

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Christopher T. Hanson, Chair
David A. Wright
Annie Caputo
Bradley R. Crowell

In the Matter of *subpoena duces tecum*

Issued to the MISSOURI DEPARTMENT OF
PUBLIC SAFETY

Case Nos. 3-2023-007, 3-2023-012

CLI-24-02

MEMORANDUM AND ORDER

This matter is before us on a motion to quash or modify a subpoena issued by the U.S. Nuclear Regulatory Commission's (NRC) Office of Investigations (OI).¹ The subpoena requires the Missouri Department of Public Safety (DPS) to produce, on behalf of the Missouri State Emergency Management Agency (SEMA), certain records in connection with two OI investigations of potential wrongdoing at SEMA.² As discussed below, we deny DPS's motion to quash or modify the subpoena. The OI inquiries are within the agency's statutory authority and seek information reasonably relevant to those inquiries. In addition, the subpoena is not too indefinite, overbroad, or overly burdensome. Finally, Missouri law does not relieve DPS of its

¹ *Motion to Quash and/or Modify the Office of Investigation's Subpoena* (Oct. 27, 2023) (Motion).

² *Subpoena duces tecum in the Matter of NRC Investigation Case No. 3-2023-007, 3-2023-012* (Sept. 29, 2023) (non-public) (Subpoena).

obligation to comply with the subpoena, and case law cited by DPS does not establish otherwise.

I. BACKGROUND

SEMA is a division of DPS established to respond to emergencies and disasters in Missouri.³ SEMA operates the Radiological Emergency Preparedness (REP) Program, which plans and prepares for potential radiological incidents that could affect Missouri residents.⁴ The REP Program also calibrates radiological equipment for state and local agencies pursuant to an NRC-issued materials license.⁵ The NRC is investigating potential wrongdoing in connection with an unescorted-access incident at SEMA on September 19, 2022, and potential wrongdoing related to a violation of recordkeeping requirements identified during an NRC inspection on August 31, 2022.⁶

As part of these investigations, OI requested records pertaining to the two incidents, including certain personnel records of a manager in the REP Program.⁷ DPS declined to produce the personnel records on the basis that they were “closed records” under Missouri law, but it raised no objections to OI’s other requests.⁸ After meeting with NRC counsel, DPS again declined to voluntarily produce the requested records. OI then served SEMA with a subpoena compelling production of the records.

³ See Preparedness Division, SEMA, <https://sema.dps.mo.gov/about/preparedness.php> (last visited Jan. 11, 2024).

⁴ *Id.*

⁵ *Id.*; see NRC Materials License 24-07974-03, Amend. No. 18 (ADAMS Accession No. ML21272A047) (non-public). On January 26, 2024, SEMA requested to terminate this license. See “Certificate of Disposition of Materials,” NRC Form 314 (Jan. 26, 2024) (ML24025A149) (non-public).

⁶ *NRC Staff’s Opposition to Missouri Department of Public Safety’s Motion to Quash* (Nov. 6, 2023) (non-public) (NRC Staff Response), Attach., Decl. of Gustave Woerner ¶¶ 2-3.

⁷ NRC Staff Response at 3.

⁸ *Id.*

DPS has filed a motion to quash or modify the subpoena pursuant to 10 C.F.R. § 2.702(f) and asserts that the subpoena is overbroad and unlimited in time and subject matter, and that disclosing the confidential personnel records would violate employee privacy rights recognized in Missouri law.⁹ As to two of the requests, DPS claims SEMA held no responsive documents, but that, “[t]o the extent that the NRC seeks emails,” SEMA was willing to conduct a search with agreed-upon parameters.¹⁰ The NRC Staff opposes DPS’s motion to quash or modify the subpoena.¹¹

II. DISCUSSION

Section 161c. of the Atomic Energy Act of 1954, as amended (AEA), authorizes the NRC to obtain information it deems necessary or proper “to assist it in exercising any authority” in the AEA, or in administering or enforcing the AEA and any regulations or orders issued thereunder.¹² Pursuant to this statutory authority, the NRC is empowered to issue subpoenas to compel the production of records.¹³ An NRC-issued subpoena is judicially enforceable where:

⁹ See Motion at 2-5. The Office of the Secretary (SECY) received the motion by e-mail and informed counsel for the Missouri Department of Public Safety (DPS) of the requirements of the Commission’s E-filing rule. See 10 C.F.R. §§ 2.302, 2.305. SECY referred DPS Counsel to the NRC’s Electronic Filing Help Desk to obtain credentials to file the motion through the Electronic Information Exchange (EIE), as required by the NRC’s rules of practice and procedure. See 10 C.F.R. §§ 2.302, 2.305. DPS Counsel obtained a digital certificate and was added to the electronic docket for this matter. SECY staff and the Electronic Filing Help Desk have communicated with DPS counsel on several occasions to provide assistance accessing the EIE. To date, DPS counsel has not filed the motion electronically, nor has DPS counsel provided SECY with a signed non-disclosure agreement required to receive non-public filings.

¹⁰ See Motion at 1.

¹¹ The parties later agreed to the terms of a protective order governing access to, and use of, information in the NRC Staff’s response designated as sensitive unclassified non-safeguards information. See Order of the Secretary (Protective Order Governing the Disclosure of Sensitive Unclassified Non-Safeguards Information) (Nov. 27, 2023) (unpublished).

¹² 42 U.S.C. § 2201(c).

¹³ See *id.*; *United States v. Comley*, 890 F.2d 539, 542 (1st Cir. 1989) (“Congress has vested the NRC with the authority to issue subpoenas in conjunction with investigations that the NRC

(1) it is issued in connection with an inquiry that is within the authority of the agency; (2) the information sought by the subpoena is reasonably relevant to that inquiry; and (3) the demand for production is not too indefinite, unreasonably broad, or burdensome.¹⁴ The NRC's regulations authorize us to quash or modify a subpoena "if it is unreasonable or requires evidence not relevant to any matter in issue."¹⁵

DPS seeks to quash or modify the subpoena's requests for personnel records on the grounds that the requests are too indefinite, overly broad, or seek information unrelated to the OI investigations.¹⁶ DPS also argues that disclosing the confidential personnel records would violate employee privacy rights recognized in Missouri law.¹⁷ As to two particular requests, DPS claims it has no responsive documents but is willing to conduct email searches after agreeing to specific search parameters.¹⁸ As explained below, we reject each of these assertions and decline to quash or modify the subpoena.

A. Requests I.C.1 through I.C.5

DPS claims that the requests in subparagraphs I.C.1 through I.C.5 are "unlimited in subject matter," "unlimited in scope," "overly broad," "vague," or "irrelevant."¹⁹ A plain reading of the subpoena's text, however, does not support these objections.

deems necessary to protect public health or to minimize danger to life or property in matters involving nuclear materials.") (citing 42 U.S.C. § 2201(c)).

¹⁴ *Shaw Group, Inc.* (NRC Investigation Case No. 2-2013-001), CLI-13-5, 77 NRC 223, 227 (2013); see also *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 818 (8th Cir. 2012) (citing *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

¹⁵ 10 C.F.R. § 2.702(f)(1).

¹⁶ See, e.g., Motion at 2.

¹⁷ See *id.* (citing Mo. Rev. Stat. § 610.021(13) (2023)).

¹⁸ See *id.* at 1.

¹⁹ See *id.* at 2-4.

DPS's arguments do not address the text at the beginning of paragraph I.C, which states that the NRC seeks records related to the REP Program manager's "employment at SEMA involving activities conducted under NRC license 24-07974-03, including, but not limited to, [the manager's] tenure in the REP Program."²⁰ Because this clause is at the start of paragraph I.C, it applies to, and therefore narrows the scope of, the requests in each of the subparagraphs under paragraph I.C. When, for instance, subparagraph I.C.1 is read in conjunction with the text at the beginning of paragraph I.C, the scope of potentially responsive records is limited not only to complaints against the named REP Program employee, but also to complaints against that employee involving activities conducted under SEMA's NRC license.

Thus, we disagree that complaints irrelevant to the OI investigations, such as a complaint alleging a violation of SEMA's copyright or anti-discrimination policies, would fall within the scope of the request. Such complaints do not "involv[e] activities conducted under" the NRC license and would therefore be nonresponsive to the subpoena. The same analysis applies equally to the other subparagraphs: The clause in paragraph I.C limits the scope of each subparagraph to activities conducted under the NRC license by the REP Program manager. Therefore, none of those requests are "unlimited in subject matter," "unlimited in scope," or "overly broad." We decline to quash or modify the subpoena on those bases.

We also disagree that the request in subparagraph I.C.1 is "unlimited in time" for similar reasons. The language at the beginning of paragraph I.C limits the request to the period during which the REP Program manager had *both* been employed at SEMA *and* involved in activities conducted under the NRC license. Therefore, the subpoena is limited in time.²¹ DPS raises the same unlimited-in-time argument with respect to the requests in subparagraphs I.C.2 through

²⁰ Subpoena ¶ I.C.

²¹ A subpoena need not specify an exact date range to be sufficiently limited in time. SEMA can determine for itself, given its knowledge of its employees' roles and responsibilities, the precise date range to use in its searches.

I.C.5.²² But the limiting terms at the beginning of paragraph I.C apply equally to those requests, and thus DPS's argument fails as to those requests as well. The subpoena's requests in subparagraphs I.C.1 through I.C.5 are not unlimited in time, and we therefore decline to quash or modify those requests on that basis.²³

DPS raises two additional arguments in opposition to the request in subparagraph I.C.4, which seeks the REP Program manager's performance appraisals and related correspondence. DPS argues such records are "irrelevant" and "wholly outside the scope of the NRC's regulatory authority."²⁴ We disagree.

An administrative subpoena should be enforced when it seeks evidence that "is not plainly incompetent or irrelevant to any lawful purpose of the agency in the discharge of its duties."²⁵ The performance of the REP Program manager is relevant to assessing that individual's understanding of NRC requirements, which in turn assists with determining the individual's mental state and whether any alleged misconduct was deliberate—one of the issues under investigation here.²⁶ Therefore, the request for performance appraisals is not irrelevant.

Section 161c. of the AEA authorizes the NRC to issue subpoenas as it deems "necessary or proper to assist it in exercising *any* authority provided in [the AEA], or in the administration or

²² See Motion at 2-4.

²³ Since none of the requests is unlimited in either scope or time, we hold they are likewise not burdensome, and we therefore reject DPS's claim that the request for training records in subparagraph I.C.5 is burdensome. See *id.* at 4.

²⁴ *Id.*

²⁵ *Whispering Oaks Residential Care Facility*, 673 F.3d at 818 (quoting *Doe v. United States*, 253 F.3d 256, 266 (6th Cir. 2001)).

²⁶ See Subpoena at 1; 10 C.F.R. § 30.10(c) (defining "deliberate misconduct" to mean, in relevant part, an intentional act or omission that a person knows (1) would cause a licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of a license issued by the NRC; or (2) constitutes a violation of a requirement, procedure, instruction, or policy of a licensee).

enforcement of” the AEA and regulations issued thereunder.²⁷ A request for the performance appraisals of an individual under investigation for violations of NRC requirements falls within the agency’s authority to enforce the AEA and NRC regulations. Therefore, the request in subparagraph I.C.4 is within the scope of the NRC’s regulatory authority.

We thus reject DPS’s claims that the request is irrelevant and outside the NRC’s authority and decline to quash or modify the subpoena on those bases.

B. Requests I.A and I.B

In addition to the personnel and other records pertaining to the REP Program manager, the subpoena also seeks information related to the two incidents that triggered the OI investigations.²⁸ In its motion to quash or modify, DPS asserts that SEMA “has no such documents,” but also states, “[to] the extent that the NRC seeks emails,” SEMA would be willing to conduct searches of emails using agreed-upon parameters, including date ranges, email addresses, and search terms.²⁹ This response implies that the subpoena did not provide adequate parameters in the first instance.

But paragraph I.A of the subpoena seeks records “from January 2021 to the present” related to “sealed source leak tests, sealed source inventories, and documentation of annual radiation protection program reviews”³⁰ And paragraph I.B requests records “from September 2022 to the present” related to “an unescorted access incident involving SEMA

²⁷ 42 U.S.C. § 2201(c) (emphasis added).

²⁸ See Subpoena ¶¶ I.A (seeking records related to sealed source test results and inventories and documentation of annual radiation protection program reviews), I.B (seeking records related to unescorted access incident that occurred on September 19, 2022, involving REP Program personnel).

²⁹ Motion at 1.

³⁰ Subpoena ¶ I.A.

Radioactive Emergency Preparedness (REP) Program personnel ... that occurred on September 19, 2022.”³¹

In our view, these requests provide sufficient information for SEMA to conduct the necessary searches. Each provides a date range and supplies sufficient contextual information for the development of search terms. Moreover, the subpoena does not need to list specific email addresses to be searched; the descriptions in paragraphs I.A. and I.B are sufficient for SEMA to identify the employees potentially concerned, specifically, those who work on sealed sources and those who could have been or were involved in the unescorted access incident that occurred on September 19, 2022, respectively.

In short, the subpoena supplies SEMA with reasonable parameters to identify any responsive records. We therefore decline to quash or modify the requests in paragraphs I.A and B.

C. Missouri Law

DPS maintains that it cannot produce any records responsive to the requests in paragraph I.C because they are “closed records” under Missouri law.³² To support this assertion, DPS cites section 610.021 of the Revised Statutes of Missouri, which states, in relevant part: “Except to the extent disclosure is otherwise required by law, a public governmental body is authorized to close ... [i]ndividually identifiable personnel records, performance ratings or records pertaining to employees”³³ As further described below, we find DPS’s reliance on this provision unavailing.

³¹ *Id.* ¶ I.B.

³² Motion at 2-5.

³³ Mo. Rev. Stat. § 610.021(13) (2023).

Section 610.021 states that a Missouri state agency is “authorized to close ... records” to the extent they relate to certain enumerated categories.³⁴ But this is not relevant to whether a federal agency can compel production of those closed records. Even were DPS to close all responsive records in this matter under section 610.021, that fact alone would not allow DPS to refuse to comply with the subpoena; rather, it would permit DPS to shield the records from the public.

But the subpoena at issue here does not implicate disclosure of records to the public. For one, the NRC withholds investigatory material as a matter of course.³⁵ In addition, OI grants access to investigatory material to NRC employees and federal law enforcement agencies on a strict need-to-know basis.³⁶ OI also maintains a system of records for investigatory material that is separate from the NRC’s publicly accessible Agencywide Documents Access and Management System.³⁷ Moreover, the NRC can withhold certain categories of records from public disclosure under its regulations.³⁸

Further, regardless of whether the records sought are withheld, the authority section 610.021 grants to close records yields by its own terms when “disclosure is otherwise required by law.”³⁹ The NRC exercised its statutory authority to enforce and administer the AEA when it

³⁴ *Id.*

³⁵ See NRC Staff Response, Attach., Decl. of Gustave Woerner ¶ 9 (noting that documents obtained during OI investigations are protected as investigative information and not made public without OI’s authorization).

³⁶ *Id.*

³⁷ *Id.*

³⁸ See 10 C.F.R. § 2.390(a) (exempting from disclosure, in relevant part, personnel records when disclosure would constitute a clearly unwarranted invasion of personal privacy; certain records compiled for law enforcement purposes; and records specifically exempted from disclosure by statute).

³⁹ Mo. Rev. Stat. § 610.021.

issued the subpoena, and DPS is therefore required by law to produce the requested records.⁴⁰ Thus, section 610.021 provides no basis for DPS to refuse to comply with the subpoena.⁴¹

The case law DPS cites does not persuade us otherwise. DPS argues that a Missouri Supreme Court decision, *Delmar Gardens v. Gartner*, prevents it from disclosing the records sought in paragraph I.C.⁴² But this case is distinguishable. *Delmar Gardens* involved a challenge to a discovery order that required a party in a private action to produce the entire personnel file of a witness for purposes of impeachment.⁴³ Civil discovery raises the prospect that records produced to an opposing party could be publicly disclosed if, for example, they are introduced as evidence at trial. By contrast, and as previously stated, records produced pursuant to an NRC-issued subpoena are withheld from public disclosure.⁴⁴ The numerous safeguards described above that apply to records produced pursuant to an NRC subpoena are not available in the civil discovery process. Moreover, as discussed above, rather than requesting an individual's entire personnel file, the subpoena limits the scope of responsive records to those relevant to activities conducted under SEMA's NRC license. In short, we disagree that *Delmar Gardens* permits DPS to withhold records responsive to the subpoena.⁴⁵

⁴⁰ See 42 U.S.C. § 2201(c) ("the Commission is authorized ... by subpoena to *require* any person to ... produce documents") (emphasis added).

⁴¹ Because we determine that there is no conflict between § 610.021 and the NRC's subpoena authority, our decision today does not take a position on whether Missouri's statute is preempted by the NRC's subpoena authority.

⁴² See, e.g., Motion at 2 (quoting *State ex rel. Delmar Gardens N. Operating, LLC v. Gaertner*, 239 S.W.3d 608, 611 (Mo. 2007) (en banc)).

⁴³ *Delmar Gardens*, 239 S.W.3d at 609-10.

⁴⁴ See NRC Staff Response, Attach., Decl. of Gustave Woerner ¶ 9.

⁴⁵ Two additional points regarding *Delmar Gardens* are worth mentioning. DPS asserts that personnel records are closed under Missouri law. See, e.g., Motion at 3 ("the Missouri Supreme Court recognizes an employee's privacy rights, which *prevent* the disclosure of the personnel records that are sought") (citing *Delmar Gardens*, 239 S.W.3d at 611) (emphasis added). But the holding in *Delmar Gardens* is not nearly so absolute: It recognized that personnel records

With respect to the subpoena's request for disciplinary-related records, DPS argues that these, too, are closed records under Missouri law.⁴⁶ DPS cites *Laut v. City of Arnold*, but as with *Delmar Gardens*, we are not persuaded. *Laut* addressed whether Missouri privacy law protected from public disclosure the disciplinary records of two municipal police department employees.⁴⁷ In that case, the records would have been publicly released had the court granted the movants' petition. Here, compliance with the subpoena will not result in public disclosure. Therefore, *Laut* is distinguishable.

In sum, we decline to quash or modify the subpoena on the basis of Missouri privacy law and related case law grounds.

are not "entirely undiscoverable in every case," and that there are instances where their discovery is appropriate. 239 S.W.3d at 611. Second, because of the trial court's unbounded request for *all* personnel records of the subpoenaed individual, the Missouri Supreme Court remanded the case to determine whether *some* amount of discovery may nevertheless be appropriate. *Id.* at 612-13. The court would not have contemplated such an outcome if personnel records were per se excluded from disclosure under the state statute. Therefore, *Delmar Gardens* does not establish a blanket prohibition on the disclosure of personnel records under Missouri law.

⁴⁶ Motion at 3.

⁴⁷ *Laut v. City of Arnold*, 417 S.W.3d 315, 317 (Mo. Ct. App. 2013).

III. CONCLUSION

For the foregoing reasons, we *deny* DPS's motion to quash or modify. The subpoena remains in force with a new return date of not later than thirty days from the issuance of this decision.

IT IS SO ORDERED.

For the Commission



Carrie M. Safford
Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of April 2024.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of *subpoena duces tecum*)
)
Issued to MISSOURI STATE) NRC Investigation
EMERGENCY MANAGEMENT AGENCY) Case Nos. 3-2023-007, 3-2023-012
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CERTIFICATE OF SERVICE

I hereby certify that copies of the **Commission Memorandum and Order (CLI-24-02)** have been served upon the following persons by Electronic Information Exchange and by electronic mail as indicated by an asterisk.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this 9th day of April 2024.