

confidential information (e.g., both proprietary and personal privacy information). This was the primary reason for the "adjacent" marking requirement. While this identification still could be confined to any required affidavit, the benefit to the Commission of adjacent marking is in obviating the need for NRC personnel to cross-reference the document to the affidavit to determine which particular portions should be protected and under what basis.

It will be acceptable to employ a bracketing approach akin to that commonly used in the FOIA process, in which portions of documents subject to particular exemptions are enclosed with brackets and marked with the statutory (exemption) basis for withholding. This is a reasonable way to handle the adjacent marking requirement, where less than an entire page is affected by the marking, and without marking each paragraph. However, the Commission's intention is not to be overly-prescriptive in the particulars of either the marking language or the mechanics, in order for submitters to have broad latitude for whatever is most sensible in each case.

The Commission does not agree that the reference to "first page" of the document is ambiguous; the provision refers to "document, or a portion of it," sought to be withheld. The reference does not encompass a "cover letter," unless the cover letter itself reveals confidential material, in which case it should be marked accordingly. Obviously, submitters are free to place any legend they choose on cover correspondence to indicate public availability where only the attachments are to be withheld from the public.

There seemed to be a consensus among commenters that a less prescriptive form of document marking would work as well as the proposed marking language and that a general requirement, coupled with the submitter's self-interest, would produce the same results. The Commission agrees with this observation and has decided to relax this requirement to reflect a less rigid standard, relying on the submitter to identify proprietary or other confidential material appropriately. The Commission will accept any marking that clearly indicates the material to be withheld from public disclosure, or the affected portion thereof, such as by the following legends: "withhold from public disclosure under 10 CFR 2.790," "proprietary," or "confidential." Any cover letter, likewise, should provide notice of confidential content in the enclosure, although there would be no reason to withhold from public

disclosure a cover letter that itself contained no confidential material. As for the affidavit, identification of confidential material by page number should be adequate, as suggested by one of the commenters. Ultimately, the Commission will honor any legend that signifies the same sense of restriction intended to be conveyed by the prescribed marking, as described more fully in response to the following comment.

6. Comment. Another commenter expressed concern that confidential documents not be vulnerable to disclosure for inadvertent or immaterial failure to follow the prescribed marking requirements and sought clarification of handling procedures in such situations, as well as a reasonable opportunity for the submitter to rectify the situation upon discovery of the error. This commenter also objected to the redaction and affidavit requirement for personal privacy information, indicating that imposing the document marking requirement for this type of information presented an administrative burden without a corresponding benefit. The commenter suggested a categorical exemption to withhold in the entirety medical, personnel, and operator examination records, and possibly other documents containing personal privacy information, arguing that it usually is clear when a document contains privacy information and the need to protect it normally requires no further justification. Finally, the commenter sought clarification of the affidavit requirement for privacy information to state that a licensee official might sign the affidavit, rather than the subject of the personal information.

Response. As noted in this comment, the proposed rule attempted to provide reassurance that submitters would not be penalized for inadvertent failure to follow prescribed marking procedures. The Commission reiterates its position that it prefers use of the standardized language set forth in the final rule because it does not believe that requiring standardized language will result in a serious hardship on submitters, especially since the NRC intends to use standardized marking language as a processing tool and not as a means of limiting access to the withholding request procedure. The NRC will not impose a penalty, however, for failure to use the precise wording prescribed. Language substantially similar to that prescribed will be equally acceptable.³

³ "The point is not to enforce a standard rigidly for its own sake, but to afford appropriate protection to submitter's confidential information,

The Commission continues to have concerns when submitters intend that the NRC treat information as proprietary or confidential, yet do not request this treatment or request this treatment without identifying those portions warranting such treatment. A major purpose of the rule is to put the public on notice that the NRC will not place itself in the position of having to comb through documents searching for confidential information that had not been identified by the submitter and for which there was no reasonable designation. There is, however, ample opportunity to resolve situations cooperatively where the submitter inadvertently neglects to mark confidential information and subsequently seeks to have it so designated. There is no need to codify such a process, and in response to admonishments not to be overly-prescriptive, the final rule does not address every type of situation that may be encountered, nor the manner in which each would be handled. Moreover, preserving the flexibility for treating each circumstance in the most appropriate fashion would seem to counsel against such codification.

As to the objection regarding the affidavit requirement for personal information, the Commission agrees with the comment that an affidavit need not accompany a request to withhold personal privacy information. The affidavit requirement is better suited to submittals containing proprietary information. The final rule thus does not require that an affidavit accompany submittals containing personal privacy information. Nonetheless, the submitter needs to identify personal privacy information in accordance with the marking requirements, to assist in the avoidance of inadvertent release.

Finally, although no comment was received on this point, the proposed rule contained a provision in § 2.790(e)(2) for the Commission to "waive the requirements of this paragraph on request, or on its own initiative, in circumstances the Commission deems appropriate." The waiver was intended to apply to the affidavit requirement. Therefore, the language has been moved to paragraph (b)(1)(ii), which pertains to affidavits, and revised to reflect that correction.

as economically and efficiently as possible. The NRC would work with submitters, as it always has, to resolve any discrepancies of which it was aware within a particular request." NRC Proposed Rule on Availability of Official Records (October 17, 2001; 66 FR 52721, 52723).