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NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF FOIA APPEALS FOR EICSB (McTIERNAN) REPORT  
AND CERTAIN OGC DOCUMENTS

Place - Washington, D. C.

Date - Wednesday, 8 February 1978

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

PUBLIC MEETING

DISCUSSION OF FOIA APPEALS FOR EICSB (McTIERNAN) REPORT  
AND CERTAIN OGC DOCUMENTS

Room 1130  
1717 H Street, N.W.  
Washington, D.C.

Wednesday, February 8, 1978

The Commission met, pursuant to notice, at 2:40 p.m.,

BEFORE:

DR. JOSEPH M. HENDRIE, Chairman

VICTOR GILINSKY, Commissioner

PETER BRADFORD, Commissioner

RICHARD T. KENNEDY, Commissioner

ALSO PRESENT:

J. NELSON

W. DIRCKS

T. ENGELHARDT

D. DONOGHUE

T. ROTHSCHILD

O. ABSTON

K. PEDERSEN

S. CHILK

#1

1 CHAIRMAN HENDRIE: The first thing -- Before this  
2 meeting gets started, the first thing I have to do is to  
3 ask my colleagues if they will join with me in voting to  
4 close this meeting under Exemption 6, and also perhaps  
5 9(b) premature disclosures, but certainly Exemption 6 on  
6 personal information.

7 COMMISSIONER KENNEDY: Before we do any voting,  
8 I would like counsel's explanation of why that's either  
9 appropriate or necessary.

10 MR. NELSON: It is -- I don't know about  
11 "necessary," I think it is appropriate. The proceeding  
12 involves the question of whether, and under what circumstances  
13 to produce documents which contain statements which people  
14 made about other people.

15 COMMISSIONER KENNEDY: But we are not going to  
16 talk about the statements that people made about other  
17 people, except in that general sense.

18 MR. NELSON: It was in that sense, and for that  
19 purpose, that I recognized the right to close portions of  
20 the meeting, in case someone wants to say: What's it about?  
21 Give us an example? What are the things we're recommending  
22 releasing?

23 To do that in the open could conceivably -- Well,  
24 it would certainly reveal the very material that you're  
25 deciding about. And under the standard application of 9(b),

1 there would be grounds to close the meeting.

2 If we want to discuss --

3 COMMISSIONER KENNEDY: But I am still not clear  
4 as to why the discussion needs to proceed in that way to  
5 reach the conclusions which we are here to reach.

6 MR. NELSON: Well, because when this meeting got  
7 planned, I didn't know we would be as far along the line  
8 toward potential agreement on some principles as I think we  
9 are, Mr. Kennedy. And if you're asking whether it's possible  
10 to do this as an open meeting, I think it is.

11 I think there may be a degree of convenience --  
12 that some Commissioner might want to have an illustration of  
13 what the papers say, and in that event it would be appropriate  
14 to close

15 COMMISSIONER KENNEDY: But, but -- you know,  
16 closing for convenience, as I understand, is not contem-  
17 plated within the statute.

18 MR. NELSON: The statute talks about the right to  
19 close when it is "likely that" something may happen.

20 COMMISSIONER KENNEDY: That's different from  
21 "convenience."

22 MR. NELSON: It defines "likely" -- It defines  
23 "likely" as: more than 50 percent.

24 (Laughter.)

25 MR. NELSON: I don't want to be misunderstood as

1 arguing for either opening or closing. I don't care. I  
2 don't think that the counsel for the requestor who are here  
3 in the room care very much about that.

4 I think that there are a couple of potential areas  
5 of agreement that we can discuss any old way. I am just  
6 saying that, if you want to close the meeting there is a  
7 legal basis to close it; if you don't want to close it,  
8 then open it.

9 COMMISSIONER GILINSKY: Well, let's see. I --

10 COMMISSIONER KENNEDY: Now at least I understand.

11 MR. NELSON: No problem.

12 COMMISSIONER GILINSKY: Are we likely to get  
13 into material that --

14 MR. NELSON: I would advise that, if we're in an  
15 open meeting and someone wants to give an example or an  
16 illustration of the material, that you would then want to  
17 close that portion.

18 COMMISSIONER GILINSKY: So, in any case, even if  
19 the meeting is closed, the transcript would be reviewed and  
20 parts which are releaseable would be released.

21 MR. NELSON: And the parts that turned out not to  
22 be exempt would be released promptly, as the law requires.

23 COMMISSIONER KENNEDY: When would that be? What  
24 does "promptly" mean?

25 COMMISSIONER BRADFORD: Monday afternoon.

1 COMMISSIONER KENNEDY: Of which week?

2 (Laughter.)

3 COMMISSIONER KENNEDY: Any particular week?

4 CHAIRMAN HENDRIE: Well, I assume every Monday  
5 afternoon.

6 COMMISSIONER KENNEDY: It's only Wednesday.  
7 Would that be, in your view, "promptly"?

8 MR. NELSON: We will attempt to meet whatever  
9 schedule the Commission wishes to ascribe to release of the  
10 transcript.

11 COMMISSIONER KENNEDY: Well, we need to have some  
12 definition of "promptly."

13 COMMISSIONER GILINSKY: Well, why don't we adopt  
14 a policy on review and release of transcripts?

15 MR. NELSON: Well, that's a matter that ought to  
16 be discussed at a meeting of the Nuclear Regulatory  
17 Commission, properly noticed under the Sunshine Act.

18 COMMISSIONER KENNEDY: I would certainly agree  
19 with that.

20 MR. NELSON: That's certainly not happened today.

21 COMMISSIONER KENNEDY: At the earliest possible  
22 date.

23 COMMISSIONER GILINSKY: I agree with that.

24 COMMISSIONER KENNEDY: That would be a week from  
25 today, if I understand the noticing requirements properly.

1 MR. NELSON: It can be less than that. It can  
2 be tomorrow, or immediately, if you think the agency business  
3 so requires an immediate discussion, then you can do it.  
4 Put up a notice, and you can hold an open meeting and discuss  
5 Sunshine Act policy.

6 COMMISSIONER KENNEDY: I would urge that we not  
7 do that, because that suggests an element of urgency when  
8 we've been dealing with this problem for many, many months,  
9 and only now does it seem to be a problem.

10 It would seem to me that the matter is so  
11 fundamental, and indeed it needs the appropriate kind of  
12 noticing -- that is, the kind of noticing that would give  
13 the widest possible dissemination that, it seems to me, was  
14 contemplated in the act when they provided "a week."

15 Is my reasoning wrong?

16 MR. NELSON: Sure. If the Commission wants to  
17 hold --

18 COMMISSIONER KENNEDY: My reasoning is wrong, did  
19 you say?

20 (Laughter.)

21 MR. NELSON: No, sir. If I said it was wrong,  
22 then I was as inarticulate as I seem to me these days.

23 If the Commission wants to meet on one week's  
24 notice in the open to discuss its policy about when it will  
25 release the transcript of closed meetings that turn out to



1 be not to exempt, it may do so.

2 COMMISSIONER KENNEDY: I would urge that we do  
3 so. Indeed, I would recommend to the Chairman that we do  
4 so a week from today, and notice it today.

5 CHAIRMAN HENDRIE: I will have to look at it  
6 against the other things that are on the agenda for next  
7 week.

8 Let's see. We'll be dealing --

9 MR. NELSON: Mr. Chairman, a lot of people came  
10 here -- some from private practice, some Bethesda -- to  
11 engage in a discussion of the extent to which certain  
12 documents ought to be released.

13 I don't think that any of them came here to hear  
14 discussions about the NRC's policy about release of  
15 transcripts of closed meetings, if I say so, with all due  
16 respect.

17 I am trying to get to Bethesda to conduct an  
18 interview --

19 COMMISSIONER KENNEDY: Well, let me just suggest,  
20 counsel, you are out of line. This Commission is in the  
21 business of dealing with the matter put before us, and  
22 indeed at the counsel's request.

23 Now, the matter is before us, and it's going to  
24 be discussed. It seems wholly appropriate, and indeed  
25 essential, that the Commission decide, at the outset, as the

1 Chairman already suggested and called for, whether the  
2 meeting is going to be closed or opened. That's what the  
3 discussion is about.

4 Now, if that is an inconvenience to you, I am  
5 sorry.

6 COMMISSIONER GILINSKY: Well, let's see. I think  
7 we have gone beyond that. We are talking about next week's  
8 schedule.

9 MR. NELSON: I think it has to do with whether  
10 there be a meeting to discuss the NRC's policy about when  
11 it will review the transcripts --

12 COMMISSIONER KENNEDY: That was not a suggestion  
13 initiated by me, counsel. I'd like to get back to what we  
14 did decide. There will be a memo from me this afternoon on  
15 the other matter.

16 CHAIRMAN HENDRIE: Let's please, if we may, turn  
17 to the question of closing the meeting.

18 COMMISSIONER KENNEDY: I vote "no," Mr. Chairman.

19 CHAIRMAN HENDRIE: It seems to me we ought just  
20 to go ahead and vote. I will register a "no" for  
21 Mr. Kennedy.

22 COMMISSIONER BRADFORD: Let me put it this way:  
23 As far as anything I intend to bring up, I would vote "no."  
24 But at the same time, if anybody intends to ask the kind of  
25 question Jerry would ask -- that Jerry had mentioned, as a

1 hypothetical example, I would change my vote out of  
2 recognition of that. That is, I do think there is an  
3 appropriate area for cloture there.

4 Based on my own anticipation of the meeting, I'm  
5 not going to get into it so I'll vote "no," unless anyone  
6 else sees a reason to close.

7 CHAIRMAN HENDRIE: All right. Vick?

8 COMMISSIONER GILINSKY: I would vote to close,  
9 merely that we should not be precluded from bringing up any  
10 matters that would normally not be brought up in an open  
11 meeting, and the transcript will be reviewed and whatever is  
12 releaseable in whole or in part will be promptly released.

13 COMMISSIONER KENNEDY: That would be grounds for  
14 closing every meeting.

15 COMMISSIONER GILINSKY: No, I think this meeting  
16 is different.

17 CHAIRMAN HENDRIE: Let's see. Peter, do you have  
18 the lead on this -- on this item? Excuse me, Trip, I'm  
19 sorry. I'm thinking of another endeavor.

20 MR. ROTHSCHILD: I think Jerry was intending  
21 to start and then head up to Bethesda for an interview with  
22 Mr. Gossick.

23 CHAIRMAN HENDRIE: Are we going to dig all that  
24 deeply into material that really shouldn't --

25 MR. ROTHSCHILD: Hopefully not.

1 CHAIRMAN HENDRIE: In that case, I will vote  
2 "no." The meeting is declared to be an open meeting of this  
3 Commission.

4 Please proceed. Jerry, do you have the kickoff?

5 MR. NELSON: There ought to be a vote that --  
6 short notice. There was no seven-day notice of this meeting  
7 if it was to be an open meeting.

8 CHAIRMAN HENDRIE: Do we need --

9 MR. CHILK: You'll need a vote, if you decide to  
10 change it from a closed -- It has been announced as a closed  
11 meeting.

12 CHAIRMAN HENDRIE: All right, we've voted down  
13 closure. I'll ask a short-notice vote to hold this meeting  
14 on short notice.

15 Those in favor?

16 COMMISSIONER KENNEDY: Aye.

17 COMMISSIONER GILINSKY: Aye.

18 COMMISSIONER BRADFORD: Aye.

19 CHAIRMAN HENDRIE: So ordered.

20 COMMISSIONER GILINSKY: Actually, there's no  
21 practical difference between it being closed or open, since  
22 nobody can react to our notice.

23 MR. CHILK: As it turns out, no one from the  
24 public is here, and the transcript -- Are there members from  
25 the public outside? Then invite them in.

1 MR. NELSON: The grievant might have wanted to come,  
2 other people.

3 CHAIRMAN HENDRIE: Okay --

4 MR. NELSON: May I make a suggestion? A small,  
5 modest suggestion?

6 We were getting very far down in my office, until  
7 we came up here. Let us try to reach a proposed agreement  
8 which we will submit to the Commission for the Commission's  
9 review. Maybe there isn't a need for a meeting at all --  
10 and I'm talking about OIA, staff, staff lawyers who are  
11 trying the grievance case, the grievant's own lawyers, and  
12 the Office of General Counsel.

13 COMMISSIONER BRADFORD: Jerry, I -- Do I  
14 misunderstand the memo from Trip? I thought there was an  
15 area of agreement.

16 MR. ROTHSCHILD: We were reaching an area of  
17 agreement.

18 MR. NELSON: We had -- The details remain to be  
19 pinned down; it's the principles that have been agreed upon.  
20 And the details, we were trying to thrash out.

21 CHAIRMAN HENDRIE: I had hoped, in fact -- I had  
22 heard that there was some progress in this direction, and I  
23 had hoped in fact that it would become an affirmation item  
24 rather than a subject for a Commission meeting.

25 MR. NELSON: I had hoped it could, Mr. Chairman.

1 CHAIRMAN HENDRIE: I have no objection to that  
2 procedure, but we'll please hear my colleagues on the  
3 subject.

4 COMMISSIONER KENNEDY: I am now totally unclear  
5 as to what the purpose of our being at the table is. I  
6 thought we were here to discuss something, at the request  
7 and recommendation of General Counsel. Why are we here?

8 CHAIRMAN HENDRIE: Presumably, because the course  
9 of negotiations which have not gone into cessation, because  
10 this meeting is cancelled, we've moved steadily toward it  
11 over the past couple of days -- presumably, because those  
12 negotiations have proceeded apace and we -- and the General  
13 Counsel feels there may indeed be an appropriate middle  
14 ground between the views of the various officers within the  
15 Commission and the parties to the grievance, which would  
16 allow the Commission to be presented with a proposal --

17 COMMISSIONER KENNEDY: Has that changed between  
18 the time we were voting to close the meeting and the time  
19 we voted not to do so?

20 I mean, I'm totally unclear as to what procedurally  
21 we're talking about right now. We were sitting here because --  
22 and talking about whether we should close the meeting or  
23 not -- because, in this discussion, matters might arise  
24 which really ought to be dealt with in the closed meeting.

25 CHAIRMAN HENDRIE: It was perfectly --

1 COMMISSIONER KENNEDY: We decided not to close  
2 the meeting --

3 CHAIRMAN HENDRIE: It was perfectly --

4 COMMISSIONER KENNEDY: Now, the counsel says, we  
5 really don't need to have the meeting at all.

6 CHAIRMAN HENDRIE: I'm sorry --

7 COMMISSIONER KENNEDY: I'm completely confused.

8 CHAIRMAN HENDRIE: Before we can open a meeting  
9 on this subject, since we hadn't voted to close it before,  
10 if it was to be closed the Commission had to meet in a  
11 non-meeting, in fact, and vote to close.

12 It had to come to that issue before the --

13 MR. NELSON: I don't think that's what  
14 Mr. Kennedy's asking. I think he is saying to me: Why did  
15 you pull us in here for a meeting, and now you're telling  
16 us you don't need one?

17 COMMISSIONER KENNEDY: That's what I'm asking.

18 MR. NELSON: The answer is, Mr. Kennedy, that  
19 things change. They don't remain precisely the same in  
20 all respects from day to day. People started talking to  
21 each other.

22 They happened to all arrive at 1717 H Street  
23 today. They happened to all end up in our law office --

24 COMMISSIONER KENNEDY: Now, wait. I understand  
25 that.

1 MR. NELSON: -- and we started talking.

2 COMMISSIONER KENNEDY: And I think that's  
3 splendid.

4 MR. NELSON: It began to look like we could  
5 reach an agreement that we might submit to the Commission.

6 COMMISSIONER KENNEDY: Well --

7 MR. NELSON: It is my recommendation that you  
8 authorize us to try and reach such an agreement which we will  
9 submit to you as soon as it is drawn up.

10 COMMISSIONER KENNEDY: I would be more than happy  
11 to do that. That is not my question.

12 My question is: Why did we have to go -- Why  
13 did we go through the exercise of talking about whether we  
14 should close or open the meeting, when in fact that's all  
15 you wanted the meeting to do?

16 MR. NELSON: Well, I didn't know that until  
17 shortly on ago. If you want somebody --

18 COMMISSIONER KENNEDY: Do you mean during this  
19 meaing?

20 MR. NELSON: I will take the blame.

21 COMMISSIONER KENNEDY: Okay.

22 MR. NELSON: Fine; it's my fault.

23 COMMISSIONER KENNEDY: It's not "blame." I'm  
24 just mystified.

25 MR. NELSON: I made a mistake. I now think that



1 there is real chance for progress in this matter, without  
2 tying up the Commission's time; and I make a recommendation  
3 to you that you have us try to draft up an agreement to be  
4 submitted to you for approval.

5 CHAIRMAN HENDRIE: I certainly, for myself, think  
6 it preferable that the offices, and officers, and parties  
7 engaged in the discussions see if they cannot find a mutually  
8 satisfactory ground.

9 If it cannot be done, then the Commission inevitably  
10 will have to decide, one way or another, on each of the  
11 matters at issue; but clearly, if there is a mutually  
12 satisfactory -- if there is an area of mutual agreement to  
13 be worked out, that is there the matter would preferably  
14 attend.

15 And I certainly would encourage it. Now,  
16 Mr. Kennedy says it's all right with him. Commissioner  
17 Gilinsky?

18 COMMISSIONER KENNEDY: Before we do, though,  
19 Gene, what's your view of all this?

20 MR. ABSTON: I agree with Mr. Nelson. We are  
21 pretty close. In fact, we tried desperately to cancel the  
22 meeting, as you may well know.

23 COMMISSIONER KENNEDY: I did not.

24 MR. ABSTON: Yes, sir. But I think we do have a  
25 pretty firm agreement. It's a compromise agreement. No one's

1 really happy with it, but it's the best, under the  
2 circumstances.

3 CHAIRMAN HENDRIE: If the sum total on  
4 "happiness" in the matter can be fairly evenly distributed,  
5 that may be as close as we get to a reasonable ground in  
6 human affairs. Vic, what's your --

7 COMMISSIONER GILINSKY: Well, there is a point  
8 which I would like to discuss.

9 MR. ABSTON: Let me interject one thing. As I  
10 understand it, there is no disagreement between the general  
11 counsel and myself and ELD. We are in agreement -- and  
12 also with the individual's attorneys involved.

13 As I understand it, we're pretty close. There's  
14 just a few minor details --

15 MR. NELSON: A couple of details.

16 MR. ABSTON: -- a couple of details that we can  
17 work out on our own, if need be. And I would suggest that  
18 we have probably got the best deal we could. I mean, it's --  
19 general counsel's taking all the hurt -- we sort of have it  
20 spread out. Right now, OIA is taking most of it.

21 COMMISSIONER GILINSKY: Well, but there are  
22 different kinds of "hurt," and I want to ask about that,  
23 if we can do that here.

24 MR. NELSON: Why don't you ask, Commissioner,  
25 when you see the agreement? It might be premature to raise

1 these issues right now.

2 COMMISSIONER KENNEDY: But then it might -- we  
3 might --

4 MR. NELSON: It might serve to --

5 COMMISSIONER KENNEDY: We would then be told that,  
6 really, since the agreement had been completely worked out  
7 only after such exhaustive effort and at such extreme  
8 compromise on the part of all parties, that it would be  
9 presumptuous to overturn this; wouldn't we?

10 MR. NELSON: I wouldn't tell you that. I would  
11 tell you you could overturn it and --

12 CHAIRMAN HENDRIE: -- start over.

13 MR. NELSON: -- turn them out the door.

14 COMMISSIONER KENNEDY: Well, no you wouldn't.

15 MR. NELSON: Of course you've got the right to  
16 do that.

17 COMMISSIONER KENNEDY: Of course you would say  
18 that, but you would urge us not to do so.

19 (Laughter.)

20 MR. NELSON: I would urge you not to do so.

21 COMMISSIONER KENNEDY: In the strongest possible  
22 terms. Let's be realistic.

23 So, I guess I -- I don't see why not ask the  
24 question now. If Commissioner Gilinsky has a question, it  
25 seems to me --

1 MR. NELSON: Well, indeed it may even guide us.

2 CHAIRMAN HENDRIE: Let me first of all find --  
3 Peter, what's your inclination in the matter, and then let  
4 us see what will --

5 COMMISSIONER BRADFORD: I was in fact prepared  
6 to cancel the meeting on the basis of the suggested memo  
7 this morning, so I'm perfectly comfortable with that  
8 suggestion.

9 CHAIRMAN HENDRIE: Okay.

10 Vic, why don't you go ahead and broach the subject,  
11 and if I may reserve the right to nudge you and suggest we  
12 terminate the conversation, if it looks as though you're  
13 beginning to prejudice this delicate embryo of a compromise.  
14 Okay?

15 Go ahead.

16 COMMISSIONER GILINSKY: You certainly have that  
17 right.

18 (Laughter.)

19 CHAIRMAN HENDRIE: I can always try.

20 COMMISSIONER GILINSKY: Well, let me just tell you  
21 what my concern is. It is simply this: That individuals  
22 who have agreed to interviews, have been promised  
23 confidentiality in these interviews, would have this  
24 confidentiality respected.

25 And I understand that a number of these

1 individuals have consented to release this, and I guess I  
2 would like to be sure that this is not as a result of any  
3 kind of pressure on the part of those who went to them because  
4 I think that would be unfortunate.

5 I would like to be assured that that is the case.

6 MR. ABSTON: As I gather -- and the general  
7 counsel can correct me if I am wrong -- there's four  
8 individuals who have consented, voluntarily so to speak, to  
9 release their statements.

10 COMMISSIONER KENNEDY: What does "voluntarily so  
11 to speak" mean?

12 CHAIRMAN HENDRIE: Yes, I think that is precisely  
13 Commissioner Gilinsky's point.

14 MR. ABSTON: Okay. I can't address whether there  
15 was any pressure put on them, but from what I gather it was  
16 simply asked: Do you have any objections?

17 MR. NELSON: Who did the asking? Do you know?

18 MR. ABSTON: Someone on your staff.

19 MR. NELSON: Was that Bill Reamer?

20 MR. ABSTON: Right; Reamer asked them.

21 MR. NELSON: Well, why don't we get him up here.

22 CHAIRMAN HENDRIE: Rather than -- Bill, just stay  
23 where you are.

24 MR. NELSON: Bill, did you put pressure on these  
25 people?

1 CHAIRMAN HENDRIE: Just stay where you are.

2 (Laughter.)

3 MR. NELSON: When did you stop beating your wife?

4 CHAIRMAN HENDRIE: Let me -- I have full  
5 confidence that Bill didn't do anything undue, and so on.

6 Let me suggest the following. It is a concern.  
7 Employees who are asked by the inspector and auditor to  
8 talk in very frank terms, and with a promise of protection  
9 of full confidentiality, who then are in effect double-  
10 crossed by the agency that employs them, and presumably to  
11 whom they might feel some loyalty, I simply can't support  
12 that.

13 If we have to come to a time, in fact, when we  
14 can no longer assure individuals being interviewed of the  
15 confidentiality of their statements, then so be it. But my  
16 understanding is that in fact that promise has been extended  
17 on behalf of the agency in the past, and I think if we cannot  
18 honor those promises we have no right to expect people to  
19 be candid with us in the future.

20 MR. NELSON: I don't want to argue this issue,  
21 because we'll be off a half an hour.

22 CHAIRMAN HENDRIE: Okay, let me -- now, let me  
23 suggest simply --

24 COMMISSIONER KENNEDY: Could I interject there,  
25 if I may before you leave that point, though, when you do

1 take that half an hour -- because I would like to hear that  
2 discussion, counsel -- I wish you would take into account  
3 in the discussion the interest of the Congress in such  
4 matters when they are trying to legislate the very protection  
5 that we're talking about -- confidential informants.

6 So, I would like to see how all that works --  
7 what works in some cases, not in others -- and I'd like to  
8 see what the differences are, and I'd like to understand  
9 them better. Not now, but at some point in the future.

10 MR. NELSON: As far as the releases in this case --  
11 the consensual releases -- would it be an extra measure of  
12 protection if we obtained written consent to the release from  
13 those individuals?

14 CHAIRMAN HENDRIE: I don't --

15 MR. NELSON: Would that help assure the --

16 CHAIRMAN HENDRIE: No, if you will all be calm  
17 and let me finish what I have to say, I'll get on to it.

18 I don't feel the need for them to yet further  
19 affirm the voluntary nature of their release. What I would  
20 like you to do, however, is -- providing this agreement  
21 goes, and the names of people who do not agree are struck --  
22 that the counsel's office go back to those people who have  
23 volunteered release, point out that others have said "no,"  
24 and ask them, just quietly, once again, if they do indeed  
25 voluntarily release their statements in full; and give them

1 the option, at that time once again, of striking their names  
2 if they so wish.

3 MR. NELSON: We will be glad to do that.

4 CHAIRMAN HENDRIE: I think in this way it --

5 COMMISSIONER GILINSKY: You know, why don't we --

6 CHAIRMAN HENDRIE: -- provides a further check.  
7 It seems fair to me, and I propose it to you.

8 COMMISSIONER KENNEDY: One minor point, in this  
9 connection: Do they -- assuring that they understand that  
10 when their statement is being released, assuming that they  
11 voluntarily authorize that, that the names of parties which  
12 may have appeared in that statement will be deleted, as I  
13 understand this piece of paper.

14 COMMISSIONER GILINSKY: Why don't we just delete  
15 those names, right off the bat?

16 COMMISSIONER KENNEDY: It says: "Deletions will  
17 be made to protect the privacy rights of others in their  
18 statements." In the released statements.

19 MR. ROTHSCHILD: That's in Part I.

20 The whole report would be made available to  
21 Mr. Bastekas and his attorneys with no deletions for the  
22 purpose of arguing relevance.

23 CHAIRMAN HENDRIE: Wait. Wait. Wait. If you  
24 tell me that a batch of you out there have made statements  
25 about me, and I'm saying "Who said that? Who said that?"



1 Who are those guys? What did they say?" And you say,  
2 "Well, I'll let you see what they said, but you can't find  
3 out who it is." Nevertheless -- and I can have those  
4 pieces of paper -- nevertheless, I can go over there and  
5 read the whole damn thing with the names on it: Will you  
6 please tell me what sort of an arrangement that is to  
7 protect confidentiality?

8 MR. NELSON: Well, it's only as good as the  
9 attorney's word that signed the agreement, and a provision  
10 of the agreement would be that it may be a protective order,  
11 and that it may be filed in the grievance proceeding, and  
12 that all would consent to its enforcement by the Administrative  
13 Law Judge, or by the Nuclear Regulatory Commission.

14 We were discussing words like that downstairs.

15 What that means is, as far as the lawyers are  
16 concerned, that if you catch them violating it they're in  
17 very serious trouble -- with the Agency, with the Bar  
18 Association, and so forth.

19 As for the grievant himself, if he's proven to  
20 have violated it, I suppose that's a matter that would have  
21 to be then considered.

22 CHAIRMAN HENDRIE: When --

23 MR. NELSON: In the last analysis, if you want  
24 the kind of agreement and protective order that would  
25 guarantee that nothing will ever happen, I don't know how

1 that can be done, realistically, in the world.

2 MR. PEDERSON: Mr. Chairman, with respect to  
3 confidentiality, isn't it confidentiality "from" the grievant  
4 that really concerns these people?

5 MR. ABSTON: Okay, it really boils down to two  
6 alternatives. In other words, it's really almost criminal  
7 to promise people that you'll keep their statements  
8 confidential, but then you later permit someone else who has  
9 nothing whatsoever to do with the situation to view those  
10 statements. I agree with you 100 percent; it's going to be  
11 disastrous. People are going to be upset, and they have a  
12 right to be upset.

13 Okay, now the alternative is to release the report  
14 under a protective agreement, that it won't be copied,  
15 discussed, or else -- and it would only be used -- that  
16 portion that has relevance to the grievance.

17 The alternative to that is to go into court,  
18 under the grievance, and maybe the whole report will be  
19 coming in as a part of the grievance hearing.

20 COMMISSIONER BRADFORD: There is another side to  
21 this. It isn't simply a matter of whether or not the  
22 agency can keep its promises to its employees. I mean, of  
23 course we can do that.

24 But at the same time, I take it that employees  
25 in a situation in which they are transferred, or disciplined,

1 or otherwise, have some right to understand the basis upon  
2 which that action was taken.

3 And we may have some problems with situations in  
4 which information was solicited on the basis of promises  
5 that perhaps were unwisely extended in the first place, given  
6 the framework of the employee's rights, so it isn't an easy  
7 matter of simply saying the NRC should keep its promises,  
8 and therefore the report is closed.

9 COMMISSIONER KENNEDY: Here the problem, if I  
10 understand the situation correctly -- and I agree with that,  
11 Peter -- we obviously must bend over backwards to protect the  
12 rights of every individual. Indeed, I think that's an  
13 obligation which we simply have to serve.

14 But as I understand the problem here, it gets  
15 complicated by the fact that the investigation was done in  
16 a completely different context altogether. It wasn't intended  
17 at all as a measure leading to anything having to do with the  
18 move of the individual.

19 MR. ENGELHARDT: And I think this is also important  
20 to bear in mind -- that that document, as far as the staff is  
21 concerned, is not relevant to this grievance procedure at all.  
22 Because it was not that document, nor was it that investi-  
23 gation, which led to the action of the Director of the  
24 Office of Administration in transferring this individual.

25 We are prepared, in order to clear the air, to

1 assure people, and to assure the grievant's attorney, and  
2 the grievant, that there was no basis for concern that this  
3 report served as any basis for the personnel action to make  
4 it available under appropriate arrangements.

5 But, if and when arguments are going to be made  
6 before this Hearing Examiner, the staff is going to reserve  
7 its right to object to whatever they feel is -- and in  
8 this case, a substantial portion if not all of it -- but  
9 object to it as being used as irrelevant to the grievance  
10 that is before this Hearing Examiner.

11 So we have an additional complication which poses  
12 a lot of problems: The original report was asked for under  
13 a Freedom of Information Act request. It was asked for  
14 under the grievance, as well.

15 And we are here now in an effort to make an  
16 equitable arrangement to resolve the difficulty as to the  
17 availability of the report, and to avoid challenges, and to  
18 avoid suspicions that the report somehow was used as a  
19 basis for a grievance, to make it available by this  
20 mechanism which the general counsel has just been describing.

21 COMMISSIONER GILINSKY: Now what is the --

22 MR. ENGELHARDT: And I think it's important to  
23 know that distinction, as to what we think that report --  
24 that we think the report is not relevant to this grievance.

25 COMMISSIONER GILINSKY: What is the relation of

1 these two requests? You're acting here on the basis of the  
2 request under the grievance procedure?

3 MR. ENGELHARDT: Well, the Freedom of Information  
4 Act request, and the grievance. In other words, there are  
5 two things pending, and maybe the general counsel would  
6 like to discuss that aspect.

7 COMMISSIONER GILINSKY: Now this would not be  
8 released under the Freedom of Information Act.

9 MR. ENGELHARDT: Well, the general counsel has  
10 staked out a position with regard to that aspect. I believe  
11 you have already enunciated your views, in the communications  
12 with the Commission.

13 MR. NELSON: Well, I feel, as I have said to the  
14 Commission, we don't care whether it's released under the  
15 label "FOI," or the label "grievance," provided the man  
16 gets a certain minimum that we think he's entitled to as a  
17 matter of fundamental merits.

18 MR. ABSTON: But the Commission has denied the  
19 appeal, on several occasions, and I personally see no reason  
20 for not denying this appeal on an FOIA. I think we're on  
21 good grounds on the FOIA.

22 MR. NELSON: The agreement we've been talking about  
23 is more a grievance-type agreement. It would deal with use  
24 in the grievance proceeding, and the protective conditions  
25 were being fashioned with an idea to look at that proceeding.

1 MR. ENGELHARDT: Now the Commission is not  
2 involved in the grievance. The grievance is a matter between--  
3 now, it's a matter before the Executive Director for  
4 Operations, who has designated or will designate it, with  
5 the agreement of the grievant's attorney, a hearing examiner  
6 from outside the Agency, who will collect the facts and who  
7 make a recommendation to the Executive Director for  
8 Operations with regard to the decision that was made by  
9 Mr. Donoghue in connection with the grievance -- the  
10 initial grievance.

11 Mr. Donoghue did not rely, in his action, on the  
12 content of that report, and has not had any bearing on his  
13 actions in dealing with the grievance.

14 So that the document, as far as we're concerned,  
15 has no relevance to the proceeding at all. And it could be  
16 dealt with under the -- as a straight Freedom of Information  
17 Act request, or as we are dealing with it here in an effort  
18 to clear the air and avoid suspicions that there is something  
19 here that is not the case, to make it available under very  
20 protective arrangements to assure that it has an absolute  
21 minimal distribution, dissemination, or availability, and  
22 to limit the availability to the attorney representing the  
23 grievant, and the grievant.

24 MR. ABSTON: What was really unfortunate about the  
25 whole situation: The individual concerned was not a part of

1 the investigation. He was deliberately excused from the  
2 investigation. But in passing, when we were talking to  
3 various people in passing, his name was mentioned, I think,  
4 seven times, and we recorded it and it turned up in the  
5 report. It was very minor, and he was really not a part of  
6 the investigation at all.

7 CHAIRMAN HENDRIE: What was the subject of the  
8 investigation?

9 MR. ABSTON: The subject of the investigation  
10 was the problems in this one branch in the NRR, the  
11 Electrical Instrument Control Systems Branch.

12 MR. NELSON: Certain personnel and organization  
13 matters specifically concerning the EICS Branch.

14 MR. ROTHSCHILD: The problem arose was -- frankly,  
15 it was a letter that Chairman Rowder sent to Congress on this  
16 matter, as a follow up to some hearings that were held on the  
17 subject, and there was one line that in effect said that  
18 these transfers -- including the transfer of Mr. Bastekas --  
19 was in part based on the McTiernan report. And in fact, the  
20 staff and OIA believed that was basically erroneous; that  
21 it may have been appropriate to transfer the other individual,  
22 but it was not applicable to the transfer of Mr. Bastekas.

23 The only problem is, now that you have gone and  
24 told Congress and made it a part of the record that this  
25 was relevant -- that you based his transfer in part upon that

1 report -- it is very hard for the Agency now to deny  
2 everything, under both the grievance proceeding and/or under  
3 the FOIA and say this is not relevant at all to what is going  
4 on here -- which is in fact the case.

5 We don't believe it is relevant, and we don't  
6 believe the seven references are relevant. It's just that  
7 we have this one statement from the Chairman of the  
8 Commission. That's the root of the whole problem.

9 MR. NELSON: I wouldn't say that the seven  
10 references are not relevant -- I don't know whether one can  
11 argue that.

12 You have not only the Chairman, you have Mr.  
13 Rusche who testified, quote, "As a final consideration of  
14 the matters raised in the OIA report, I announced a  
15 reorganization of the Division of Systems Safety aimed at  
16 improving the difficult human relations situation and the  
17 organizational effectiveness of the EICS Branch." Mr.  
18 Rowder's line, which is that the transfers of the grievant  
19 and another employee, quote, "were taken in response to an  
20 investigation by Mr. Thomas J. McTiernan, Director, Office of  
21 Inspections and Audit, into" --

22 COMMISSIONER BRADFORD: Mr. Chairman --

23 MR. NELSON: Now, having said that --

24 COMMISSIONER BRADFORD: -- it was you, rather than  
25 me, that reserved the right to tug on a sleeve, and I'm not



1 it's still Victor's sleeve that's appropriate, but I think  
2 maybe this meeting has run about as far as it usefully can  
3 without beginning to prejudice the possibility of the  
4 parties being able to work out an agreement.

5 MR. ABSTON: It's either go to the mattress, or  
6 negotiate more; it's one or the other.

7 (Laughter.)

8 MR. ABSTON: You either take a hard-nosed approach  
9 that we're not going to release anything under any  
10 circumstances and let the general counsel defend this in  
11 court --

12 MR. NELSON: Thank you.

13 MR. ABSTON: -- or at the Department of Justice,  
14 or we try to work out something that's acceptable to all the  
15 parties.

16 MR. ENGELHARDT: But the arrangement that's being  
17 planned -- worked out in disclosing the report would, at  
18 least at this juncture, make available the names of  
19 individuals who were named under that report.

20 COMMISSIONER KENNEDY: But under the protective  
21 order.

22 MR. ENGELHARDT: Under the protective order. But  
23 under the protective order, the grievant's attorney would  
24 have the opportunity to further question those individuals  
25 named, and even call them as witnesses if he feels -- and

1 the board -- the Hearing Examiner feels the issue is relevant  
2 to this particular grievance.

3 COMMISSIONER GILINSKY: Let me understand, Tom.  
4 This includes the interviews of persons who have not  
5 consented to the release of the interview?

6 MR. ABSTON: May I clarify something? There's  
7 two -- we're talking about two interviews. We're talking  
8 about the report which contains the interviews; that's one  
9 set of interviews; there's 30 or 40 people involved.

10 The four individuals who have consented that  
11 their interviews be released are interviews that they gave  
12 to the general counsel's office and are not included in  
13 that report. That's something altogether different.

14 Now that's what we had agreed to --

15 CHAIRMAN HENDRIE: Well, now, we're talking  
16 here about individuals assured of confidentiality by your  
17 office.

18 MR. ABSTON: Right; okay. But, now -- we're  
19 talking about the ones in the report, okay? That's separate  
20 from the four that he's talking about in the paper. Those  
21 were taken by the general counsel's office --

22 COMMISSIONER GILINSKY: And those are relatively  
23 recent? Is that the idea?

24 MR. ABSTON: No, they were some time after our  
25 report. I can't remember exactly when.

1 MR. NELSON: I can get the date.

2 COMMISSIONER GILINSKY: Oh, so this antedates  
3 your arrival here, Jerry?

4 MR. NELSON: Long antedates it, if I may say.

5 MR. ABSTON: But it was --

6 COMMISSIONER KENNEDY: I'm not sure what relevance  
7 that is.

8 MR. ABSTON: Well, the same individuals are  
9 involved, but they're different statements.

10 COMMISSIONER GILINSKY: I was just trying to find  
11 out when that happened.

12 MR. ENGELHARDT: Well, let me mention this: As  
13 far as the so-called McTiernan report is concerned -- the  
14 report proper -- the proposal would be to make that report,  
15 in toto, available under a protective arrangement to the  
16 attorney for the grievant and the grievant.

17 And they would then be able to make whatever  
18 arguments they can to the Hearing Examiner as to the relevance  
19 of that report, portions of that report, or interviews with  
20 individuals who are contained within that report, to the  
21 grievance.

22 And that is where we, in the Office of the Executive  
23 Legal Director, would be prepared, as we see it, to argue  
24 that point.

25 COMMISSIONER GILINSKY: Well, who represents the

1 individuals who gave the interviews?

2 MR. ENGELHARDT: They are not represented in this  
3 proceeding.

4 COMMISSIONER KENNEDY: Tom, could I ask --

5 COMMISSIONER GILINSKY: Well, who's looking out  
6 for their rights?

7 COMMISSIONER KENNEDY: Well, that's sort of my  
8 question. Could I just --

9 COMMISSIONER GILINSKY: Sorry.

10 COMMISSIONER KENNEDY: Following that precise  
11 point, Tom, I want to go back to something you said a moment  
12 ago to be sure I understand it.

13 If the report, which includes all of these  
14 interviews and everything else, is turned over to the Hearing  
15 Examiner, to the grievant and his attorneys, under the  
16 protective order, it then devolves upon the grievant and  
17 his attorneys to show relevance and prove it to the Hearing  
18 Examiner.

19 Having done that, any part which is shown to be  
20 relevant or agreed by the Hearing Examiner -- to be ruled  
21 by the Hearing Examiner to be relevant, is now fair game.  
22 And indeed if that involves a part of an interview, that  
23 interviewee is then subject to call before the hearing as a  
24 witness. Is that correct?

25 MR. ENGELHARDT: Correct.

1 COMMISSIONER KENNEDY: Even though he was not  
2 aware that indeed the confidentiality of his earlier interview  
3 had already been breached. Is that correct? I want to  
4 understand what the actual situation would be.

5 MR. ENGELHARDT: That, I think, is a fair statement.

6 COMMISSIONER KENNEDY: Okay, now that's the first  
7 question -- and I think that's part of what your concern is.

8 The second part that I see as a possible concern  
9 is: In the effort to show relevance in the first instance,  
10 must this be done on the basis of the documents themselves?  
11 Or, as to portions which the grievant and/or his attorneys  
12 are alleging would be relevant, is any portion of that then  
13 subject to testimony before the Hearing Examiner? And, could  
14 one of the testifiers in the earlier report be called before  
15 the Hearing Examiner in the effort to seek relevance?

16 CHAIRMAN HENDRIE: To establish relevance.

17 COMMISSIONER KENNEDY: Yes, to establish relevance.  
18 Could that be the case?

19 MR. ENGELHARDT: It's possible.

20 CHAIRMAN HENDRIE: Once the grievant and his  
21 attorney read the report and know the names of people who  
22 mentioned the grievant in the course of their interviews,  
23 those people are fair game to be called into the grievance  
24 proceedings by that side, in any event, aren't they --  
25 whether the report is judged in any sense relevant?

1 MR. ENGELHARDT: They could be --

2 CHAIRMAN HENDRIE: So once the report is open  
3 before them, why those people are exposed; okay?

4 MR. ENGELHARDT: Exactly.

5 CHAIRMAN HENDRIE: Well, I must say I have to ask,  
6 with Commissioner Gilinsky: Who is looking out for the  
7 rights of those members of the staff?

8 COMMISSIONER KENNEDY: My question is the same.

9 MR. NELSON: Well, you have a very -- putting my  
10 own prejudices to one side -- you have conflicting policies  
11 here. There is no solution that is going to make --

12 COMMISSIONER KENNEDY: Well, wait. Could I use a  
13 different word than "policies"? You know, I think it's more  
14 than policies, isn't it? It's equities.

15 MR. NELSON: You have conflicting equities and  
16 claims --

17 COMMISSIONER KENNEDY: That's right.

18 MR. NELSON: -- to authenticity.

19 I can only tell you that, from a litigation  
20 viewpoint, matters are difficult; that the appearance has  
21 fairness problems; that perhaps these men should never have  
22 been given the kind of sweeping assurances they were given;  
23 or, perhaps once having been given, nobody should have  
24 embraced this document in explaining the reassignment of  
25 the grievant. Perhaps mistakes were made along the way, but

1 here we are.

2 One way that it is done with companies sometimes  
3 in the competitive area, where trade secrets are alleged  
4 and the government determines to release, is to give suf-  
5 ficient advance notice to enable the companies to obtain  
6 restraining orders against the release.

7 Now that's all right if you're talking about a  
8 big company with money, but if you're talking about the  
9 ordinary government employee, it's not too meaningful.

10 CHAIRMAN HENDRIE: For ordinary employees, I  
11 don't find that --

12 MR. NELSON: I don't know what to do. This is  
13 a very, very tough conflict.

14 I could make a very flip and easy suggestion,  
15 and that is: To find the manner or position that's  
16 acceptable to him, and let's move on. I don't know that  
17 that --

18 MR. ABSTON: I may interject one thing that might  
19 rest some of your fears. The concerned individual knows  
20 exactly -- all the people involved. He knows all the  
21 individuals, all the staff members, all the branch chiefs,  
22 assistant directors.

23 COMMISSIONER KENNEDY: They are personally known  
24 to him...

25 MR. ABSTON: Right, yes.. So, they could call

1 any of these witnesses, irregardless of anything else, cold.  
2 So the mere fact that they had the access to the report, I  
3 doubt seriously would give him much insight as to --

4 MR. NELSON: But they'd know what he said; that's  
5 the point.

6 MR. ABSTON: Yes, but about somebody else.

7 MR. NELSON: On the one hand, on want the  
8 confidentiality; you want management discretion. On the  
9 other hand, you want fairness with the grievant.

10 MR. ABSTON: It'll really be an absolute disaster  
11 to our office. It'll make our job a hundred times more  
12 difficult, and what's --

13 COMMISSIONER KENNEDY: Well, I would suggest it  
14 would make it essentially impossible in the terms that the  
15 office was created, and in the terms for which the office  
16 has stood under the "open door" policy and everything else  
17 since that creation.

18 MR. NELSON: You could get all the statements.  
19 All you have to do is not purport to transfer people on the  
20 strength of the statements.

21 COMMISSIONER KENNEDY: Well, I don't think we --

22 MR. NELSON: That's where it -- where the  
23 government can't have its cake and eat it, too.

24 COMMISSIONER KENNEDY: Well, I agree with that.  
25 I agree with it 100 percent; don't misunderstand. You know,



1 I believe the grievant has clear rights here which simply  
2 cannot, should not, must not be abridged. They've got to  
3 be protected. I understand that.

4 MR. ABSTON: So, really, we're working with two  
5 things. Under the FOIA, if the Commission denies the appeal,  
6 okay, we're on firm ground there.

7 Okay, what's released under the grievance under  
8 protective order will satisfy the individual involved, and  
9 probably satisfy the grievance in the public -- so there are  
10 merits on both sides.

11 MR. ENGELHARDT: Yes, but we don't know what the  
12 reaction might be with regard to those who are named in the  
13 report. We don't have any idea what their feelings might  
14 be in regard to our limited release.

15 COMMISSIONER KENNEDY: Who are not "interviewees"--

16 MR. ENGELHARDT: Who have not seen this report.

17 COMMISSIONER KENNEDY: -- but whose names are  
18 mentioned by the people who are interviewed, and who now  
19 do not even know that their names were mentioned in that  
20 report, you're saying.

21 MR. ENGELHARDT: That's right.

22 MR. ABSTON: Most of them are going to be highly  
23 upset. You know, they're going to really be upset, and  
24 they're going to have the right to be. And there's really  
25 no way that it'll be kept secret. Once the report goes to

1 the Hearing Examiner and he releases it to the attorneys  
2 involved, the word will get out, and these people are going  
3 to be highly incensed. We're going to receiving all kinds  
4 of --

5 COMMISSIONER KENNEDY: You mean, the "fact" that  
6 it has, not its content --

7 MR. ABSTON: Right.

8 COMMISSIONER KENNEDY: -- but simply the fact  
9 that this has happened.

10 Well, of course the fact will be --

11 MR. ABSTON: And the only position that we can  
12 take is: Look, you know, we defend under the FOIA; we  
13 promised you confidentiality to the extent that we possibly  
14 could under the grievance; it was released under the  
15 protective order --

16 MR. DONOGHUE: But we're not legally compelled to  
17 release it in the grievance proceeding.

18 MR. NELSON: Do you all know that there is an  
19 argument that the promise was broken?

20 COMMISSIONER KENNEDY: What promise?

21 MR. NELSON: The promise of confidentiality.  
22 The grievant's lawyers have submitted a memorandum -- which  
23 I don't know that I ever circulated beyond discussing -- in  
24 which they alleged that there was a circle of people, that  
25 the promise was made it wouldn't go below that circle, or

1 that line; that it did go below that line -- they allege.

2 MR. ABSTON: I can testify to the fact that it  
3 was investigated, and the allegations proved to be unfounded.

4 MR. NELSON: Well, then in that case their  
5 allegation is incorrect, but there is an allegation being  
6 made and seriously pressed that the promises were broken, and  
7 that the statements were shown to somebody that wasn't in  
8 the original -- I have no idea about it.

9 COMMISSIONER KENNEDY: Well, where does this leave  
10 us?

11 CHAIRMAN HENDRIE: Amply puzzled, is where I think  
12 it leaves us -- the conflicting --

13 MR. NELSON: No purpose.

14 CHAIRMAN HENDRIE: -- the rights and claims are  
15 clear.

16 Please tell me what, in fact, the law compels  
17 the Commission to do? Or is that a matter of interpretation?

18 MR. NELSON: Well, under the Freedom of  
19 Information Act, we have a request by a person for government  
20 records. They have to be produced, unless they fall within  
21 one of nine exemptions.

22 They're not classified; that takes care of the  
23 first exemption. They're not little, piddling detail in  
24 which no one could conceivably have any interest within the  
25 meaning of the Supreme Court's construction of the second.

1           They're not covered by any particular statute,  
2           which is the meaning of the third. They're not trade secrets  
3           of commercial or financial information, the fourth. There  
4           may be some question about the fifth -- and I'll come back  
5           to that in a moment.

6           The sixth deals with records which may be with-  
7           held to protect against a clearly unwarranted invasion of  
8           personal privacy. The case law there puts you directly into  
9           the task of weighing the interests of the requestor against  
10          the interests of those whose privacy is sought to be  
11          protected. That may have something to do with this case.

12          They are not investigatory records compiled for  
13          law enforcement purposes, within the meaning of the seventh.

14          They have nothing to do with banks, or oil wells,  
15          so far as I know, so the eighth or ninth aren't invoked.

16          Therefore, you've got to produce the records,  
17          unless they are exempt under the fifth or sixth. Exemptions  
18          are to be sparingly applied -- "rigorously applied" -- the  
19          thrust of the law of disclosure notwithstanding.

20                 COMMISSIONER GILINSKY: What is the fifth?

21                 MR. NELSON: The fifth exemption literally has  
22                 to do with that which you could not get in discovery if you  
23                 were conducting a private lawsuit against the government.  
24                 It's confusing if you read it that way, but if you translate  
25                 it into opinions, advice, recommendations made in the give and

1 take of coming up with policy, you have the fifth exemption.

2 The FOIA also requires that "reasonably segregable  
3 portions" of exempt records be released. That is, if the  
4 Agency has to go at and pull out the stuff that's not  
5 exempted, release that even if some stuff is exempt on the  
6 same page.

7 Now, the fifth exemption cases have generally  
8 laid down the rule that that which is purely factual is  
9 not covered by the fifth exemption. And if one were to  
10 apply that kind of thinking, you would come out with the  
11 conclusion that the fifth exemption doesn't cover anything  
12 at all here, period.

13 And there is a case of witness statements given  
14 under the Unfair Labor Practice-National Labor Relations Act  
15 to support charges of unfair labor practices, where a court  
16 has so held.

17 We know for a fact that there is more than one  
18 case in the labor field ordering production of statements  
19 given by witnesses in support of unfair labor practice  
20 charges on the ground that they're purely factual.

21 On the other side of the coin are three cases.  
22 One called "Brockway," and another one which follows  
23 Brockway. Those have to do with the protectability of  
24 military aircraft accident reports.

25 A legal system which, as I recall, Commissioner

1 Kennedy might refresh my recollection on this -- there are  
2 in effect two sets of accident reports: one public, and  
3 one nonpublic.

4 The public one is a pretty good fullsome discus-  
5 sion of what happened in the accident. The nonpublic one  
6 is produced, by the strongest assurances of confidentiality,  
7 given in the interest of national defense, of national  
8 security, to attempt to find out everything in the world that  
9 might have gone wrong with that airplane at that time.

10 The courts have upheld the military -- specifi-  
11 cally a Navy case and an Air Force Case -- in protecting  
12 those kinds of factual documents, because of the express  
13 need for the confidentiality in the national security and  
14 national defense sense.

15 The applicability --

16 COMMISSIONER KENNEDY: Is this the Air Force case?

17 MR. NELSON: The Air Force case, I think, is the  
18 Brockway case, Commissioner, and the Navy case is more  
19 recent. The name of it is not in my head at this moment.

20 There is an Army IG case, decided here in the  
21 District Court, where that kind of protection was given to  
22 an Army IG report. This is a one-judge, one-district-court  
23 opinion here in Washington, and that case we would want to  
24 cite on our side, as well, if we were purporting to withhold  
25 all of this.

1 Now, I would say that the Army IG case facts,  
2 according to my friends in the Pentagon, involve civilian  
3 employees who were dissatisfied that they weren't getting  
4 cut in on the awards policy. And an IG investigation was  
5 conducted of the extent to which people were getting a fair  
6 crack at the awards.

7 CHAIRMEN HENDRIE: Maybe you'd better send us a  
8 copy.

9 (Laughter.)

10 MR. NELSON: That's a little bit different from a  
11 man who puts himself in the position of the grievant in this  
12 case, it seems to me.

13 So that I personally have very cautious feelings  
14 about overreliance on the Brockway line of cases. I do not  
15 rule out that we could make a respectable legal argument.  
16 We've said that in papers from our office, and I don't mean  
17 to degrade that argument. I think it arises on a parti-  
18 cularly bad factual situation.

19 You have the grievant reassigned. He doesn't  
20 like where he is. There's some papers that emanate from  
21 high up that seem to show that this book had something to  
22 do with it, and we tell him: Sorry, old fellow, you can't  
23 see those papers; on the strength of which -- or at least  
24 in part because of which, some people said you got trans-  
25 ferred.

1 MR. PEDERSON: Jerry, the view of the Justice  
2 Department on this would seem to be important. Have they  
3 been talked to about our ability to defend this under FOIA?

4 MR. NELSON: Yes. They say that they are willing  
5 to defend this case under the FOIA; yes, sir. That is my  
6 understanding from conversations with Bob Salischer.

7 MR. ABSTON: Yes. There's two separate things:  
8 There's the FOIA, and the grievance; and they shouldn't be  
9 comingled.

10 Now, we have successfully defended not only this  
11 report but other investigative reports that gets hundreds  
12 and hundreds of requests. And the Commission has gone along  
13 on the appeals, denying the appeals on Exemptions 5 and 6.

14 So, that's pretty well -- we're pretty well set  
15 on that.

16 Now, what you do under the grievance is something  
17 altogether different. They shouldn't be comingled.

18 MR. NELSON: Well, I hear that argument that's  
19 being made by everybody except me.

20 (Laughter.)

21 MR. NELSON: I think that there isn't a judge in  
22 the world that isn't going to comingle the two in its own  
23 mind. I don't think we can look at these as two abstract  
24 compartments.

25 When these fellows walk in a district court in a



1 Freedom of Information Act case, he's going to tell them  
2 exactly why he wants all this stuff.

3 COMMISSIONER KENNEDY: Doesn't that depend upon  
4 what matter is put before the judge? If the question is  
5 an abstract one as to the application of the Freedom of  
6 Information Act by the Commission, that's one thing.

7 But, if the question is the equities involved in  
8 the individual's grievance suit, and whether or not his  
9 rights and concerns have been properly protected, whether  
10 the guy got the information under the Freedom of Information  
11 Act or under his grievance procedure doesn't matter, so long  
12 as --

13 MR. NELSON: You're absolutely right.

14 COMMISSIONER KENNEDY: -- in that case the judge  
15 felt that he ought to get it.

16 MR. NELSON: Absolutely right.

17 COMMISSIONER KENNEDY: And in that case, Gene  
18 Abston's case is right.

19 MR. ABSTON: Right. Because if you give it to  
20 him under FOIA, then everybody else is entitled to it. Not  
21 only that report, but every other report.

22 MR. NELSON: If the fellow's sitting there with  
23 a bunch of documents that he got in the grievance proceeding  
24 litigating for him under a different label for the rest of  
25 them in the district court, we're in a much, much better

1 posture. That's not what I'm trying to disagree with.  
2 I'm sorry I wasn't clear.

3 I was speaking to the notion that the two are  
4 inseparable boxes. We can deny it in the FOIA case, ship  
5 them out to the grievance proceeding, and we'll never hear  
6 from them again.

7 That is a mistake. It is my recommendation that  
8 we not do that.

9 Finally, let me say this. Legally, under the  
10 Freedom of Information Act, the sixth exemption which does  
11 protect against "clearly unwarranted invasions of personal  
12 privacy" requires a balancing process between the conflicting  
13 interests -- the interests of the requestor and the  
14 interests of the person whose privacy is sought to be  
15 protected.

16 If that case law means anything at all, it seems  
17 to me to inevitably intrude the grievance proceeding and  
18 the equities into the kind of sixth exemption determination  
19 that you would have to make for FOIA purposes.

20 So, I would have trouble in legally, saying that  
21 there are two separate boxes; and I have trouble in the  
22 real-world of litigation in saying there are two separate  
23 boxes.

24 If, however, he gets the papers in the grievance  
25 proceeding, I promise you won't hear from me again about this

1 case.

2 (Laughter.)

3 MR. NELSON: I don't care. We can give it to him  
4 under any label. My view is: The man is entitled to  
5 something, as a matter of fundamental fairness. Now, we can  
6 argue about the details -- how much, in what name, and all  
7 the rest -- and give him nothing. It seems to me to be very  
8 bad law, and very bad policy in dealing with career  
9 employees.

10 I have said enough.

11 CHAIRMAN HENDRIE: But we still find ourselves  
12 unable to reconcile that proposition with the equally  
13 reasonable one --

14 MR. NELSON: Now that we know the --

15 CHAIRMAN HENDRIE: -- that employees promised  
16 confidentiality are likely to be turned out.

17 MR. NELSON: Well, there is an advantage in this  
18 exercise. And that is, that the grievant's lawyers have  
19 heard all of this, and perhaps they can understand a little  
20 better what we've been dealing with in trying to talk with  
21 them, and the depth of the policies that are at stake.

22 COMMISSIONER KENNEDY: And indeed it goes to the  
23 very heart of the open-door policy which we have repeatedly  
24 asserted as an underlying principle of the way this  
25 Commission is to function, which we have assured the Congress

1 over and over again we would give every impetus to.

2 Now there's an obvious conflict. Let me say --  
3 let me just be sure to close that on the note that I remain  
4 wholly mindful of the concerns we must have for the rights  
5 of the grievant; they must be protected.

6 MR. NELSON: I can only suggest we try to go back  
7 to the drawing board, having heard the discussion and the  
8 seriousness of the Commission's concerns, and see if there  
9 is any workable way to do it.

10 Nothing would happen without your approval.

11 CHAIRMAN HENDRIE: Since I don't have any better  
12 place to turn, I recommend that course to my colleagues.

13 COMMISSIONER BRADFORD: Good. Let's cancel the  
14 meeting.

15 (Laughter.)

16 CHAIRMAN HENDRIE: Or, maybe we could back and  
17 vote to close, now.

18 (Laughter.)

19 COMMISSIONER KENNEDY: Let me say that I think  
20 that the meeting, in ventilating these issues a bit and  
21 getting them out so they can be discussed, has been  
22 extremely useful for my own thinking and I appreciate it.

23 MR. NELSON: Very much so for us, too.

24 CHAIRMAN HENDRIE: Okay. Thank you very much.  
25 The Commission may have a minute and a half, and then we

1 will turn to the subject of the response to States of New  
2 York, Wisconsin, and Ohio.

3 (Whereupon, at 3:40 p.m., the hearing was  
4 adjourned.)

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