

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
E. Roy Hawkens
Dr. Sue H. Abreu

In the Matter of

TENNESSEE VALLEY AUTHORITY

(Enforcement Action)

Docket Nos. EA-20-006 and EA-20-007

ASLBP No. 21-969-01-EA-BD01

April 2, 2021

MEMORANDUM AND ORDER

(Denying TVA's Motion for Return and Protection of Privileged and Confidential Documents)

In this enforcement proceeding, after the Board issued a Protective Order,¹ the NRC Staff filed its initial document disclosures.² Thereafter, the Tennessee Valley Authority (TVA) moved for the return and protection of two documents it claims are privileged and one document it claims is confidential.³ The NRC Staff opposes.⁴

For the reasons explained below, we deny TVA's motion.

I. BACKGROUND

TVA requests the return of three documents in the NRC Staff's possession:

¹ Licensing Board Protective Order (Governing Non-Disclosure of Certain Documents Claimed to be Confidential) (Feb. 8, 2021) (unpublished) [hereinafter Protective Order].

² NRC Staff Initial Disclosures (Feb. 18, 2021).

³ [TVA] Motion for Return and Protection of Privileged and Confidential Documents (Mar 1, 2021) (non-public) [hereinafter TVA Motion].

⁴ NRC Staff Answer to the Tennessee Valley Authority's Motion Regarding Disclosures (Mar. 11, 2021) [hereinafter Staff Answer]. Although the Staff opposes TVA's motion, it made all three documents non-public pending resolution of this motion. Id. at 2.

(1) An August 30, 2018 memorandum entitled “Investigation into Harassment and Hostile Work Environment Allegations in Nuclear Licensing Organization — Involvement of Beth Wetzel” (OGC Memorandum).⁵ As its title suggests, the OGC Memorandum reports on the conclusions of an internal investigation by TVA’s Office of General Counsel (OGC) into Ms. Wetzel’s actions as a TVA employee.⁶

(2) An August 10, 2018 letter from TVA General Counsel Sherry Quirk to TVA Vice President Joseph Shea (Quirk Letter).⁷ The Quirk Letter communicated a legal conclusion and recommendation about employment action related to Michael McBrearty.⁸

(3) A June 2019 settlement agreement between the Department of Labor (DOL) and TVA concerning Mr. McBrearty (Settlement Agreement).⁹

Both the OGC Memorandum and Quirk Letter were sent to the NRC Staff during the course of its investigation when a TVA employee emailed both documents to an NRC special agent on May 23, 2019.¹⁰ The DOL sent a copy of the Settlement Agreement to the NRC on July 16, 2019.¹¹

TVA asserts that the OGC Memorandum and Quirk Letter are protected by attorney-client privilege and that the Settlement Agreement “contain[s] confidential personnel

⁵ Email from Deanna L. Fults, TVA, to Scott K. Luiña, NRC OI, attach., OGC Memorandum, at PDF 7–9 (Aug. 30, 2018) (ADAMS Accession No. ML21040A247) [hereinafter OGC Memorandum].

⁶ TVA Motion at 2.

⁷ Email from Deanna L. Fults, TVA, to Scott K. Luiña, NRC OI, attach., Letter from Sherry Quirk, TVA, to Joseph Shea, TVA, at PDF 29–32 (Aug. 10, 2018) (ADAMS Accession No. ML21040A247) [hereinafter Quirk Letter].

⁸ TVA Motion at 2.

⁹ TVA Motion, attach. D, [Michael McBrearty] Mutual Settlement Agreement and Release of Claims (June 18, 2019) [hereinafter Settlement Agreement].

¹⁰ TVA Motion at 2; Staff Answer at 2–3 & n.8; see Official Transcript of Proceedings, Interview of Deanna Fults at 56, 58, 77–80 (May 23, 2019) (ADAMS Accession No. ML21043A053).

¹¹ TVA Motion at 5.

information” not suitable for public dissemination.¹² TVA also asserts that disclosure of all three documents violates the terms of the Protective Order.¹³

II. DISCUSSION

The Protective Order does not govern this dispute. It pertains only to documents that are exchanged through discovery in this proceeding: that is, to documents received “solely pursuant to Subpart G and this Protective Order.”¹⁴ Because all three documents were sent to the NRC in 2019—more than a year before TVA even requested a hearing¹⁵—the Protective Order does not apply. Rather, we apply federal common law¹⁶ and applicable Commission regulations.

In our analysis, we assume that both the OGC Memorandum and Quirk Letter were protected by the attorney-client privilege when they were created.¹⁷ The issue before the Board is whether, by its actions (or inactions), TVA has waived the privilege. Waiver can occur in one of two ways.

First, the privilege holder may fail to take adequate steps to protect and preserve the privilege.¹⁸ For example, a waiver may occur when a party fails to take reasonable measures to

¹² TVA Motion at 1; see id. at 13 (citing 10 C.F.R. § 2.390(a)(6)).

¹³ Id. at 1.

¹⁴ Protective Order at 1 n.2.

¹⁵ Tennessee Valley Authority’s Answer and Request for Hearing (Nov. 30, 2020) [hereinafter TVA Answer].

¹⁶ See Upjohn v. United States, 449 U.S. 383 (1981); Fed. R. Evid. 501.

¹⁷ When a corporation’s lawyers conduct an internal fact investigation that perhaps could have been conducted instead by non-lawyers (such as members of its human resources department), it might be argued that the lawyers are functioning at least in part as managers, and that all their communications are not necessarily protected by attorney-client privilege. See, e.g., M. Kayla Dunn et al., It’s a Privilege, Not a Right: Best Practices for the In-House Lawyer, 10 THE NAT’L L. REV. 307 (Nov. 2, 2020) (“Whether privilege protects an in-house lawyer’s communications depends on the predominant purpose of the communication.”). The NRC Staff has not made that argument.

¹⁸ S.E.C. v. Lavin, 111 F.3d 921, 930 (D.C. Cir. 1997).

retrieve documents that are inadvertently disclosed¹⁹ or fails to assert a privilege until long after becoming aware of the disclosure.²⁰

Second, a waiver may also occur if the contents of privileged communications are voluntarily put in issue by the holder of the privilege.²¹ As the Commission recognizes, when a company claims that an internal investigation justifies its actions, “[t]he company cannot then use the attorney-client privilege to withhold details of the investigation.”²² In other words, “the company cannot use the privilege as both a shield and a sword.”²³ Moreover, “disclosure of ‘any significant part’ of a communication waives the privilege.”²⁴

TVA, we conclude, has waived privilege for the OGC Memorandum and Quirk Letter in both ways.

A. Failure to Protect and Preserve Attorney-Client Privilege

TVA waived its attorney-client privilege, for both the OGC Memorandum and Quirk Letter, by failing to take reasonable steps to protect and preserve its privilege.

¹⁹ See Felman Prod. Inc. v. Indus. Risk Insurers, No. 3:09-0481, 2010 WL 2944777, at *3–4 (S.D. W. Va. July 23, 2010) (stating reasonableness is a factor to consider in evaluating whether inadvertent disclosure results in a waiver of attorney-client privilege; moreover, consistent with Federal Rule of Evidence 502(b), a party who makes an inadvertent release escapes waiver only if it took prompt steps to rectify the error) (citing Victor Stanley, Inc. v. Creative Pipe, Inc., 250 F.R.D. 251, 259 (D. Md. 2008)).

²⁰ See Baxter Travenol Labs, Inc. v. Abbott Labs, 117 F.R.D. 119, 121 (N.D. Ill. 1987) (holding that a failure to assert a privilege for several months in the face of an opposing party’s repeated use of and reliance on the document waives the privilege).

²¹ Daryl M. Shapiro, CLI-08-6, 67 NRC 179, 184 (2008) (“[I]mplied waiver involves cases where the holder of the privilege placed the report ‘in issue.’”); see Peterson v. Wallace Computer Servs., Inc., 984 F. Supp. 821, 824–25 (D. Vt. 1997); United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir. 1991) (“Thus, the privilege may implicitly be waived when [a party] asserts a claim that in fairness requires examination of protected communications.”).

²² Shapiro, CLI-08-6, 67 NRC at 184; see Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1162–63 (9th Cir. 1992) (holding that a party that claims that it acted pursuant to the advice of counsel cannot use the privilege to immunize that advice from scrutiny).

²³ Shapiro, CLI-08-6, 67 NRC at 184.

²⁴ In re Grand Jury Proceedings, 727 F.2d 1352, 1356 (4th Cir. 1984) (quoting United States v. Cote, 456 F.2d 142, 145 (8th Cir. 1972)).

First, after a TVA employee disclosed both documents to the NRC in May 2019, others at TVA apparently remained unaware they were in the NRC Staff's possession for half a year (in the case of the OGC Memorandum²⁵) or even longer (in the case of the Quirk Letter²⁶). How, one wonders, could TVA not know that these two documents—both seemingly critical to explaining what happened to Ms. Wetzel and to Mr. McBrearty—had been produced to the NRC? Did TVA not keep a log of documents it produced? Did TVA's lawyers not review its production to the NRC when preparing TVA employees for, and accompanying them to, interviews with NRC investigators? TVA's seemingly casual approach to handling its documents does not suggest that, even from the start, it was taking all reasonable steps to preserve privilege.

Second, when TVA did become aware that privileged documents had been produced, it still did not take adequate steps to preserve the privilege. This is true for both the OGC Memorandum and the Quirk Letter.

TVA became aware that the NRC Staff had the OGC Memorandum on November 20, 2019, during an interview of TVA attorney John Slater.²⁷ The parties do not agree whether TVA counsel asserted privilege for the OGC Memorandum at that time.²⁸ Regardless, after TVA did

²⁵ Staff Answer at 2–3.

²⁶ Id. at 2, 4; see TVA Motion at 4.

²⁷ Staff Answer at 3 (“The [Nov. 20, 2019] interview transcript indicates that [TVA counsel] Mr. Walsh stated ‘I was not aware that you had this information’ when the TVA OGC memorandum was raised in the interview, but the transcript does not reflect that Mr. Walsh raised the issue of the document being covered by the attorney-client privilege at Mr. Slater’s interview.” (footnote omitted)).

²⁸ See Official Transcript of Proceedings, Interview of John E. Slater at 57–58, 106–07, 115–17 (Nov. 20, 2019) (Ex. 39 OI Report) (ADAMS Accession Nos. ML21043A269 and ML21043A291). TVA claims it objected on grounds of attorney-client privilege during the November 2019 interview with Mr. Slater but no such objection appears in the record. See TVA Motion at 3; id., attach. B, Letter from E. Todd Presnell, TVA, to Scott K. Luiña, NRC, at 1–2 (Dec. 11, 2019); Staff Answer at 3.

request return of the OGC Memorandum by letter in December 2019,²⁹ and the NRC Staff promptly requested legal justification for doing so,³⁰ TVA never responded.³¹ Later, during the parties' June 2020 pre-decisional enforcement conference, TVA's own counsel repeatedly referenced the OGC Memorandum without any assertion of privilege.³²

TVA claims it was not aware the NRC Staff had the Quirk Letter until initial disclosures,³³ but again TVA's unfamiliarity with the status of its own documents is surprising. In fact, the Quirk Letter was also discussed during the June 2020 pre-decisional enforcement conference.³⁴ When NRC investigators asked questions about the Quirk Letter, TVA did not object.³⁵

B. Placing the Advice of TVA's Office of General Counsel in Issue

TVA has also waived privilege by placing the contents of the OGC Memorandum and Quirk Letter in issue.

As the NRC Staff points out, "during the [June 2020] pre-decisional enforcement conference, counsel for TVA repeatedly referred to the TVA OGC Memorandum and its subject matter, and at no point . . . did TVA assert a claim of attorney-client privilege" for that document.³⁶ For example, TVA counsel stated that Joseph Shea terminated Beth Wetzel "because of OGC's recommendation."³⁷ In addition, NRC "[S]taff counsel directly questioned

²⁹ TVA Motion at 3–4; see id., attach. B, Letter from E. Todd Presnell, TVA, to Scott K. Luiña, NRC (Dec. 11, 2019).

³⁰ Staff Answer at 3. The Staff requested that TVA "provide legal authority justifying the demand to return the document." See TVA Motion, attach. C, Letter from Sara Kirkwood, NRC, to E. Todd Presnell, TVA (Dec. 16, 2019).

³¹ Staff Answer at 3 & n.12.

³² Id. at 4 (citing TVA PEC Tr. at 83, 89, 92, 113).

³³ TVA Motion at 4.

³⁴ Staff Answer at 4 (citing TVA PEC Tr. at 113, 168).

³⁵ Id. at 6.

³⁶ Staff Answer at 4; id. at 7–10; TVA PEC Tr. at 83, 89, 92, 113.

³⁷ TVA PEC Tr. at 83.

TVA representatives about the contents of the Quirk Letter,” without any assertion of attorney-client privilege.³⁸

Indeed, TVA relied on the subject matter of the OGC Memorandum and Quirk Letter in its request for a hearing before this Board. For example, TVA claims that:

(1) its employment decisions were “supported by independent reviews;”³⁹

(2) specifically, Ms. Henderson’s complaint “was appropriately referred to TVA’s [OGC] for an independent investigation;”⁴⁰

(3) “[t]he OGC investigation substantiated many of the Complaint’s allegations;”⁴¹

(4) “the OGC investigation found that Mr. McBrearty’s behavior violated three TVA policies;”⁴²

(5) Mr. McBrearty was placed on administrative leave “[b]ased on the results of this independent [OGC] investigation;”⁴³ and

(6) “TVA’s [i.e., OGC’s] investigation found wrongdoing by Ms. Wetzel with no connection to protected activity.”⁴⁴

Although the Board rules at this time only that attorney-client privilege has been waived for the two documents addressed in TVA’s motion, we are concerned that TVA contemplates deciding whether to more broadly waive the privilege “upon completion of discovery.”⁴⁵

As TVA appears to recognize, it may not claim reliance on the advice of counsel as a defense while, at the same time, claiming privilege for that advice. Therefore, TVA may wish to

³⁸ Staff Answer at 4; id. at 7–10; TVA PEC Tr. at 113, 167–68.

³⁹ TVA Answer at 1.

⁴⁰ Id. at 9.

⁴¹ Id.

⁴² Id.

⁴³ Id.

⁴⁴ Id. at 18.

⁴⁵ TVA Motion at 12.

discuss with the NRC Staff a time by which it will decide whether to waive privilege, in order to allow the NRC Staff a reasonable opportunity to take depositions or other discovery concerning the role of TVA's lawyers in the employment decisions that are central to this case.

Of course, TVA need not waive privilege (except insofar as, by its actions, it may have done so already). However, TVA should be aware that, if it does not waive privilege in time for the NRC Staff to take relevant discovery, the Board will entertain motions to exclude from evidence (1) documents withheld as privileged during discovery; and (2) testimony concerning the role of TVA's lawyers in its decision process.

C. The Settlement Agreement Need Not Be Withheld from Public Disclosure

TVA claims the Settlement Agreement should be withheld from public disclosure under 10 C.F.R. § 2.390(a)(6), which exempts "[p]ersonnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."⁴⁶ The NRC Staff asserts it appropriately disclosed the Settlement Agreement after considering its "relevan[ce] to disputed issues."⁴⁷ We agree.

The NRC favors "openness and transparency" in its adjudicatory proceedings.⁴⁸ In licensing board proceedings, for example, settlements must be closely scrutinized in the public interest and, if approved, their terms must be embodied in a final order.⁴⁹ Likewise,

⁴⁶ 10 C.F.R. § 2.390(a)(6).

⁴⁷ Id. § 2.709(a)(6)(i)(A).

⁴⁸ See Pac. Gas and Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), LBP-11-5, 73 NRC 131, 134 (2011) (citing Tenn. Valley Auth. (Bellefonte Nuclear Plant, Units 1 & 2), CLI-10-26, 72 NRC 474, 478 n.23 (2010)); Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,195 (Jan. 14, 2004) ("At the foundation of the Commission's approach are the provisions in Subparts C and G which provide for mandatory disclosure of a wide range of information, documents, and tangible things relevant to the contested matter in the proceeding, and the NRC's provisions for broad public access to documents in [10 C.F.R.] § 2.390.").

⁴⁹ 10 C.F.R. §§ 2.203, 2.338(h)(4)(i).

10 C.F.R. § 2.328 provides that all NRC hearings must be public unless certain national security exemptions apply.⁵⁰

As the NRC Staff points out,⁵¹ disputes involving the NRC's employee protection regulations are routinely adjudicated in open hearings, even though they necessarily disclose a substantial number of details regarding the individuals involved.⁵² In adjudicatory proceedings such as this, the proper balance between personal privacy and transparency is not the same as when responding to a request under the Freedom of Information Act.⁵³ What constitutes "a clearly unwarranted invasion of personal privacy" is different. In the context of this case, where TVA's actions concerning Mr. McBrearty are of prime importance and the possibility of bias might be a proper subject for examination if he is called as a witness, we cannot say disclosure of the Settlement Agreement is unwarranted.

In addition, the NRC and DOL have entered into a Memorandum of Understanding (MOU) that requires identification and proper handling of sensitive documents that they exchange.⁵⁴ The MOU does not supersede the confidentiality obligations of either agency under federal law.⁵⁵ We find it significant, however, that the NRC Staff represents it advised the

⁵⁰ See id. §§ 2.328, 2.390.

⁵¹ Staff Answer at 13.

⁵² See, e.g., Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 1; Sequoyah Nuclear Plant, Units 1 & 2; Browns Ferry Nuclear Plant, Units 1, 2, & 3), LBP-03-10, 57 NRC 553 (2003).

⁵³ See 5 U.S.C. § 552.

⁵⁴ Notice of Signing of a Revised Memorandum of Understanding Between the NRC and the Department of Labor (DOL), 63 Fed. Reg. 57,324, 57,325 (Oct. 27, 1998); see Memorandum of Understanding Between NRC and Department of Labor, Employee Protection, 47 Fed. Reg. 54,585 (Dec. 3, 1982); Nuclear Regulatory Commission Enforcement Manual, Rev. 7, Change 7 § 1.3.14 (Dec. 1, 2020) (ADAMS Accession No. ML20329A339).

⁵⁵ Revised MOU Between the NRC and the DOL, 63 Fed. Reg. at 57,325 ("Every agency agrees to share all information it obtains concerning a particular complaint of discrimination and, to the extent permitted by law, will protect information identified as sensitive that has been supplied to it by the other agency.").

DOL of the NRC Staff's intention to publicly disclose the DOL documents, pursuant to its discovery obligation in this case, and the DOL did not "express[]" disagreement."⁵⁶

Although the NRC need not withhold the Settlement Agreement from public disclosure, the scope of discoverable information is broader than the scope of admissible evidence. We do not rule at this time whether the Settlement Agreement would be admissible at the evidentiary hearing.⁵⁷

III. ORDER

TVA's motion is denied.

It is so ORDERED.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

Rockville, Maryland
April 2, 2021

⁵⁶ NRC Staff Memorandum Responding to Board's March 17, 2021 Order at 1–2 (Mar. 24, 2021). The NRC Staff's memorandum did not make clear whether the DOL did not "express[]" disagreement" by not responding or by affirmatively agreeing with the NRC Staff's decision to disclose the Settlement Agreement.

⁵⁷ See Fed. R. Evid. 408 (settlements and settlements negotiations generally not admissible); see also Settlement Agreement ¶ 20.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying TVA's Motion for Return and Protection of Privileged and Confidential Documents)** have been served upon the following persons by Electronic Information Exchange.

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TENNESSEE VALLEY AUTHORITY
Docket Nos. EA-20-006 and 20-007-EA

MEMORANDUM AND ORDER (Denying TVA's Motion for Return and Protection of Privileged and Confidential Documents)

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Dated at Rockville, Maryland,
this day 2nd of April 2021.

Office of the Secretary of the Commission