person's criminal liability. In this instance, because the witness may not realize he is a target for criminal referral and potential prosecution, the limited notice should be given.

The Committee believes that even in this exceptional situation, the investigator should retain the discretion to determine whether to convey the notice orally or in writing, as well as its precise formulation. While the Committee is mindful that this may result in some lack of uniformity, that is a consequence of preserving the flexibility that the Office of Investigations, in the Committee's view, must have.

Finally, during the course of the Committee's hearings several witnesses suggested that other affected parties, including the licensee and the collective bargaining

representative, should routinely be given notice of all interviews so that they could be present or offer to be present, either as participants or observers. The Committee is unaware of any precedent for such a policy and disfavors its adoption by the NRC. In the Committee's view, the routine presence of such additional persons at these interviews would so alter their investigative character as to deprive the NRC of the value of the investigative interview as an enforcement and oversight tool.

Separate Statement of Committee Member Professor Ralph S. Spritzer:

In addressing Question 1, the Committee recommends that a prospective interviewee who is a target of the investigation in the sense that there is reason to believe that he has committed a crime be advised of his opportunity to consult with counsel "where the important information-gathering function of OI becomes secondary to the effort to establish criminal liability" of the interviewee. I agree that considerations of fairness call for advice in this situation. I would not restrict the giving of advice, however, to the case where the investigation of criminal liability is the primary purpose of the investigation. In my view, it is desirable that an effective warning (one that covers the opportunity to seek and be represented by counsel, and the Fifth Amendment privilege) be given whenever there is reasonable likelihood that the interviewee's responses to the investigator may be self-incriminatory, whether or not prosecution, at that stage, is the investigator's primary concern. In short, I believe that it is enlightened public policy to see to it that the interviewee or witness threatened with the danger of self-incrimination is aware of his prerogatives. The sophisticated witness has that awareness. The witness who is uninformed to begin with should stand on equal footing.

Question 2. May, and, if so, should the Commission limit an interviewee's choice of counsel by excluding from the interview any attorney who also represents the entity being investigated?

In responding to this question, we note at the outset that interviews conducted by the Office of Investigations or by the Office of Inspection and Enforcement have almost invariably been conducted without the aid of legal process. Doubtless this will continue to be the usual situation, although there may be occasional instances in which the Commission will resort to the issuance of compulsory process.

Where legal process has not been issued, the prospective interviewee may always decline to appear or to cooperate. Also, of course, he or she may decline to participate unless permitted to appear with counsel of his or her choice. It follows that an investigator has one of two options if an interviewee not under subpoena insists that he or she be represented by a particular attorney: the investigator may permit the attorney to be present or forego the conduct of the interview. 1/

1/ The investigator's decision on whether to forego the interview probably will be made by balancing the need for the interview against the potential prejudice to the investigation of having that particular attorney present at the interview. In this connection we note the apparently wide-spread belief of investigators that the presence of an attorney representing both the entity being investigated and the witness being interviewed may, in some circumstances, harm the investigation by inhibiting the freedom with which employees communicate to NRC investigators. This inhibition stems, investigators and others believe, from the concern that whatever the employee

This right of an interviewee to decline to cooperate if unaccompanied by counsel of his or her choice or, for that matter, by another person such as a union representative, includes the right to be accompanied by counsel for the licensee or other company counsel. The Office of Investigations obviously has no authority to prohibit an interviewee from being represented by such counsel or from being accompanied by a union representative, fellow employee or friend. Moreover, prior to

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(cont.)
states to investigators will be reported to the company, even if harmful to the employee or the company. The representatives of the industry who appeared before the Advisory Committee disputed this, stressing that having available company counsel may, to the contrary, provide reassurance to the witness, help ease whatever anxiety he or she may have, and thereby enhance the freedom of communication.

Another point raised by investigators and other witnesses was the concern that if the NRC allows company counsel to be present at interviews of their employees, the latter will not be able to refuse the offer of company counsel to be present without adversely affecting their employment status with the company. The response of the industry representatives to this is that experience has shown that employees, when offered the assistance of company counsel, often do in fact reject the offer. The empirical evidence presented to the Advisory Committee on these matters was minimal. Although the Committee believes that the responses of the industry representatives may accurately reflect what occurs in some cases, common sense dictates that at least in other cases, employees will be reluctant to refuse the offer to be represented by company counsel and to communicate freely in the presence of company counsel.

One final point is the concern of the investigators that company counsel, when reporting back to the company what transpired in the interview, will reveal the direction and scope of the investigation and thereby potentially prejudice the investigation by allowing the company to affect the availability or content of testimony or documents subsequently sought by the investigators to the company's benefit.

or during an investigation, a licensee, contractor, subcontractor, vendor, or union has the right to advise its employees or union or nonunion members of their right to have present counsel, including counsel for the company or a union representative. This procedure has been followed in prior NRC investigations and no basis exists of which this Committee is aware to preclude it from being done in the future. 2/

Although in informal interviews the NRC cannot prohibit interviewee-selected company counsel, union representative or specific friend from attending the interview, nothing would prevent the investigator from discussing with the company, its counsel, the union, or special friend the reasons why they should not attend an interview of a service employee in a particular case. Similarly, if such counsel, union representative or friend appears at an interview, there is nothing to prevent the Office of Investigations from following a procedure analogous to that which an Internal Revenue Service officer may pursue at an interview of a summoned third party

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2/ The law, of course, makes it unlawful to obstruct an investigation by agents authorized to conduct investigations of criminal conduct. 18 U.S.C. § 1510. Any communication, oral or written, that appeared to violate this law would, we assume, be referred to the Department of Justice for appropriate investigation. It was suggested that guidelines be adopted setting forth what advice could properly be communicated to employees and others without exposure to the charge of obstruction of justice. The Advisory Committee considers this impractical. What is controlling in such matters is the intent with which advice is given, an intent that will be predicated on an assessment of surrounding circumstances. No simple formulation is possible.

witness. See Internal Revenue Service Manual § 4022.42, MT 4000-181. The IRS officer may first explore the potential conflict of interest with the attorney, and if the matter is not resolved, he may ask the witness such questions as whether the witness wishes an attorney to be present, who hired the attorney, who is paying for the attorney, whether the witness understands that the attorney represents others, and whether the witness realizes that there is a potential conflict of interest. As the IRS Manual recognizes, the witness ordinarily is entitled to have counsel of his choice present. Only under "extreme circumstances" will the IRS attempt to seek disqualification of counsel in court. Although these IRS procedures apply to witnesses formally summoned for an interview, the Advisory Committee believes that these procedures can be adapted to the voluntary setting of field interviews by NRC investigators.

The remaining question is whether the Commission, in a situation where it undertakes to compel testimony by issuance of a subpoena, may appropriately issue an order, or seek a court order, limiting the witness' choice of counsel. Section 6(a) of the Administrative Procedure Act broadly provides, "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented and advised by counsel. . . ." 5 U.S.C. § 555(a). The "plain and necessary meaning of this provision" is that the person summoned is entitled to "counsel of [his] choice," Backer v. Commissioner,

275 F.2d 141, 144 (5th Cir. 1960). Accordingly, the courts have been restrictive of occasional efforts by administrative agencies to exclude, on conflict-of-interest grounds, counsel chosen by a witness. The issue posed by the Commission's Question 2 has much in common with the issue presented to the court of appeals in S.E.C. v. Csapo, 533 F.2d 7 (D.C. Cir. 1976). That case involved the application of an S.E.C. sequestration rule providing that absent permission no counsel for a witness "shall be permitted to be present during the examination of any other witness called in such proceeding." The court stated (p. 11):

> We are of course mindful of the historical antecedents of the sequestration rule and of the important purposes which it is designed to serve. See Torras v. Stradley, 103 F. Supp. 737 (N.D. Ga. 1951); United States v. Smith, 87 F. Supp. 293 (D. Conn. 1949). We do not question its utility in preserving the integrity of an investigation and recognize its practical necessity under certain circumstances. But we are not for that reason at liberty to ignore the clear congressional mandate [Section 6(a), Administrative Procedure Act] referred to above. Thus, before the SEC may exclude an attorney from its proceedings, it must come forth, as it has not done here, with "concrete evidence" that his presence would obstruct and impede its investigation.

An earlier Ninth Circuit case involving the same sequestration rule likewise upheld its "general propriety," but held that it must be accommodated to the demands imposed by the Administrative Procedure Act. S.E.C. v. Higashi, 359 F.2d 550 (9th Cir. 1966). The court concluded that Higashi, a corporate

director, might not be deprived of the services of corporate counsel because that would deny him the services of the attorney who might be of greatest help to him. We are satified that a blanket rule excluding "any attorney who also represents the entity being investigated" would not be sustained by the courts. An order of exclusion addressed to a particular situation might be upheld, in the words of the Csapo opinion, if there was "concrete evidence" that the attorney's presence would obstruct the proceeding.

We are accordingly of the view that it would be appropriate to enter or seek an order of exclusion only where (a) a witness has been ordered to testify, and (b) there is concrete evidence that the chosen representative of that witness is in such a position that his participation as counsel would seriously prejudice the investigation.

Question 3. Should the NRC allow interviewees to tape record the interview and/or should the NRC record the interview at the request of an interviewee?

In responding, we have limited our consideration to interviews that are voluntary or conducted without the aid of legal process. These represent the large majority of NRC investigatory interviews. Being voluntary, we believe the interviews accordingly should be conducted in a manner agreeable to the parties.

If an interviewee insists upon tape-recording the interview or having it tape recorded by the NRC, we would expect the NRC to accommodate this wish or terminate the interview.

As subsidiary questions, it is asked:

(a) whether the NRC should advise the interviewee, prior to the interview, of the right to tape record it; and, if so, what form the advice should take?

Tape recording is a privilege or an option available to the interviewer and interviewee. We do not think it rises to the dignity of a right in the context of a voluntary interview. Similar privileges extend to the time and place of an interview and to whether third parties are present or whether a written summary is prepared and signed by the interviewee. If the circumstances of the interview are agreeable to the participants, we do not think any advice need be given as to

the other optional ways in which the interview might be conducted.

(b) under what circumstances should the interviewee be allowed to keep the tape or a copy of the tape?

If the interviewee has arranged for the tape recording, it seems to us the dominion over the tape belongs to the interviewee, not to the NRC. It is for the interviewee to decide who is to have custody of the tape and whether copies should be made. If on the other hand the NRC makes the tape recording, the situation is reversed and the decisions are up to the NRC to make. Normally, we would think the NRC should make a copy available to the interviewee, with such charge for its costs as may be deemed appropriate.

(c) whether, if the interviewee records the interview, and the NRC does not, the NRC may insist on having a copy to the tape?

We do not think the NRC is in any position to insist on receiving a copy of the tape. It may request a copy. The interviewee may offer a copy. But if the NRC really wants a copy, it has the option of recording the interview for itself.

Question 4. Should the NRC give all interviewees express grants of confidentiality?

The Advisory Committee believes that the term "confidentiality" must be precisely defined for meaningful discussion and coverage in NRC's investigatory policies. As understood by the Committee, it is the withholding from dissemination to the public (including licensees, vendors, or other employer organization) of the name and other personal identifiers of certain individuals who provide information to the Commission, subject to some limitations as discussed below. It is to be distinguished from formal "informer" designation whereby some agencies essentially contract with carefully screened individuals not to divulge their identities under almost any circumstances in return for information. This latter category may include such measures as providing the individual with money, job and even a new identity if he/she is compromised.

We believe that the considerations against granting confidentiality to all interviewees outweigh those in favor of such a universal grant. The considerations weighing against such a blanket approach are as follows:

- Effective confidentiality agreements are extremely difficult to implement. Not only must the name and obvious personal identifiers, such as position or job title, be protected, but other information as well. This could include relationships to other individuals, presence at events or meetings, and other

material from which the interviewee's identity might be inferred. While difficult, this is achievable on a selective basis but as a practical matter not feasible for wholesale use. We perceive that inadvertent breach of the confidentiality promise is very likely if there are widespread confidentiality grants. The publicity resulting from breach of these agreements, however unintentional the breaches may have been, can seriously harm the investigative program by deterring others from coming forward who had important information but who will disclose it only on a promise of confidentiality.

- Reports of investigations which contain confidentiality grants are more difficult to use. The more reports are expurgated to preserve confidentiality, the more cryptic they become. Confidentiality requires that the Commission staff endeavor to keep some information from adjudicatory boards and parties or, alternatively, seek protective orders. It may also impede the staff's enforcement purposes. Finally, it could restrict the use of these reports by Congressional oversight committees.
- Confidentiality grants can make it more difficult to conduct the investigation. For example, when a person has been given confidentiality, the investigators are not free to use his name and other information which

may identify him as the source in eliciting information from other interviewees.

- In some instances, confidentiality conceivably may serve to protect wrongdoers.

The major reason for considering a universal express grant of confidentiality is the possibility that it might increase the flow of information to the NRC. However, we are aware of no empirical evidence that this would occur. Indeed, as noted above, the widespread employment of such grants could decrease the flow of unsolicited information through inadvertent breaches of confidentiality. In addition, we believe an experienced investigator will normally not need confidentiality to obtain information from the great majority of witnesses.

a. What limitations, if any, should be placed on grants of confidentiality by the NRC?

The Committee believes that grants of confidentiality should be in writing, signed by an NRC investigator, and contain an acknowledgement by the interviewee that he understands the agreement. Further, we believe it prudent to include in the agreement the following limitations:

- That the interviewee's identity may be communicated to other public agencies if necessary to fulfill their statutory responsibilities;
- That the interviewee may waive confidentiality by taking action inconsistent with confidentiality such as disclosing his/her identity or providing

information to another person that contradicts the information provided to the NRC;

- That the confidentiality is not absolute and the NRC may have to disclose his/her identity in response to an order of a hearing board or a court.

The limitations set out above are not all-inclusive. Because the NRC is free to grant or withhold confidentiality as it sees fit, it may impose any conditions or limitations on the grant which it considers appropriate in a particular case.

We deem it most important that the agreement candidly reflect the limitations on the grant of confidentiality.

b. Should there be different policies for different types of interviewees, e.g., those who come forward on their own, and those whom the NRC has to seek out?

There are various types of interviewees for whom different policies on confidentiality could be forged, e.g., supervisory/non-supervisory, licensee/non-licensee employees, voluntary/compelled, executive/non-executive, those who come forward on their own/those approached by the NRC. Because the subject matter of investigations varies widely, we do not believe that any rigid policy differentiations should be adopted for these various groups. Rather, we believe that the status of various types of interviewees may, on a case-by case basis, be one of several relevant factors which should be considered in determining whether to grant confidentiality to a particular

interviewee, the principal factor being the investigation's need for information.

We are aware, however, that Part 21 of the Commission's regulations can be read as providing express confidentiality to certain individuals who voluntarily come forward with information, as opposed to those who are sought out. 10 CFR 21.2. Nonetheless, for the reasons set forth above, we do not believe drawing such a distinction outside of Part 21 is warranted.

c. Should the NRC grant confidentiality in the absence of a request for confidentiality?

The Committee does not believe that the NRC should normally grant confidentiality in the absence of a request. However, if it is apparent to an investigator that there is unusual apprehension on the part of the interviewee or a withholding of information, he should explore this and use sound judgment as to raising the subject of confidentiality on his own initiative.

d. Should the NRC advise witnesses of the availability of confidentiality, and, if so, what form should this notification take?

The Committee believes that the NRC should normally advise individual witnesses of the availability of confidentiality only when, in the judgment of the investigator, the grant of confidentiality may be appropriate and the advice of its availability may persuade an otherwise reluctant interviewee to provide information. The form of notice should be left to

the discretion of the investigator. If confidentiality is granted, however, it should be in writing as discussed above.

Respectfully submitted,

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September 13, 1983

9. Termination Date

Approximately three to five months from date of filing.

10. Date of Filing

John C. Boyle
Advisory Committee
Management Officer