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United States Senate
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510–6175

November 26, 2013

The Honorable Allison M. Macfarlane
Chairman
Nuclear Regulatory Commission
Rockville, MD 20852

Dear Chairman Macfarlane:

As Chairman of the Environment and Public Works Committee (EPW), which has the duty and authority to oversee the Nuclear Regulatory Commission (NRC), I am deeply concerned about the controversial and obstructive new policy that NRC has designed in order to justify withholding information from Members of Congress.

The United States Constitution gives Congress broad authority over Executive Branch agencies like the NRC. As an "independent agency," the NRC is independent from the Executive Branch – not from Congressional oversight. It is the NRC's responsibility to keep Congress apprised of its activities, as well as to follow the law and use its authorities responsibly and in the public's interest.

Despite these responsibilities, the NRC unilaterally devised a drastic change of policy behind closed doors, failed to notify the EPW Committee about this far-reaching proposal, and then unilaterally implemented this harmful policy without consulting Congress or the public.

This policy is a radical departure from previous NRC document policies and creates significant hurdles and delays that can be used to withhold information entirely from the Chairs and Ranking Members of oversight committees. It also allows the NRC to broadly deny information to individual Members of Congress, even when the information is related to matters affecting their home states. NRC has additionally attempted to justify this new policy through claims that it needs to do so in order to protect against the public release of sensitive materials, even though these claims are not supported by either case law or Department of Justice guidance documents (Please see attached information).

It is clear that the changes to the NRC policy work against the interests of Congress and attempt to undercut constitutional oversight. I call on the NRC to cease its efforts to circumvent Congress' oversight authority and create a policy that is a model of transparency and respects Congress' responsibility to oversee the NRC.

Sincerely,

Barbara Boxer
Chairman

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Appendix 1
Staff Analysis of NRC's New Policy for Transmitting Sensitive Documents to Congress

SUMMARY: NRC's new policy removes the rights of most Senators to receive sensitive documents at all, and imposes new means by which even requests submitted by Committee Chairmen will be obstructed, delayed and possibly even denied. The new policy has been altered from one that generally presumes that sensitive documents will be provided to Congressional requesters to one that generally presumes that they will not.

NRC's new policy removes the rights of most Senators to receive sensitive documents at all

The Commission's old practice was to provide sensitive documents to Members of its Congressional oversight committees as well as to other Members of Congress when the documents address matters pertaining to his or her State or District. In that manner, Members of the Senate Environment and Public Works Committee could more fully conduct their oversight and legislative responsibilities, and individual Senators not on the Committee could obtain safety, financial or other information related to nuclear reactors or materials that impact their States.

The Commission's new policy denies sensitive documents to all but Chairs and Ranking Members of its oversight committees (and imposes new limitations on Chairs and Ranking Members as well – see below). If an individual Senator asks that a Chair or Ranking Member make a request for documents on his or her behalf, both the Chair and the Ranking Member would receive copies of all documents produced. This could compromise the confidentiality of the individual Senator's work, including work related to matters in his or her own State.

The NRC's new policy directs NRC staff to try to limit the documents provided, even to oversight Committee Chairs and Ranking Members

The NRC's old policy directed NRC staff to ask for a delay in the provision of "particularly" or "highly" sensitive documents such as ongoing investigations until the matter at hand had been decided. It also *allowed* NRC staff to suggest a different way to provide the information requested, such as allowing Congressional staff to review the materials on NRC premises or suggesting other conditions associated with their provision. However, if the Congressional requester still wished to receive the documents, NRC staff was directed to consult with NRC Commissioners but then provide them in a manner that clearly indicated that the documents could not be publicly released.

The NRC's new policy does not distinguish between "particularly" or "highly" sensitive documents and other non-public materials, and requires NRC staff to attempt, as a matter of course, to pursue alternatives to providing *any* non-public document to the Congressional requester. If the Congressional requester continues to require the documents, NRC staff is directed to provide NRC Commissioners with the opportunity to approve or disapprove a proposed document production. These changes will delay the provision of materials requested by NRC's oversight Committee Chairs or Ranking Members as each Commissioner determines whether to approve, disapprove, or delay the response even further by insisting that a full

Commission vote be taken. This could also result in the denial of some or all of the requested documents to Committee Chairs and Ranking Members via direction of NRC Commissioners absent legal authority to withhold any such materials whatsoever.

NRC's new policy may seek to deny Committee Chairs and Ranking Members documents that have also been subject to a Freedom of Information Act (FOIA) request

NRC's old policy allowed for the transmittal of documents that had also been subject to a FOIA request to Congressional requesters as long as they were transmitted with a cover letter asking that they be maintained in confidence until the FOIA determination had been made.

The new policy simply states that NRC staff should keep Congressional requesters apprised of the status of the FOIA request, but is silent on the question of whether the documents will be provided while the FOIA determination is pending. Any person who wished to delay Congressional oversight of a particular matter could seemingly file their own FOIA request for information in order to complicate, delay or deny Congressional requests for the same materials.

Appendix 2

Comparing NRC's Old and New Policies for Transmitting Sensitive Documents to Congress

Old Policy: http://www.nrc.gov/about-nrc/policy-making/icp-chapter-6-2011.pdf
New Policy: http://www.nrc.gov/about-nrc/policy-making/icp-chapter-6-2013.pdf

SUMMARY: NRC's new policy removes the rights of most Senators to receive sensitive documents at all, and imposes new means by which even requests submitted by Committee Chairmen will be obstructed, delayed and possibly even denied. The new policy has been altered from one that generally presumes that sensitive documents will be provided to Congressional requesters to one that generally presumes that they will not.

Who in Congress can receive sensitive documents from the NRC?

Old policy: "The Commission's general practice is to provide sensitive documents requested by Members of its Congressional oversight committees. It will also provide sensitive documents to other Members of Congress when the documents address matters pertaining to his or her State or District. In other circumstances, OCA [the NRC Office of Congressional Affairs] should advise the Member that the NRC prefers that such requests be made through the full Committee or Subcommittee Chairman or ranking minority Member of an NRC oversight committee."

New policy: "Sensitive documents may be provided only upon written request by a Chairperson or Ranking Member of one of NRC's Congressional oversight committees or subcommittees, acting in his or her capacity as Chairperson or Ranking Member…. Individual members of Congress who request sensitive information should be provided publicly available information that is responsive to their requests and offered briefings. The Commission's expectation is that requests for sensitive information will come from the Chairperson or Ranking Member of an NRC oversight committee or subcommittee."

How should NRC staff respond to requests for sensitive documents they prefer not to provide?

Old policy: "In some cases, where the nature of the documents is *highly* sensitive, the Commission *may* wish to consider alternatives to direct transmittal. For example, the Commission *may* wish to suggest retaining the documents on the premises and making them available to Congressional staff for their review."

New policy: "When sensitive documents are requested, OCA, in consultation with the Office of the General Counsel (OGC), *should* first pursue appropriate alternatives to meet the requester's need for information that do not involve production of sensitive documents."

What should NRC do when Congress continues to wish to obtain sensitive documents even after hearing NRC's concerns?

Old policy: For *particularly* sensitive documents, such as ongoing investigations, "the Commission's *preference* is that these documents not be provided to Congress until after the agency has decided the matter at issue. When documents within these categories are requested, OCA will discuss the sensitivity of the document with the requester and ask to defer the request until after the agency has made its decision on the matter at issue. If the requester refuses to withdraw or defer his or her request, then OCA, after consultation with the Commission, *will provide* these documents to Congress pursuant to the procedures set forth below." The procedures referred to include a requirement that the documents be transmitted with a cover letter specifying that they should not be publicly released, and each sensitive document should be so marked as well. The presumption in the 2011 document is that sensitive documents *will* be provided upon request, absent additional direction from the Commission.

New policy: "In recognition of the Commission's decision-making responsibilities, OCA is to ensure that the Commission receives an *opportunity to approve, or a reasonable opportunity to object to,* the initial staff tasking that would include the compilation of sensitive documents as well as a proposed response that would include production of sensitive documents." The new policy does not distinguish between 'highly sensitive' and 'sensitive' documents, and appears to require an active decision on the part of the Commission to approve or disapprove the document production.

How should the NRC handle Congressional requests for documents that have also been FOIAd?

Old policy: In cases where non-public documents requested by a Congressional source are also being requested under a FOIA request, they *should be transmitted* to the requesting Congressional committee under a cover letter signed by the Director, OCA explaining that the documents are subject to a pending FOIA request and requesting that they be maintained in confidence pending a FOIA determination.

New policy: In cases where sensitive documents requested by the Chairperson or Ranking Member of an NRC oversight committee or subcommittee are also being requested under a Freedom of Information Act (FOIA) request, OCA should make reasonable efforts to keep the Congressional requester(s) informed of the status of the pending FOIA request."

Appendix 3

Giving documents to individual Members of Congress does not require that those documents be provided to the general public under a Freedom of Information Act (FOIA) request

1979: In the case of Murphy v. Army, the D.C. Circuit held that disclosure of Army documents to a Member of Congress acting in his official capacity did not require those documents be disclosed to any member of the general public. See *Murphy v. Department of the Army*, 613 F.2d 1151, 1158-59 (D.C. Cir. 1979).

1980: The Department of Justice issued FOIA guidance[1] stating that "Absent any abuse of discretion, however, agencies are authorized to exercise their discretion to grant or deny access to an exempt document. They are not subject to any absolute requirement that discretionary access to a particular person necessarily means that access must be granted to all persons."

1983: The Department of Justice issued FOIA guidance[2] stating that "Similarly, the disclosure of a specifically requested document to a Member of Congress in his or her official capacity, *see Murphy v. Department of the Army*, 613 F.2d 1151, 1155 (D.C. Cir. 1979), to a congressional committee, *see Aspin v. Department of Defense*, 491 F.2d 24, 26 (D.C. Cir. 1973), or to the Government Accounting Office (an arm of Congress), *see Shermco v. Secretary of the Air Force*, 613 F.2d 1314, 1320-21 (5th Cir. 1980), has been held not to waive Exemption 5 protection for predecisional documents. Nor does a disclosure to Congress waive Exemption 1 protection for classified documents. *See, e.g., Moon v. CIA*, 514 F. Supp. 836, 841 (S.D.N.Y. 1981)… In a related vein, it appears to be the general rule that when an agency is compelled to disclose a document under limited and controlled conditions, it is not barred from later invoking applicable exemptions under the FOIA."

1984: The Department of Justice issued FOIA guidance[3] stating that "This is not to say, however, that agencies are without discretion to make broad FOIA disclosures to individual Members of Congress under appropriate circumstances. *Accord Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979) (FOIA exemptions are discretionary, not mandatory). Recognizing the importance of federal information flow to effective congressional relations, Executive Branch agencies should of course give very careful consideration to any access request received from a Member of Congress, with discretionary disclosure often a possibility. And where an agency makes such a discretionary disclosure in furtherance of a legitimate governmental interest, together with careful restrictions on further dissemination, it should be able to resist an argument that such action constitutes a "waiver" of FOIA exemptions. *See FOIA Update*, Spring 1983, at 6."

2000: In *Heggestad v United States Department of Justice*, 182 F. Supp. 2d 1, 13 (2000), the U.S. District Court for the District of Columbia stated that "this Circuit has explicitly held that a document otherwise covered by the deliberative process privilege does not lose this status merely

[1] http://www.justice.gov/oip/foia_updates/Vol_I_4/page3.htm
[2] http://www.justice.gov/oip/foia_updates/Vol_IV_2/page6.htm
[3] http://www.justice.gov/oip/foia_updates/Vol_V_1/page3.htm

because it was disclosed to a member of Congress without an explicit warning of its confidential status."

2004: The Department of Justice issued a FOIA Guide[4] that states that "agencies making an official disclosure of information outside the executive branch should be able to do so without risking waiver of that information under circumstances in which the agency can demonstrate a legitimate purpose for the disclosure, and is able to establish that the disclosure was made with a restriction on further dissemination. Generally speaking, if an agency is able to establish these two fundamental anti-waiver elements, its later claim of exemption will likely prevail" (emphasis added).

[4] http://www.justice.gov/oip/discretionary.htm