



May 1, 1985

POLICY ISSUE

SECY-85-153

(Notation Vote)

For: The Commission

From: William J. Dircks, Executive Director
for Operations
Herzel H. E. Plaine, General Counsel

Subject: PROVIDING INFORMATION TO ADVISORY PANEL
ON TMI-2 CLEANUP

Prior History: The Commission met with the Advisory
Panel for the TMI-2 Cleanup on March 7,
1985.

Summary: The NRC legally can provide the Advisory
Panel with non-public information and
still withhold that information from
public disclosure. However, there are
policy considerations which weigh
against providing the Advisory Panel
with non-public information.
Determinations of whether to provide the
Panel with non-public information should
be made on a case-by-case basis.

CONTACT:
Mike Masnik, TMIPO
2-7466

Rick Levi, OGC
4-1465

8505300675

Discussion:

I. Background

At the March 7, 1985 Commission meeting, the Advisory Panel for the Decontamination of TMI-2 (Advisory Panel) expressed concern about communications between the NRC and the Panel. The Panel's specific concern was that the NRC staff had changed its position on whether the polar crane administrative procedures violations at TMI-2 were willful, but had not so advised the Panel. The Panel learned of staff's revised position by obtaining a copy of the NRC responses to the Udall Subcommittee staff questions.

The NRC staff explained that these matters dealt with an ongoing enforcement case, and therefore it did not release the information. Staff stated it would have advised the Panel of staff's changed position when the enforcement action was completed and the information would be public.

To resolve these concerns about communications between the NRC and the Advisory Panel, the Commission requested OGC, the staff, and OI to review the current staff practice on making information available to the Advisory Panel, and to specify the types of documents which: (1) can be made available to the Panel for unrestricted use; (2) can be made available with restrictions on further dissemination; or (3) should not be provided to the Panel. The Commission stated it would review the proposed staff practice, and then forward it to the Advisory Panel for review and comment.

II. Current Policy on Providing Information to Advisory Panel

The NRC currently provides the Advisory Panel only with relevant and significant information that is publicly available. The following briefly describes the process for determining what public information is relevant and significant,

and is accordingly provided to the Panel.

All TMI-2 incoming and outgoing correspondence is screened for possible distribution to the Panel by the NRC Panel Liaison, as are all documents that are part of the public record dealing specifically with the TMI-2 cleanup. Relevant and significant public documents are sent to the Panel within two weeks, with a cover memo which summarizes the important documents for the convenience of the Panel Members.

Classes of public documents that are typically reviewed for significance and relevance to the Panel's activities include the following:

- Staff Safety Evaluation Reports
- Requests by the licensee for safety reviews

- Reports published by other State or Federal agencies
- All docketed incoming and outgoing correspondence with the licensee, including enforcement actions
- Licensee requests for Technical Specification changes
- NRC approvals or disapprovals of Technical Specification changes
- Weekly site status reports

Classes of both public and non-public documents that are typically determined to be either not relevant and significant, or not publicly releasable, and therefore which are not provided to the Panel, include the following:

- Internal GPU correspondence where the Three Mile Island Program Office (TMIPO) receives an

information copy on an informal basis

- Documents dealing with Unit 1 issues
- TMI-2 safeguards information, protected under 10 CFR 2.790
- Correspondence to and from other Federal agencies, unless publicly released
- Staff reviews of detailed licensee procedures
- Internal NRC correspondence, including Commission staff papers and other correspondence that are not the subject of open Commission meetings
- Any information on investigations and enforcement actions that has not been publicly released

Congressional correspondence was not in the past listed in either of the above two categories because typically it would be of little or no interest to the Panel (e.g., Congressional requests for status reports, preparation of testimony, and budgetary estimates). The answers to the Udall Subcommittee staff questions previously mentioned were unusual. In the interests of practicality, the NRC Panel Liaison now screens documents, including Congressional correspondence, and coordinates with the Office of Congressional Affairs to ensure that the Panel receives, in a timely fashion, all relevant Congressional correspondence that is publicly released.

III. Legal Considerations in Providing Information to Panel

The Federal Advisory Committee Act provides that documents provided to an Advisory Committee may be withheld from public disclosure if they are

withholdable under the Freedom of Information Act (FOIA). Therefore the Panel could be provided almost any type of document, and that document, if it is withholdable under FOIA, could be withheld from public disclosure.¹ See, e.g., Aviation Consumer Action Project v. Washburn, 535 F.2d 101 (D.C. Cir. 1976).

IV. Recommendations for Future Policy

The Commission requested a specific delineation of the types of documents that:

- (1) can be made available to the Panel for unrestricted use;

¹Section 10(b) of the Federal Advisory Committee Act provides as follows:

Subject to section 552 of Title 5, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

- (2) can be made available to the Panel with restrictions on further dissemination; or
- (3) should not be provided to the Panel.

The first category includes any documents that are publicly available. Staff in this regard intends to follow its current policy for identifying such documents, as set out supra.

The second and third categories require somewhat more analysis. Legally the Panel can be given documents which have not been publicly disclosed. However, the Panel historically has operated completely in the open, making it a practice not to withhold any information from the public. Providing the Panel only with public information allows members of the public to question actions on the part of the licensee or

the regulatory agencies to the same extent as Panel members. Partly as a result of this openness, the Panel has enjoyed the trust of the public. It could be disadvantageous to the Panel's activities to begin having them consider non-public information, in that such action could lead to some loss of public credibility for the Panel. This consideration weighs against providing the Panel with non-public information.

Moreover, some documents are so sensitive that distribution is limited even within the agency. These include pending investigatory and enforcement material. This type of information therefore should not be disseminated outside the agency without a strong justification. Staff does not believe the Panel's activities generally require that it be given information on such pending matters, and therefore generally there is insufficient justification for providing the Panel with such information.

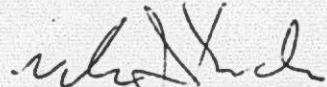
Nonetheless, there may be some instances where non-public information so directly relates to the Panel's activities that the Panel's need for the information overrides the above considerations. In those cases, the information should be provided to the Panel with the explicit understanding that it will not be made public. However, instances where this may occur cannot be identified generically. The staff instead proposes to review non-public information on a case-by-case basis to determine whether it should be provided to the Panel on a restricted basis. If the staff determines that the Panel's need for specific information outweighs the considerations against providing such information, it will request the Commission to authorize disclosure to the Panel, with appropriate restrictions on its use.

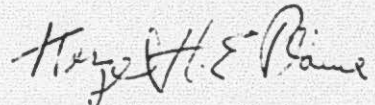
Conclusion

The staff, through the NRC Panel Liaison, will continue to make good faith efforts to review publicly available information and provide relevant and significant information to the Advisory Panel. In addition, the NRC Panel Liaison will review relevant non-public material to identify any instances where the Panel's need for the information outweighs the considerations against providing it to the Panel. The staff in those cases will request the Commission to authorize disclosure of the information to the Panel, with appropriate restriction on its use. The NRC Panel Liaison will continue to withhold other non-public material.

Recommendation: Review policy as set forth above, and then provide this paper to Advisory Panel for its review and comment.

Coordination: OI concurs in this memorandum.


 William J. Dircks
 Executive Director
 for Operations


 Herzl H. E. Plaine
 General Counsel

Commissioners' comments or consent should be provided directly to the Office of the Secretary by c.o.b. Thursday, May 16, 1985.

Commission Staff Office comments, if any, should be submitted to the Commissioners NLT Wednesday, May 8, 1985, with an information copy to the Office of the Secretary. If the paper is of such a nature that it requires additional time for analytical review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

DISTRIBUTION:

Commissioners

OGC

OPE

OCA

OI

OIA

OPA

REGIONAL OFFICES

EDO

ELD

SECY