



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

SECRETARY

January 5, 2006

COMMISSION VOTING RECORD

DECISION ITEM: SECY-05-0213

TITLE: POLICY OPTIONS AND RECOMMENDATIONS FOR THE
RELEASE OF REPORTS PREPARED BY THE OFFICE OF
INVESTIGATIONS

The Commission (with Chairman Diaz and Commissioner Jaczko agreeing and Commissioner Lyons agreeing in part) approved Option 3, as recorded in the Staff Requirements Memorandum (SRM) of January 5, 2006. Commissioners McGaffigan and Merrifield approved Option 1.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in cursive script, appearing to read "Annette L. Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons
OGC
EDO
PDR

VOTING SUMMARY - SECY-05-0213

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. DIAZ	X				X	12/7/05
COMR. McGAFFIGAN		X			X	11/29/05
COMR. MERRIFIELD	X				X	12/8/05
COMR. JACZKO	X				X	11/28/05
COMR. LYONS	X				X	12/8/05

COMMENT RESOLUTION

In their vote sheets, Chairman Diaz and Commissioner Jaczko approved Option 3 and Commissioner Lyons approved Option 3 in part. Commissioners McGaffigan and Merrifield approved Option 1. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on January 5, 2006.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary

FROM: CHAIRMAN DIAZ


SUBJECT: **SECY-05-0213 - POLICY OPTIONS AND
RECOMMENDATIONS FOR THE RELEASE OF
REPORTS PREPARED BY THE OFFICE OF
INVESTIGATIONS**

Approved XX  Disapproved _____ Abstain _____
w / Comments

Not Participating _____

COMMENTS:

See attached comments.




SIGNATURE
Dec 7, 05

DATE

Entered on "STARS" Yes No _____

Chairman Diaz' Comments on SECY-05-0213

I approve of the staff's recommendation outlined as Option 3. I agree with the staff's assessment that there is not a compelling reason to change the current practice of providing reasonably detailed summaries of OI investigative reports in wrongdoing cases and providing redacted OI reports for cases involving discrimination. The staff has provided reasonable grounds for the different approach to discrimination cases, including consideration of the impact on alleged and third-party witnesses. The NRC must ensure an appropriate level of openness in wrongdoing investigations, also ensuring that nuclear industry employees work in an environment in which they feel free to raise safety concerns. I believe the current practice appropriately achieves these objectives.

A handwritten signature in black ink, appearing to be 'LD', is written below the end of the text paragraph.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MCGAFFIGAN
SUBJECT: **SECY-05-0213 - POLICY OPTIONS AND
RECOMMENDATIONS FOR THE RELEASE OF
REPORTS PREPARED BY THE OFFICE OF
INVESTIGATIONS**

Approved _____ Disapproved X Abstain _____

Not Participating _____

COMMENTS: *I approve Option 1 instead of Option 3. See
attached comments.*

Edward M. Taffey Jr.

SIGNATURE
November 29, 2005

DATE

Entered on "STARS" Yes X No _____

Commissioner McGaffigan's Comments on SECY-05-0213

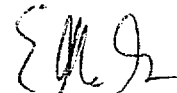
I approve Option 1. Specifically, the NRC policy should be that all OI reports, with appropriate redactions and without the supporting documentation, and after OGC review of the sufficiency of the evidence, should be provided to the participants before any predecisional enforcement conference (PEC).

The arguments offered in SECY-05-0213 in support of the staff's recommendation to continue to restrict and retard the release of OI reports are essentially repeats (in at least some cases word-for-word) of the same arguments presented in the Discrimination Task Group (DTG) Report (April 2002), which was an attachment to SECY-02-0166. The DTG was absolutely unpersuaded by those same arguments then, as was the Commission in accepting the DTG recommendation in Item #8 of the associated SRM:

The Commission approved the DTG's recommendation that the OI report, with appropriate redactions and without the supporting documentation, and after OGC review of the sufficiency of the evidence, should be provided to the participants before the predecisional enforcement conference. Release should be limited to the OI report while the staff explores ways to gain efficiencies in redacting information from supporting documentation. OGC's legal sufficiency review should be performed after OI completes its report, prior to its public release.

I accept that the DTG was primarily focused on discrimination cases, but a broad reading of the above SRM language does not appear to support the staff's current bifurcated practice of voluntarily releasing OI reports only in discrimination cases. In any case, the "two-track" system should cease and the above Commission position should be extended to encompass all cases involving an OI report. Those same documents, with appropriate redactions, would always be released shortly thereafter in compliance with the Freedom of Information Act (FOIA). Those same documents with similar redactions would always be released to a litigant contesting an enforcement action before the Atomic Safety and Licensing Board Panel. I remain unconvinced that any delay in releasing evidence that could facilitate a fuller discussion at the PECs achieves anything other than delay itself. In particular, Option 3 would provide no additional protection to allegers, whistleblowers, and/or witnesses than would Option 1.

I found several of the "two-track" arguments attributed to stakeholders to be worthy of specific rebuttal. First, the staff appears to credit that early release of the OI reports could facilitate reprisals or the provision of false information to the NRC during the PEC. Second, the staff cautioned that more OI reports redacted will result in more staff resources expended. In the first case, it remains the responsibility of the licensee to maintain a safety conscious work environment and the duty of the NRC to be both open and vigilant completely irrespective of precisely just when FOIA-covered documents are released. Whatever certain stakeholders' expectations may be, the Commission's expectations are and always have been that any such deeds will be met, pursued, and prosecuted to the fullest extent permitted by law. As for the second argument, the timing of the redaction (before the predecisional enforcement conference versus later under FOIA or Part 2 discovery procedures) should have a calculably zero effect on resources, while the preparation of the staff's recommended detailed summaries, followed by later redaction efforts (under FOIA or Part 2 discovery procedures), would always require more resources than simply performing the redactions and not creating the detailed summaries in the first place.



Edward McGaffigan, Jr.

11/29/05
(Date)

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MERRIFIELD
SUBJECT: **SECY-05-0213 - POLICY OPTIONS AND
RECOMMENDATIONS FOR THE RELEASE OF
REPORTS PREPARED BY THE OFFICE OF
INVESTIGATIONS**

Approved Disapproved Abstain

Not Participating

COMMENTS:

*I approve option 1, subject to
the attached comments.*



SIGNATURE

12/08/05

DATE

Entered on "STARS" Yes No

Commissioner Merrifield's Comments on SECY-05-0213

I approve the approach outlined in Option 1, which would allow release of redacted OI reports for the purpose of preparing for predecisional enforcement conferences, regardless of whether the case involves discrimination. I strongly believe that this issue had already been voted on by the Commission in SECY-02-0166 and was resolved in favor of release of redacted OI reports in all cases. I have significant concerns that this issue is before us again, indicating a severe misinterpretation of the Commission's guidance in the SRM associated with SECY-02-0166.

Like Commissioner McGaffigan, I remain unpersuaded by the arguments offered in opposition to release of OI reports in all wrongdoing cases. I believe that the Commission's interests are better served by allowing informed discussions to take place at the predecisional enforcement conference stage resulting in the NRC staff making the most appropriate enforcement decision possible. I would expect that the Office of Enforcement, Office of Investigations, and Office of the General Counsel will work collaboratively to establish an efficient process for the redaction and review of OI reports in order to minimize any resource impacts on their respective offices.



12/8/05

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary


FROM: COMMISSIONER JACZKO

SUBJECT: **SECY-05-0213 - POLICY OPTIONS AND
RECOMMENDATIONS FOR THE RELEASE OF
REPORTS PREPARED BY THE OFFICE OF
INVESTIGATIONS**

Approved Disapproved Abstain

Not Participating

COMMENTS: See attached comments.



SIGNATURE

1/12/05

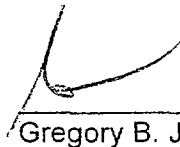
DATE

Entered on "STARS" Yes No

**Commissioner Jaczko's Comments on SECY-05-0213
Policy Options and Recommendations for the Release of Reports Prepared
By the Office of Investigations**

I approve of the staff's recommendation outlined in option 3, which would continue the current policy of releasing redacted OI reports for discrimination cases only. My support for the staff's efforts to protect the detailed information contained in the OI reports in wrongdoing cases is based upon the compelling need for the agency to protect the identities of the alleged, whistleblowers, and witnesses who cooperate in an OI investigation. Additionally, the agency has a legal basis for protecting much of this information prior to the final agency decision on the matter. Given this, and given that the factual summaries currently provided to the licensees prior to a pre-decisional enforcement conference in wrongdoing cases provide the licensees with sufficient detail to inform the conference participants of the circumstances of the apparent violation, I see no need to change the current policy.

The second option presented by the staff is a compromise option, allowing for the release of redacted OI reports in wrongdoing cases where there is no longer a need or interest in protecting the identity of the witnesses. While this option would appear to alleviate concerns about protecting the identities of cooperating individuals, it would require the staff to make a judgment call on a case-by-case basis as to whether or not there is a need to protect the identity of the individuals cooperating in the OI investigation. I believe this option would place the staff in the awkward position of having to speculate about whether this information is already known by the licensee. Moreover, I am concerned that a policy decision making this a case-by-case determination could discourage individuals from fully cooperating in OI investigations for fear that their identity might not be protected. Given the importance of the NRC's enforcement and allegation programs, I am not comfortable supporting an option that could undermine these programs.



Gregory B. Jaczko

11/28/05
Date

NOTATION VOTE

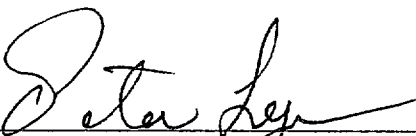
RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER LYONS
SUBJECT: **SECY-05-0213 - POLICY OPTIONS AND
RECOMMENDATIONS FOR THE RELEASE OF
REPORTS PREPARED BY THE OFFICE OF
INVESTIGATIONS**

in part, see comments
Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS:



SIGNATURE
12/8/05

DATE

Entered on "STARS" Yes ___ No ___

Commissioner Lyons' Comments on SECY-05-0213
Policy Options and Recommendations for the Release of Reports
Prepared by the Office of Investigations (OI)

I approve, in part, the staff's recommendation for Option 3. The staff recommends that redacted OI reports be released prior to holding a predecisional enforcement conference (PEC) for discrimination cases only. I do not approve releasing OI reports prior to holding a PEC in any case, regardless the nature of the case. While the staff in the SECY assumed that there was no interest in changing current NRC policy regarding discrimination cases, I believe that the policy of releasing OI reports in discrimination cases prior to holding a PEC should be discontinued. Instead, the staff should provide PEC participants with a reasonably-detailed summary and should not release OI reports prior to a PEC unless required by law to do so.

I share Commissioner McGaffigan's view that the current "two-track" system of releasing OI reports in discrimination cases and of not releasing OI reports in non-discrimination cases does not appear to be well-grounded and should cease. According to the SECY paper, the rationale behind the current "two track" system appears to be that in discrimination cases, the identities of alleged and witnesses are likely known to the licensee. I do not agree that this is always true - cases have many aspects, and the subject of an enforcement action may not know its accusers. Further, a case labeled as a "discrimination" case may involve broader non-discrimination issues. In any event, SECY-99-019 states that the practice of releasing OI reports in discrimination cases stems from the Enforcement Policy, which the staff interprets to permit release when the matter under investigation relates to a proceeding before the U.S. Department of Labor under Section 211 of the Energy Reorganization Act, 42 U.S.C. § 5851. The theory seems to be that a completed OI report is already available to parties in the related Department of Labor matter through that process. I do not find this distinction persuasive in maintaining the "two-track" system.

While Commissioner McGaffigan would replace the "two-track" system with a policy that all OI reports would be provided to PEC participants, I believe that the staff should not release OI reports prior to a PEC unless required by law to do so. According to the NRC Enforcement Policy, the purpose of a PEC is to obtain information to help the NRC determine the appropriate enforcement action, such as a common understanding of the facts, planned corrective actions and significance of the issues. If the NRC considers that it has sufficient information to make an enforcement decision, a PEC is not normally held. Since the PEC takes place during the information-collecting phase of the enforcement process, anything that hinders information collection during the PEC should be prevented. Should the NRC provide PEC participants information used to formulate the NRC's case, PEC participants may shape the information they present at the PEC. In any event, while I lend my emphatic support of Commissioner McGaffigan's point that the Commission's expectation remains that anything less than full and honest disclosure of relevant information from a licensee is unacceptable, I believe that in cases involving alleged wrongdoing, we may be well-served to be more skeptical of the candor of PEC participants.


Peter B. Lyons

12/8/05
Date