

propose any changes to the document withholding criteria nor to the previously proposed copyright provision.

In the revised proposed rule, the NRC also responded in detail to the comments it had received on the December 23, 1992, proposed rule. Some of the comments received on the October 17, 2001, proposed rule make arguments that the Commission rejected in that notice. After reviewing these arguments again, the Commission stands by its explanation set forth in the October 17th notice and will not address those same arguments again.

II. Responses to Comments

A. Overview

The Commission received six comments in response to its October 17, 2001, notice of proposed rulemaking. The comments were from an individual, two nuclear industry vendors, one electric generation company, and two nuclear industry trade organizations. The comment period ended on December 31, 2001, but the NRC gave full consideration to comments received after that date. The comments pertained to the proposed changes in all three categories: document return, including disclosure of proprietary information; document marking; and copyright handling. Most of the comments considered the proposed document return regulations as overly broad, particularly as they apply to the functions of the Office of Investigations. The proposed document marking provisions also were criticized and commonly viewed by commenters as unnecessary, unworkable, or burdensome, and the proposed copyright handling procedures were deemed either unnecessary or unauthorized. The specific comments are addressed below.

B. Document Disclosure

1. *Comment.* Some commenters focused on the issue of disclosure of proprietary information over the submitter's objections, which was not the subject of this rulemaking, rather than the core issue regarding return to the submitter of documents claimed to contain proprietary information. Although the Commission does not propose changes in its current document disclosure policy or practice, this issue warrants a response as it represents a fairly widespread concern among the comments received. Certain commenters objected to the potential for disclosure of proprietary information pursuant to a balancing test, a long-standing provision of 10 CFR

2.790(b)(5), giving the Commission discretionary disclosure authority. The objection is based on a claim that balancing is not within the Commission's authority once a determination is made that the submitted information is proprietary and falls within exemption 4 of the Freedom of Information Act (FOIA).¹ Rather, the commenters asserted, the balance already has been struck by Congress in favor of the protection of proprietary information. Additionally, one commenter argued that the Trade Secrets Act, 18 U.S.C. 1905, prohibits disclosure of information falling within exemption 4 of FOIA.

Response. The Commission is not making any changes to § 2.790(b)(5). Current regulations, which are based on sound judicial case law,² recognize the NRC's authority to balance the public's interest in disclosure against the potential harm that such disclosure would cause the submitter. This authority has not been enhanced by the proposed changes and there is nothing in the FOIA, FOIA case law, or the Trade Secrets Act that prohibits a balancing of this type.

Courts have expressly acknowledged that, when determining whether to disclose information that falls within exemption 4 of the FOIA, agencies may balance the public's interest in disclosure against the harm that would be caused by disclosure to the provider of the information. *See Public Citizen Health Research Group v. FDA*, 185 F. 3d 898 (D.C. Cir. 1999); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 293–94 (1979) (holding that Congress did not intend FOIA exemptions to be mandatory bars to disclosure). The public interest to be weighed in this balance has been narrowly defined as an interest in determining the bases for and effects of agency action (*i.e.*, determining “what the government is up to”), and does not include incidental benefits from disclosure that may be enjoyed by members of the public. *Public Citizen*, 185 F. 3d at 904, 905. Section 2.790(b)(5), which weighs the public's interest in being “fully apprised

as to the bases for and effects of the proposed action,” currently reflects this understanding of the interests that the Commission may properly consider when deciding whether to disclose proprietary information. There is no need to alter the balancing test the Commission has long used.

One commenter argued that the Trade Secrets Act, 18 U.S.C. 1905, prohibits the use of a balancing test to determine whether to disclose information considered proprietary under FOIA exemption 4. According to the Supreme Court, in order for an agency to disclose information considered proprietary and otherwise prohibited from disclosure under the Trade Secrets Act, the agency must act pursuant to properly promulgated rules based on a federal statute other than FOIA itself. *See Chrysler Corp.*, 441 U.S. at 301–05, 308. Section 2.790(b)(5) of the Commission's regulations, which permits the use of a balancing test to determine whether to disclose proprietary information, was enacted pursuant to the Commission's rulemaking authority under the Atomic Energy Act of 1954, as amended (AEA). *See* 42 U.S.C. 2201(p). This rulemaking authority enables the Commission to make such rules as may be necessary to carry out the purposes of the AEA, one of which is the dissemination of unclassified scientific and technical data. *See* 42 U.S.C. 2031(b), 2201(p). Because § 2.790(b)(5) was properly promulgated under the authority of the AEA, using rulemaking procedure required by the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, it authorizes the Commission to disclose information that would otherwise be prohibited from disclosure under the Trade Secrets Act. *See Chrysler Corp.*, 441 U.S. at 301–05, 308.

Finally, the proprietary determination decisionmaking process provides several opportunities for the submitter to make a case for withholding information from public disclosure. As a practical matter, the final determination may be the outcome of a series of exchanges between the agency and the submitter, almost always resulting in the protection of truly confidential and privileged portions of the material, while making available enough of the rest to inform the public adequately of the vital details that the public needs to understand and inquire into the Commission's actions. The Commission stresses that it rarely, if ever, has released proprietary information over the objection of a submitter. The Commission emphasizes that there is nothing in the final rule that will result in a more liberal release

¹ This exemption protects “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. 552(b)(4) (2000).

² Indeed, this very regulatory authority of the NRC was tested in court nearly twenty years ago and remains good law today. *General Electric Co. v. NRC*, No. 80–2244 (C.D. Ill. Nov. 30, 1983), motion to vacate denied (C.D. Ill. June 26, 1984), *aff'd in part, rev'd in part and remanded*, 750 F. 2d 1394 (7th Cir. 1984). That same case also provides fundamental legal authority for the proposition that a rule permitting withdrawal of documents before public release would be inapplicable once the agency was in receipt of a FOIA request for the information.