



The Use of Non-Public Information in the NRC Licensing Process

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Topics

- Protecting proprietary information submitted to NRC
- Other protected information, including Classified information, Safeguards Information (SGI) and Sensitive Unclassified Non-Safeguards Information (SUNSI)
- Confidential information in the NRC hearing process

Disclaimer: these are my own views and opinions, and not the opinions of Westinghouse Electric Company.

Legal Framework – Freedom of Information Act (FOIA)



FOIA.gov

Source: www.foia.gov

- 5 U.S.C. § 552; enacted 1966 (amended several times since)
- Basic purpose: “to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”
- Enforceable right of the public to gain access to federal “agency records”
- Presumption of disclosure, unless an exemption applies
- Exemption 4:
 - trade secrets
 - commercial or financial information that is confidential
 - Intended to encourage voluntary submission of useful information to the government and ensures confidential information is protected
 - Balancing of public and private interests



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NRC Regulations & Guidance

- 10 C.F.R. § 2.390 originally codified in 1956 (predates FOIA)
 - Governs submission of information to NRC
 - “Final NRC records and documents ... shall not, in the absence of an NRC determination of a compelling reason for nondisclosure after a balancing of the interests of the person or agency urging nondisclosure and the public interest in disclosure, be exempt from disclosure and will be made available for inspection and copying at the NRC Web site, <http://www.nrc.gov>. . . .” Emphasis added.
- 10 C.F.R. Part 9
 - Governs FOIA requests from the public
 - Defines agency record as “a record in the possession and control of the NRC that is associated with Government business.”
- Guidance:
 - [Regulatory Issue Summary 2004-11 \(Supporting Information Associated with Requests for Withholding Proprietary Information\)](#)
 - [Regulatory Issue Summary 2014-01 \(Regulatory Requirements for Withholding of Proprietary Information from Public Disclosure\)](#)
 - [Information Notice 2009-07 \(Withholding of Proprietary Information from Public Disclosure\)](#)
 - [NRC Management Directive 3.1 \(Freedom of Information Act\)](#)

10 C.F.R. § 2.390 Overview

- Establishes a presumption of disclosure for documents sent to NRC for licensing and rulemaking documents
 - Compelling basis needed for nondisclosure
- Standard FOIA exemptions apply
 - § 2.390(a)(4): exempts trade secrets and commercial or financial information
 - Other exemptions include national security, personal privacy, law enforcement
- 10 C.F.R. § 2.390(b): procedures for requesting withholding from public disclosure
- 10 C.F.R. § 2.390(c): granting or denying requests for withholding
- 10 C.F.R. § 2.390(d): treatment of security-related information



Source: www.nrc.gov

Requirements for Withholding Proprietary Information: 10 C.F.R. § 2.390(b)

- Must be met every time a proprietary document could become an agency record
- Basic Requirements
 - Marking of proprietary documents
 - Bracketing of information within proprietary documents
 - Affidavit supporting withholding
 - Non-proprietary version (recommended and often required by NRC)
- Why?
 - Prevent inadvertent release of proprietary information
 - Demonstrate legitimacy of the claim to the NRC
 - Provide NRC a basis to withhold under FOIA

Marking/Bracketing of Proprietary Documents

- Not prescriptive – must reasonably alert the reader
 - “The point is not to enforce a standard rigidly for its own sake, but to afford appropriate protection to submitters’ confidential information, as economically and efficiently as possible.”
- Page markings
 - Readily visible at the top, by electronic watermark or “other suitable markings on the body of the page”
 - Language “substantially similar to” “confidential information submitted under 10 CFR 2.390” or “proprietary”

Information Bracketing

Page markings indicate whether the document contains proprietary information

Brackets “[]” used to indicate portions that have been removed as proprietary

Code letters used to indicate the type of proprietary information being withheld (tie to affidavit)

Westinghouse Non-Proprietary Class 3 LTR-NRC-13-45 NP-Attachment

Question 9: Worst SBLOCA
The WCAP-16996-P/WCAP-16996-NP, Volumes I, II, and III, Revision 0, Section 29.2.3 “Break Type, Split Break Area and Break Flow Model Uncertainty Methodology,” proposes a position for the treatment of the break type and size []^{a,c}

[]^{a,c} Section 29.2.3 claims that “this approach provides an adequate coverage of all possible LOCA scenarios” and Section 30.1 “Statistical Methodology Roadmap” asserts this is done []^{a,c} According to Section 30.5 “Overview of Full Spectrum LOCA Statistical Procedure (ASTRUM-FS)”, when generating a representative sample of the LOCA scenarios population, []^{a,c} WCAP-16996-P/WCAP-16996-NP, Volumes I, II and III, Revision 0 Section 31.3, “Analysis of Results for Region I,” presents a demonstration analysis of the FSLOCA™ methodology for a selected three-loop Westinghouse PWR. For Region I, the break area is sampled between []^{a,c}

[]^{a,c}

To assess the appropriateness of the proposed position in the FSLOCA methodology regarding SBLOCA resolution and treating the worst break size in Region I, please present the results from an additional analysis for the demonstration three-loop Westinghouse plant (V. C. Summer (CGE)) examined in Section 31.3. In this analysis, please assume that the examined breaks range from 2.0-inch to 6.0-inch equivalent diameter (0.022 ft² to 0.196 ft² or 0.5 percent to 4.8 percent break area), []^{a,c}

[]^{a,c} Please present the updated Figures 31.3-4 to 31.3-7 and Tables 31.3-1a and 31.3 1b to illustrate the obtained results. If this approach does not guarantee adequate resolution of the worst break, please consider an alternative method as discussed in the following paragraph. Please be aware that for some plants the PCT can

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NRC Affidavit Requirements (§ 2.390(b)(1))

- Affidavit must accompany the submittal
- Executed by the owner of the information
 - Licensee/customer in possession of vendor's proprietary information cannot submit affidavit on vendor's behalf.
- Affidavit signer must be:
 - "Officer or upper-level management official," and
 - Specifically delegated function and authorized to apply for withholding
- No oath or affirmation/notarization requirement (28 U.S.C. § 1746)
- Affidavit signer:
 - Must have personal knowledge of the content of the submittal, or
 - Personal knowledge of the criteria or procedures used to make the determination as well as knowledge of the competence/qualification of the primary reviewer



Source: US NRC

NRC Affidavit Content (§ 2.390(b)(1)(ii))

- Identify the document or pages to be withheld;
- Include the official title of the person signing the affidavit;
- Describe the basis for proposing that the information be withheld;
- Include a specific statement of the harm that would result if the proprietary information is disclosed to the public;
- Identify the location(s) in the document where proprietary information is located; and
- Include a full statement of the reason for claiming the information is proprietary, including addressing the specific factors from 10 C.F.R. § 2.390(b)(4).

10 C.F.R. § 2.390(b)(4) Factors

- (i) Information has been held in confidence by its owner;
- (ii) Information is of a type customarily held in confidence by its owner and, except for voluntarily submitted information, whether there is a rational basis therefor;
- (iii) Information was transmitted to and received by the Commission in confidence;
- (iv) Information is not available in public sources;
- (v) Public disclosure of the information sought to be withheld is likely to cause substantial harm to the competitive position of the owner of the information, taking into account the value of the information to the owner; the amount of effort or money, if any, expended by the owner in developing the information; and the ease or difficulty with which the information could be properly acquired or duplicated by others.



Source:
Washington Post

NRC's Review of the Withholding Request

- NRC reviews submitter's request and determines whether to grant or deny
 - NRC has denied requests because information was already publicly available or not actually held in confidence
- No obligation to review unmarked documents and information
- Pre-disclosure notification: written notice to the submitter and opportunity to object within 30 days (MD 3.1)
- Written notice of final decision to disclose (MD 3.1)

Balancing and Disclosure

- 10 C.F.R. § 2.390(b)(5): NRC reserves right to disclose proprietary information if it determines that the “right of the public to be fully apprised as to the bases for and effects of the proposed action outweigh the demonstrated concern for protection of competitive position...”**
- NRC’s authority to conduct balancing affirmed on two different occasions on judicial review
- “The Commission stresses that it rarely, if ever, has released proprietary information over the objection of a submitter.”

NRC Post Submittal Review –Withdrawal

- Section 2.390(c)(2): “If the Commission denies a request for withholding under this section, it will provide the submitter with a statement of reasons for that determination.... The document will not be returned to the submitter.”
- Section 2.390(c)(3): “Whenever a submitter desires to withdraw a document from Commission consideration, it may request return of the document, and the document will be returned unless...”
 - It forms part of the basis of official agency action
 - Has been requested under FOIA
 - Is part of ongoing OI investigation
- Denial notices typically provide for 30 days to request withdrawal

Other Protected Information

- Classified Information
 - Includes National Security Information (classified by Executive Order) and Restricted Data (classified by Atomic Energy Act, because compromise would assist in the design, manufacture, or utilization of nuclear weapons)
 - Access requires clearance at least at the level of classification, and need-to-know
 - Information about potential uncompensated security vulnerabilities
 - NRC authorizes facility and personal clearances under 10 C.F.R. Parts 95 and 25
- Safeguards Information (SGI)
- Sensitive Unclassified Non-Safeguards Information (SUNSI)

Proprietary information is fundamentally the submitter's responsibility/burden to protect. Protection of SGI and SUNSI is a shared responsibility.

Safeguards Information (SGI)

- Requirements for handling, storage and processing SGI in 10 C.F.R. Part 73.
 - Special category of information handled and protected like classified information
- Defined in 10 C.F.R. § 73.2 as unclassified information which specifically identifies:
 - detailed control and accounting procedures for physical protection of significant quantities of SNM;
 - detailed security measures for physical protection of nuclear material; or
 - security measures for physical protection and location of vital plant equipment.

Sensitive Unclassified Non-Safeguards Information (SUNSI)

- Includes several types of non-public information
 - Includes proprietary information
 - Personal and private information
 - Attorney-client privilege
 - Information from confidential sources
 - Security-related information (non-safeguards)
- Guidance in [Regulatory Issue Summary 2005-31 Rev. 1 \(Control of SUNSI\)](#):
 - Encourages the identification and marking of security-related information: “Security-Related Information—Withhold under 10 CFR 2.390”
 - Black-out security-related information in public versions
 - Encourages the use of internal controls to prevent release of security-related information (restricting access, controlling reproduction, need-to-know)
 - Provides detailed criteria for defining security-related SUNSI

Confidential Information in NRC Hearing Process

- In general, hearing requests in licensing proceedings must be based on public information.
- After a hearing is granted, ASLB will often issue protective order covering confidential information subject to discovery/disclosure. Examples:
 - Proprietary information
 - SUNSI
 - SGI
 - Personal privacy
- 2015 challenge by State of New York in Indian Point license renewal adjudicatory proceeding.
 - NYS argued that certain Westinghouse proprietary documents should be disclosed.
 - ASLB upheld confidential designations under § 2.390(a)(4).
- Special procedures for accessing SGI in ITAAC hearings for combined licenses
 - NRC will allow prospective petitioners to seek access to SGI in advance of hearing request, through pre-clearance process
 - Requires “need-to-know,” determination of trustworthiness and reliability, and demonstration of likelihood to establish standing
 - All Part 73 requirements apply



Source: ABA Journal