

changes. Therefore, the Commission has chosen to maintain its present approach to the classification of proprietary information in the text of the rule, with a slight modification intended to capture the precise standard for voluntarily submitted information set forth in *Critical Mass*. Under the current rule, one factor to be considered when determining whether a submittal is proprietary is "whether the information is of a type customarily held in confidence by its owner and whether there is a rational basis therefor." 10 CFR 2.790(b)(4)(ii). In response to this comment, and in order to align the Commission's rules with the holding of *Critical Mass*, the final rule eliminates any inquiry into whether there is a rational basis for withholding voluntarily submitted information if it is of a type customarily held in confidence by its owner. In cases of mandatory submittals, the rational basis factor may be weighed along with the others listed in § 2.790(b)(4) in order to determine proprietary status. In cases of voluntarily submitted information, the only factor to be considered in determining whether the information is proprietary is the "customarily held in confidence" factor, in accordance with *Critical Mass*. Thus, the final rule will accurately reflect the standard of *Critical Mass* while retaining the flexibility to accommodate future changes to the legal criteria for determining when submitted information is considered to be proprietary.

4. *Comment.* A few of the commenters considered the proposed rule to sweep too broadly with respect to retention of documents obtained during investigations conducted by the NRC Office of Investigations (OI) and preferred to see the rule provision restricted to "evidence" obtained during an ongoing OI investigation. Some commenters were concerned about the additional release under FOIA of confidential information inadvertently revealed at Advisory Committee or at open Commission meetings. One of these commenters also objected to the proposed change from the 30-day period after denial of a withholding request to a "reasonable time" after which the information in question would be publicly released, assuming no other resolution was reached sooner.

Response. The Commission does not agree with the suggestion that only those documents that specifically form the basis of the OI's decision, i.e., "evidence," should be subject to the return exception, or for that matter, only those documents relied upon to make an official finding or to develop a report,

decision, or policy by an advisory committee or the Commission in Sunshine Act meetings. Such an interpretation would add nothing to the provisions that provide for retention of documents that form the basis of a final decision or agency action. The Commission would not compound a mistake by deliberating making publicly available confidential information that had been inadvertently or erroneously released at an Advisory Committee or an open Commission meeting. The Commission takes pains to ensure that inappropriate disclosures do not occur. However, in the unusual circumstance that it should happen, the NRC would not simply publish the information under the theory that "the horse is already out of the barn."

As for the issue regarding a suitable period of time to provide the submitter after denial of a withholding request, the Commission has changed it from 30 days to a "reasonable time" to allow maximum flexibility, particularly in situations in which time may be of the essence and a 30-day period is simply untenable. The regulation merely substitutes the less definitive qualifier "reasonable time" for the specific but rigid quantifier 30 days. In no case would the submitter be afforded inadequate notice; notice is guaranteed and the amount of time to be provided is specified in the notice itself. This modification will permit an informed decision of the amount of time that may be afforded judiciously for the submitter to address the denial without jeopardizing any of the Commission's competing responsibilities. Even where a brief period is deemed necessary, the submitter still will be provided adequate opportunity to address the matter.

D. Document Marking

5. *Comment.* The proposed rule used the term "confidential" to encompass all types of information that might be susceptible to protection under 10 CFR 2.790. One commenter was troubled by the potential for confusion because the same term is used in the context of classified national security information. The commenter suggested an alternative.

The Commission's proposed rule also would require submitters of documents containing proprietary or other confidential information to mark those portions of the documents claimed to be withholdable from the public and would provide direction on how this is to be done. The comments on the proposed document marking provisions were largely oriented toward pragmatic concerns over the potential burdens of

performing "adjacent" marking and top-of-page marking, calling them duplicative, time-consuming, impractical, and unnecessary. Some commenters viewed the marking provisions as too prescriptive and suggested that a general requirement, combined with submitters' self-interest, would accomplish the Commission's goal of reducing the risk of inadvertent disclosure of proprietary or otherwise confidential material. Two commenters generally supported the proposed marking requirement, one requesting clarification to determine whether the "first page" to which the proposed regulation referred was the cover letter or a substantive page, and if the cover letter, whether it also must bear an indication of confidential content. The commenter suggested a "decontrolling" provision for the cover letter when separated from the remaining material. This commenter believes that identification in the affidavit of the location of confidential material by page number should be adequate. One commenter requested guidance on how portion marking might be done (e.g., would bracketing of material to be withheld be appropriate?), and on identification in the affidavit of the location of information to be withheld.

Response. The proposed rule used the term "confidential" because it was already employed in the existing version of the rule and because exemption 4 of the FOIA, the primary statutory provision for withholding information from public disclosure that serves as the model for this section, as well as the judicial case law, utilize that term. Thus, there is value in employing it. Changing the term now might produce confusion, particularly since it will be at variance with both the statutory language and the interpretive case law. Thus, the Commission has decided to retain the term "confidential" in accordance with established usage and case law, with the understanding that the intent is to interpret the term consistently with that usage and not as a reference to classified national security information.

In response to the comments regarding the marking requirements for documents containing confidential information, e.g., proprietary or personal privacy information, the Commission's final rule provides submitters of confidential information greater leeway. As to the need for adjacent marking, it is noted that, while some parties may submit one type of confidential information (e.g., proprietary information), others may submit documents or packages with mixed, or more than one, type of