

**POLICY ISSUE
(Notation Vote)**

March 6, 2015

SECY-15-0032

FOR: The Commissioners

FROM: Mark A. Satorius **/RA/**
Executive Director for Operations

SUBJECT: REVIEWING DOCUMENTS FOR PUBLIC RELEASE USING SENSITIVE
UNCLASSIFIED NON-SAFEGUARDS INFORMATION GUIDANCE

PURPOSE:

To recommend that the Commission revise its policy and allow routine review for public release of certain categories of documents that are currently prohibited from proactive release, and to request that the Commission withdraw its direction to that effect in Staff Requirements Memoranda (SRM) SECY-04-0191 and SRM-SECY-05-0101. This paper does not address any new commitments.

SUMMARY:

In the aftermath of the events of September 11, 2001, the NRC staff prepared SECY-04-0191, "Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure," and SECY-05-0101, "Withholding from Public Disclosure Sensitive Unclassified Information Concerning Materials Licenses and Certificate Holders," requesting Commission approval of guidance for protecting sensitive unclassified information concerning nuclear power reactors and materials licensees and certificate holders from public disclosure. The intent was to provide guidance to ensure that information that could reasonably be expected to be useful to potential adversaries was not made public. Part of the Commission's approval of the recommendations in these papers included guidance directing that certain fire protection and emergency planning and response information was to be initially withheld from public release and reviewed in response to a request for release, such as a Freedom of Information Act (FOIA) request.

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This paper requests the Commission withdraw that portion of the SRMs that proscribes routine review and release of the described information and instead direct that this information be reviewed and analyzed under the terms of the agency's generally-applicable Sensitive Unclassified Non-Safeguards Information (SUNSI) Policy.

BACKGROUND:

After the events of September 11, 2001, the U.S. Nuclear Regulatory Commission (NRC) assessed and revised its information policies to provide greater assurance against publicly disclosing information that could reasonably be expected to be useful to potential adversaries. Post-September 11, Congress did not expand the categories of information that are not required to be released in response to a FOIA request because release would be harmful to governmental or private interests. In December 2003, the NRC Executive Director for Operations (EDO) established a task force to address the types of sensitive unclassified material that should routinely be withheld from public disclosure.¹ The task force submitted its recommendations to the EDO in November 2004.²

Meanwhile, in a SRM dated May 7, 2004, the Commission directed the staff to develop guidance to ensure information that could reasonably be expected to be useful to a potential adversary be withheld from public disclosure.³ On November 9, 2004, the Commission issued SRM-SECY-04-0191, which approved (among other things) proposed guidance to prohibit proactive release to the public of sensitive unclassified information concerning nuclear power reactors.⁴ The Commission further directed the staff to develop similar guidance for materials and NRC-licensed facilities. In response, the staff provided to the Commission SECY-05-0101, to restrict proactive release to the public of certain information concerning materials licensees and certificate holders.⁵ The Commission subsequently approved that guidance via SRM-SECY-05-0101.⁶ Both of these SRMs approved the staff's recommendation to not

¹ Memorandum to the Office Directors from William D. Travers, "Task Force to Address Sensitive Unclassified Material Management" (Dec. 3, 2003) (ML033320043) (public).

² Task Force Report for the Executive Director for Operations, "Management of Sensitive Unclassified Non-Safeguards Information (SUNSI)" (Nov. 10, 2004) (ML043010551) (non-public).

³ Staff Requirements—COMSECY-03-0036—"Update on the Withholding from Public Disclosure of Sensitive, Unclassified Information Related to Power Reactors" (May 7, 2004) (ML041280489) (non-public).

⁴ Staff Requirements—SECY-04-0191—"Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure" (Nov. 9, 2004) (ML043140175) (public); "Withholding Sensitive Unclassified Information Concerning Nuclear Power Reactors from Public Disclosure," Commission Paper SECY-04-0191 (Oct. 19, 2004) (ML042310663) (public).

⁵ "Withholding from Public Disclosure Sensitive Unclassified Information Concerning Materials Licensees and Certificate Holders," Commission Paper SECY-05-0101 (June 8, 2005) (ML051040407) (package) (non-public).

⁶ Staff Requirements—SECY-05-0101—"Withholding from Public Disclosure Sensitive Unclassified Information Concerning Materials Licensees and Certificate Holders" (Oct. 7, 2005) (ML052840311) (non-public).

proactively make public certain covered documents, specifically relating to fire protection and emergency preparedness information, until requested and released under FOIA or disclosed in an adjudicatory or rulemaking proceeding.⁷ This direction marked a change from the NRC's usual policy of proactively releasing to the public categories of documents prepared by the regulated community or the NRC staff. The staff estimates that, as a result of this policy, in 2014 nearly 1500 fire protection or emergency preparedness documents were not reviewed for possible proactive release.

As a result of the task force's recommendations cited above, the NRC established its SUNSI Policy as described in COMSECY-05-0054.⁸ The agency issued this policy to ensure that the staff properly handles and protects SUNSI from unauthorized disclosure. SUNSI is "any information of which the loss, misuse, modification, or unauthorized access can reasonably be foreseen to harm the public interest, the commercial or financial interests of the entity or individual to whom the information pertains, the conduct of NRC and Federal programs, or the personal privacy of individuals."⁹ The policy adopted fully conformed to legal requirements. Neither the Administrative Procedure Act nor any other law required the NRC—absent a FOIA request—to proactively disclose the documents covered by the Commission's decisions. It should be noted that the SUNSI Policy itself does not protect from disclosure fire protection and emergency preparedness information addressed by SRM-SECY-04-0191 and SRM-SECY-05-0101. Rather, that information is initially withheld from public release due to Commission direction in the two SRMs and not reviewed against the SUNSI Policy.

In recent months, the agency has received FOIA requests seeking large numbers of agency documents that were covered by the agency's post-September 11, 2001, policies. These have included requests for fire protection and emergency preparedness documents, as well as updated Final Safety Analysis Reports (FSARs).¹⁰ In addition, the staff has received requests for the agency to revise its policy prospectively, so that material covered by the prior policy would now be routinely available for review and release.

⁷ SECY-04-0191, Attachment 1, "Handling of Sensitive (Nonsafeguards) Information on Nuclear Power Reactors That Could Reasonably Be Expected to be Useful to a Potential Adversary," at 7 (Oct. 2004) (ML042310663) (public); SECY-05-0101, Attachment 3, "Proposed Revisions to NMSS SISP Review Criteria (Redline/Strikeout Revision of Attachment 1) (June 2005) (ML051470212) (non-public), at 7.

⁸ "Policy Revision: Handling, Marking, and Protecting Sensitive Unclassified Non-Safeguards Information (SUNSI)," COMSECY-05-0054 (Oct. 26, 2005) (ML052520181) (public).

⁹ "Management of Sensitive Unclassified Non-Safeguards Information (SUNSI)," Task Force Report for the Executive Director for Operations (Nov. 10, 2004) (ML043010551) (non-public), at 1-2.

¹⁰ "E-mail from D. Lochbaum, Union of Concerned Scientists, to NRC FOIA Resource" (Oct. 20, 2014) (ML14293A245) (requesting all emergency planning records received after October 1, 2004, for several named facilities) (FOIA/PA Request No. 2015-0025); "E-mail from D. Lochbaum, Union of Concerned Scientists" (Dec. 5, 2014) (ML14339A664) (public) (requesting all updates, revisions, and amendments to the Final Safety Analysis Report received by the NRC since October 1, 2001, for all nuclear power reactors) (FOIA/PA Request No. 2015-0082); In addition, the NRC has received 62 substantively similar FOIA requests for fire protection documents (FOIA/PA-2014-0403 to 2014-0464). See, e.g., "E-mail from D. Lochbaum, Union of Concerned Scientists, to NRC FOIA Resource" (Aug. 25, 2014) (ML14261A114) (public) (requesting all fire protection records received after October 1, 2004, by the NRC from the licensee for Salem station).

DISCUSSION:

At the time the Commission directed the staff to restrict public disclosure of sensitive unclassified information concerning nuclear power reactors (SRM-SECY-04-0191) and materials licensees and certificate holders (SRM-SECY-05-0101), the agency had not yet established overarching guidance for the treatment of sensitive information. The SUNSI Policy has since been developed.¹¹

The staff has now had a decade of experience implementing the SUNSI Policy. Further, as discussed in SECY-04-0191 and SECY-05-0101, much of the information that has been presumptively restricted from release is not considered to be sensitive information and is not withholdable under FOIA. The staff recommends that the Commission revise in part the policy approved in SRM-SECY-04-0191 and SRM-SECY-05-0101 to the extent the policy provides for presumptive withholding in full of fire protection and emergency preparedness information.¹² In its place, the staff recommends that the Commission approve the staff's use of the SUNSI Policy for these documents, which could then be considered for routine release. The SUNSI Policy provides that the staff will review each document considered for routine release to the public to determine whether the document or any portions are releasable consistent with NRC guidance, including applying screening criteria to determine if information should be withheld from public disclosure because it could reasonably be expected to be useful to a potential adversary. The staff recommends that the rest of the policy approved in SRM-SECY-04-0191 and SRM-SECY-05-0101 stand.

Stated simply, the staff seeks to discontinue the presumptive restriction on release of fire protection and emergency planning and response information. This revision in policy would result in timely release of non-sensitive information that previously has been limited from public release until such time as a FOIA or other request for its release has been made—specifically, fire protection and emergency preparedness information. If a document contains any sensitive information, then that document would continue to be withheld in its entirety absent a FOIA request or a need to disclose it in an adjudicatory or rulemaking proceeding. If the Commission adopts this policy revision, based on its experience to date, including responses to FOIA requests, the staff anticipates that many fire protection and emergency preparedness documents would be publicly released in their entirety. The policy changes here apply prospectively—they will apply to documents received from external submitters or prepared by

¹¹ Under Executive Order 13556 “Controlled Unclassified Information” (CUI), Federal agencies—including the NRC—will eventually shift from the current approach of relying upon agency-specific policies for controlling sensitive unclassified information (such as the NRC’s SUNSI Policy) to following a government-wide CUI policy for controlling such information. The NRC would develop and establish its own CUI program based on the parameters of the government-wide policy. The details of the government-wide policy, for which the National Archives and Records Administration is responsible, are currently under development.

¹² As a practical matter, documents that require SUNSI review by the NRC are initially processed into ADAMS as non-publicly available. Emergency plans, emergency plan implementing procedures, emergency exercise scenarios, fire protection plans, and fire hazards analysis reports are tagged in ADAMS as “review for release upon request;” consistent with the Commission’s direction, SUNSI review is not routinely performed on these documents.

the NRC staff after the effective date of the new policy. If members of the public desire access to documents generated prior to that date, they would need to file a FOIA request.

Application of this approach, however, would not produce the desired disclosure of almost all portions of FSARs or their updates.¹³ These lengthy documents generally include some proprietary or security-related information that should not be disclosed. The staff will work with the licensee community in developing guidance so that the portions of FSARs and updated FSARs that may be appropriately released to the public can be proactively released without waiting for a FOIA or other request. Unlike other categories of documents that may not be immediately reviewed for release under the SUNSI Policy (e.g., Topical Reports and Part 21 reports from vendors), these are key licensing documents for which there is now demonstrated public interest.

Under 10 CFR 50.71(e)(4), for example, reactor licensees are required to submit subsequent revisions of their FSARs annually, or 6 months after each refueling outage, provided the interval between successive updates does not exceed 24 months. The revisions must reflect all changes up to a maximum of 6 months prior to the date of filing. The information submitted by the reactor licensees must also be marked for withholding in accordance with 10 CFR 2.390(b), which should capture proprietary and security-related information that is appropriately withheld from public disclosure. The staff will issue final guidance on FSAR submissions, after considering stakeholder input, within the next 6 months. The staff expects that, following the issuance of that guidance, FSAR submissions (excluding sensitive information) for all facilities should be made publicly available not later than approximately 24 months after issuance of the final guidance.¹⁴

These proposed revisions to the agency's document release policies will improve consistency with President Obama's January 21, 2008, memorandum (74 Fed. Reg. 4683), which provides for a presumption in favor of disclosure and provides that agencies should take affirmative steps to make information public without waiting for specific requests from the public.

¹³ Safety analysis reports, FSARs, and updated FSARs are not presumptively withheld, but, like several other categories of documents requiring SUNSI review, are initially processed into ADAMS as non-publicly available and are annotated as "non-public pending review." The "owner office" (as indicated in the "addressee affiliation" ADAMS field) is then responsible for performing the requisite SUNSI review of the documents to determine whether they will be publicly released to the public following the SUNSI review.

¹⁴ The staff expects that, consistent with the schedule provided in section 50.71(e) for these submittals, it will take approximately 24 months for a full cycle of FSAR update submittals to be processed by the staff. This time period also allows the staff to process FSAR updates that are submitted by the licensee as hard copy replacement pages pursuant to 10 CFR 50.4(b)(6).

RECOMMENDATIONS:

1. That the SUNSI Policy be applied to documents containing fire protection and emergency preparedness information and those documents would be subject to disclosure upon receipt from external entities or after preparation by the NRC staff if they do not contain sensitive information. The staff further requests that the Commission withdraw its approval, in SRM-SECY-04-0191 and SRM-SECY-05-0101, of the staff's review guidance to the extent that the Commission approved via those staff requirements memoranda the staff policy that those documents may not be proactively disclosed.

2. That the policy revisions take effect 6 months from the Commission's approval of this recommendation. This implementation date will allow the staff to work, after appropriate interactions with the regulated community, to inform the public of the policy change and to develop guidance on the marking of fire protection and emergency preparedness documents, as well as issue final guidance associated with the release of FSARs and their updates.

RESOURCES:

This activity is unbudgeted. The staff expects that, with few exceptions, the impact on existing resources will not be significant and that additional resources are not needed at this time. There will be little to no resource impact on either ongoing mission-related reactor licensing efforts or the review of fire protection program licensing actions, including NFPA 805 reviews, as the licensees already mark these documents in accordance with 10 CFR 2.390(b). In accordance with that regulation, "[t]he NRC has no obligation to review documents not so marked to determine whether they contain information eligible for withholding" and may release those documents not so marked. The staff expects, likewise, that there will not be a significant resource impact expected on the efforts to reduce the licensing backlog.

With respect to the policy change involving the review and release of FSARs, updated FSARs, and emergency preparedness documents, the resource impact on the staff is uncertain. The development of additional guidance associated with these documents is expected to improve the quality of licensee submissions (and thereby reduce review time), but the review of these documents may have some impact on internal staff resources, as staff has not been reviewing these documents for routine public release since the effective date of SRM-SECY-04-0191.

Any additional resource needs identified in the future will be addressed through the planning, budgeting, and performance management process.

The Commissioners

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COORDINATION:

The Office of the Chief Financial Officer has reviewed this paper for resource implications and has no objection. The Office of the General Counsel has reviewed this paper and has no legal objection.

/RA/
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