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Description of document:	Nuclear Regulatory Commission (NRC) Office of the Inspector General (OIG) investigation into alleged leak of non-public information by a member of Defense Nuclear Facilities Safety Board (DNFSB) to the Department of Energy (DOE), 2011
Request date:	2012
Released date:	11-August-2014
Posted date:	20-October-2014
Source of document:	U.S. Nuclear Regulatory Commission Mail Stop T-5 F09 Washington, DC 20555-0001 Fax: 301-415-5130 E-mail: FOIA.resource@nrc.gov

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NRC FORM 464 Part I (OIG)
(03-2014)

U.S. NUCLEAR REGULATORY COMMISSION

RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

FOIA/PA	RESPONSE NUMBER
2012-0228	2

RESPONSE TYPE: ☑ FINAL ☐ PARTIAL

REQUESTER

DATE: AUG 11 2014

PART I. -- INFORMATION RELEASED

☐ No additional agency records subject to the request have been located.

☐ Requested records are available through another public distribution program. See Comments section.

☐ GROUP: Agency records subject to the request that are identified in the specified group are already available for public inspection and copying at the NRC Public Document Room.

☐ GROUP: Agency records subject to the request that are contained in the specified group are being made available for public inspection and copying at the NRC Public Document Room.

☑ GROUP A: Agency records subject to the request are enclosed.

☐ Records subject to the request that contain information originated by or of interest to another Federal agency have been referred to that agency (see comments section) for a disclosure determination and direct response to you.

☐ We are continuing to process your request.

☐ See Comments.

PART I.A -- FEES

AMOUNT* $

* See comments for details

☐ You will be billed by NRC for the amount listed.

☐ You will receive a refund for the amount listed.

☑ None. Minimum fee threshold not met.

☐ Fees waived.

PART I.B -- INFORMATION NOT LOCATED OR WITHHELD FROM DISCLOSURE

☐ No agency records subject to the request have been located. For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c) (2006 & Supp. IV (2010). This response is limited to those records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

☑ Certain information in the requested records is being withheld from disclosure pursuant to the exemptions described in and for the reasons stated in Part II.

☑ This determination may be appealed within 30 days by writing to the FOIA/PA Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Clearly state on the envelope and in the letter that it is a "FOIA/PA Appeal."

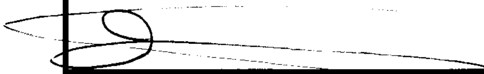
PART I.C COMMENTS (Use attached Comments continuation page if required)

Portions of the responsive records have been withheld pursuant to FOIA Exemption 7(C) by the Defense Nuclear Facilities Safety Board. The denying official is:

Andrew Thibadeau, Information/FOIA Officer
DNFSB
Suite 700
625 Indiana Ave., NW
Washington, DC 20004

The appeal procedures for DNFSB can be found at 10 CFR 1703.109.

SIGNATURE - ASSISTANT INSPECTOR GENERAL



NRC FORM 464 Part II (OIG)
(03-2014)

U.S. NUCLEAR REGULATORY COMMISSION

RESPONSE TO FREEDOM OF INFORMATION ACT (FOIA) / PRIVACY ACT (PA) REQUEST

FOIA/PA 2012-0228

DATE AUG 11 2014

PART II.A -- APPLICABLE EXEMPTIONS

GROUP A

Records subject to the request that are contained in the specified group are being withheld in their entirety or in part under the Exemption No.(s) of the PA and/or the FOIA as indicated below (5 U.S.C. 552a and/or 5 U.S.C. 552(b)).

☐ Exemption 1: The withheld information is properly classified pursuant to Executive Order 12958.

☐ Exemption 2: The withheld information relates solely to the internal personnel rules and practices of NRC.

☐ Exemption 3: The withheld information is specifically exempted from public disclosure by statute indicated.

- ☐ Sections 141-145 of the Atomic Energy Act, which prohibits the disclosure of Restricted Data or Formerly Restricted Data (42 U.S.C. 2161-2165).
- ☐ Section 147 of the Atomic Energy Act, which prohibits the disclosure of Unclassified Safeguards Information (42 U.S.C. 2167).
- ☐ 41 U.S.C., Section 4702(b), prohibits the disclosure of contractor proposals in the possession and control of an executive agency to any person under section 552 of Title 5, U.S.C. (the FOIA), except when incorporated into the contract between the agency and the submitter of the proposal.

☐ Exemption 4: The withheld information is a trade secret or commercial or financial information that is being withheld for the reason(s) indicated.

- ☐ The information is considered to be confidential business (proprietary) information.
- ☐ The information is considered to be proprietary because it concerns a licensee's or applicant's physical protection or material control and accounting program for special nuclear material pursuant to 10 CFR 2.390(d)(1).
- ☐ The information was submitted by a foreign source and received in confidence pursuant to 10 CFR 2.390(d)(2).
- ☐ Disclosure will harm an identifiable private or governmental interest.

☐ Exemption 5: The withheld information consists of interagency or intraagency records that are not available through discovery during litigation. Applicable privileges:

- ☐ Deliberative process: Disclosure of predecisional information would tend to inhibit the open and frank exchange of ideas essential to the deliberative process. Where records are withheld in their entirety, the facts are inextricably intertwined with the predecisional information. There also are no reasonably segregable factual portions because the release of the facts would permit an indirect inquiry into the predecisional process of the agency.
- ☐ Attorney work-product privilege. (Documents prepared by an attorney in contemplation of litigation)
- ☐ Attorney-client privilege. (Confidential communications between an attorney and his/her client)

☐ Exemption 6: The withheld information is exempted from public disclosure because its disclosure would result in a clearly unwarranted invasion of personal privacy.

☑ Exemption 7: The withheld information consists of records compiled for law enforcement purposes and is being withheld for the reason(s) indicated.

- ☐ (A) Disclosure could reasonably be expected to interfere with an enforcement proceeding (e.g., it would reveal the scope, direction, and focus of enforcement efforts, and thus could possibly allow recipients to take action to shield potential wrong doing or a violation of NRC requirements from investigators).
- ☑ (C) Disclosure could constitute an unwarranted invasion of personal privacy.
- ☐ (D) The information consists of names of individuals and other information the disclosure of which could reasonably be expected to reveal identities of confidential sources.
- ☐ (E) Disclosure would reveal techniques and procedures for law enforcement investigations or prosecutions, or guidelines that could reasonably be expected to risk circumvention of the law.
- ☐ (F) Disclosure could reasonably be expected to endanger the life or physical safety of an individual.

☐ OTHER (Specify)

PART II.B -- DENYING OFFICIALS

Pursuant to 10 CFR 9.25(g), 9.25(h), and/or 9.65(b) of the U.S. Nuclear Regulatory Commission regulations, it has been determined that the information withheld is exempt from production or disclosure, and that its production or disclosure is contrary to the public interest. The person responsible for the denial are those officials identified below as denying officials and the FOIA/PA Officer for any denials that may be appealed to the Executive Director for Operations (EDO).

DENYING OFFICIAL	TITLE/OFFICE	RECORDS DENIED	APPELLATE OFFICIAL EDO	SECY	IG
Joseph A. McMillan	Assistant Inspector General, OIG	Group A	☐	☐	✓
Andrew Thibadeau	Information/FOIA Officer, DNFSB	Group A	☐	☐	☐
			☐	☐	☐

Appeal must be made in writing within 30 days of receipt of this response. Appeals should be mailed to the FOIA/Privacy Act Officer, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, for action by the appropriate appellate official(s). You should clearly state on the envelope and letter that it is a "FOIA/PA Appeal."

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555-0001

OFFICE OF THE
INSPECTOR GENERAL

July 28, 2011

Don W. Fox
Acting Director & General Counsel
U.S. Office of Government Ethics
1201 New York Avenue, NW.
Suite 500
Washington, DC 20005

Dear Mr. Fox:

This letter conveys the results of an Office of the Inspector General (OIG), U.S. Nuclear Regulatory Commission (NRC), investigation into an allegation made by (b)(7)(C) (b)(7)(C) Defense Nuclear Facilities Safety Board (the Board), to the Office of Government Ethics (OGE). (b)(7)(C) reported that (b)(7)(C), a Board member, leaked non-public information to the Department of Energy (DOE). OGE referred the matter to the Council of Inspectors General on Integrity and Efficiency which assigned my office to review the allegation.

Allegation

(b)(7)(C) alleged that (b)(7)(C) a presidentially appointed Board member, leaked a November 2010 draft Board letter concerning the National Nuclear Security Administration's (NNSA)[1] Transformational Governance and Oversight Initiative (Governance Initiative) to (b)(7)(C) and/or (b)(7)(C) (b)(7)(C) also stated that Board members suspected that (b)(7)(C) may have leaked other draft letters to DOE.

Findings

OIG found that (b)(7)(C) did not release the Board's draft letter concerning NNSA's Governance Initiative to DOE, but provided his own rewrite of the draft letter to (b)(7)(C) via e-mail.

(b)(7)(C) provided a signed, sworn statement admitting that on several occasions he discussed draft Board correspondence with DOE. He stated that he e-mailed a copy of his rewrite of the Board's draft letter concerning NNSA's Governance Initiative to the

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[1] NNSA is responsible for the management and security of the nation's nuclear weapons, nuclear nonproliferation, and naval reactor programs. It also responds to nuclear and radiological emergencies in the United States and abroad.

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(b)(7)(C). (b)(7)(C) also stated that he read to DOE's Chief of Nuclear Safety portions of the Board's draft letter concerning deposition velocity.

While Board members and staff believed that (b)(7)(C) actions undermined the Board's effectiveness and independence, and violated its practice of not releasing or discussing information in draft letters to DOE until they were finalized, OIG found that the Board lacked written guidance or formal policies that prohibited the communications. In addition, OIG found that draft Board letters under review by Board members do not have any restricted markings.

Background

42 U.S.C. Section 2286 established the DNFSB as an independent establishment in the Executive Branch. The Board is responsible for reviewing and evaluating the content and implementation of the standards relating to the design, construction, operation, and decommissioning of DOE defense nuclear facilities. The Board is required to investigate any event or practice at a DOE defense nuclear facility which the Board determines has or may adversely affect public health and safety. The Board may systematically analyze design and operational data, and review the design of a new DOE defense nuclear facility before construction. The Board is required to make recommendations to the Secretary of Energy with respect to DOE defense nuclear facilities.

The Board is composed of five presidentially appointed members who are respected experts in the field of nuclear safety. The President designates the Chairman and Vice Chairman. All members are appointed for 5-year terms. A member may serve after the expiration of his or her term until a successor has taken office. (b)(7)(C)

The purpose of NNSA's Governance Initiative is to identify the responsibilities, processes, and requirements that NNSA will use to transform and improve Federal governance and oversight of its Management and Operating (M&O) contractors.

Basis of Findings

Review of Board and Department of Energy Letters

OIG reviewed one draft and two official letters between the Board and DOE concerning the Governance Initiative, and an e-mail concerning the draft letter from (b)(7)(C) to the other Board members.

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The draft letter,[2] a one and a half page document prepared by the Board's technical staff in October 2010 and addressed to (b)(7)(C) expressed the "Board's concern that NNSA's initiative to exempt its M&O contractors from requirements contained in DOE directives is inconsistent with the DOE directives system and will have a negative impact on safety." The Board requested, within 30 days, a briefing to address (1) DOE's perspective on the initiative and whether it is consistent with its directives system, (2) NNSA's goal for the initiative and the anticipated end-state, (3) NNSA's criteria for categorizing requirements, and (4) DOE's plans for evaluating the impact of the initiative on the safety of defense nuclear facilities. According to the draft, until DOE performed the evaluation, the Board wanted NNSA to postpone granting exemptions to the requirements.

OIG learned that the October 2010 draft letter, which contained no markings to indicate restricted distribution, was never finalized or issued.

OIG reviewed a November 17, 2010, e-mail from (b)(7)(C) to the other Board members stating the October 2010 draft letter "was one of the worst letters I have read. It's my guess that if the draft letter were sent it would significantly reduce voluntary dialogue with the Department....I'm not sure my redraft is any better – but it is shorter." (b)(7)(C) included in his e-mail his proposed redraft, which stated essentially:

> DNSFB is concerned that unintended negative nuclear safety consequences may result from the recent NNSA memorandum dated August 16, 2010, to exempt duplicative, overly prescriptive, inconsistent and/or unclear sections of DOE directives from the Nevada and Sandia M&O contracts. Within the past week, Board Members and Board staff have made these concerns known to the Department's senior leadership. However, it is the consensus of the Board that a pause in the implementation process is necessary, and that it not be reinitiated until all parties have a clear and unambiguous understanding of the consequences, intended and unintended.

OIG also reviewed two letters issued between the Board and DOE. The first was a November 19, 2010, letter from (b)(7)(C) to (b)(7)(C) stating:

> Thank you for taking the time to meet this week...NNSA will not approve modified contractual approaches for health, safety, and security directives, all of which will be reviewed in the next 6 to 8 months using the Department's directives review system.

[2] The draft letter was provided to OIG by (b)(7)(C) for the Board.

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On December 7, 2010, (b)(7)(C) sent (b)(7)(C) a letter stating:

> The [Board] appreciates the action that you have taken to address [NNSA's] initiative to remove health and safety requirements from M&O contracts at defense nuclear facilities.... However, many questions remain and the Board will continue to focus on understanding the basis, as well as the justification, for removing or relaxing specific requirements.

Computer and Network Forensic Review

(b)(7)(E)

> (b)(7)(E)

Following these comments was the e-mail (b)(7)(C) sent to Board members of his redraft of its letter concerning NNSA's Governance Initiative.

Interview of (b)(7)(C)

(b)(7)(C) told OIG that the Board uses two primary vehicles to communicate requests to DOE. One is a letter which asks DOE for reports or to take specific actions. The second is a recommendation to the Secretary of Energy, asking the Secretary to take specific actions. The Board sends letters to the Deputy Secretary of Energy, the Under Secretaries of Energy, and the Assistant Secretaries of Energy. A recommendation is stronger than a letter, and more formal and visible. DOE must formally accept a

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recommendation from the Board and is required to prepare an implementation plan subject to the Board's approval. Both recommendations and letters are made publicly available soon after their issuance.

(b)(7)(C) stated that (b)(7)(C) basic job is to make sure communications between the Board and DOE are occurring on a frequent and effective basis; also, she is to make sure that the Deputy Secretary of Energy, to whom she reports directly, is fully aware of issues the Board is considering for action.

Once an issue is formulated, the Board staff initially communicate verbally with DOE as "intensely" and "forcefully" as they can about the issue. If, however, the staff believes that a letter or recommendation by the Board is needed, the staff will brief the Board members on the issue and suggest the need for such involvement by the Board. If a determination is made that the issue has not been addressed through the staff's discussion with DOE, the Board will begin to execute letter writing and/or recommendations.

(b)(7)(C) stated that DOE is generally aware of the Board's basic concerns and interests prior to the Board's decision to write a letter. However, he stated, "the difference is that when we actually send the letter, the Board is going on record and formally raising the issue. It promotes public confidence in the interaction between the Board and DOE that public health and safety is being adequately addressed." (b)(7)(C) (b)(7)(C) said that the Board is supposed to raise issues and DOE is supposed to respond to the issues. He said that if a letter is not written, "it gives the appearance that DOE is unilaterally, without real input from the Board, taking this issue on and doing work." He believes the process works better when the Board goes on record and DOE responds to the Board.

(b)(7)(C) said that before the Board issues a letter, "DOE does not know the particulars of the letter. They don't know the tone or the complete substance of the letter." He said it has never been the practice of the Board to share draft letters or information from drafts with DOE before the final document is released. The Board's practice is to work issues with DOE staff prior to writing a letter. However, he said when the Board begins to actually write a letter and prepare it for signature, the information is considered predecisional and is not shared with DOE.

Although (b)(7)(C) could not identify any written policies or guidance prohibiting Board members from sharing draft letters with DOE, he said that sharing such information undermines the Board's effectiveness. He noted that up until the time a letter is sent, it can be changed. Thus, when someone shares a predecisional draft, the person is not sharing the final product. He also said that DOE does not like receiving letters from the Board and may try to "head off" a Board letter if it learns of the letter's content before it is issued.

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(b)(7)(C) also believed that while the Board is reviewing a draft letter and finalizing its position and seeking concurrence on the letter, it is inappropriate for a Board member to have discussions with DOE about information in the draft. He said it is inappropriate because the Board "needs to be independent of DOE and if we begin to have discussions with DOE, the independence would be lost." However, (b)(7)(C) could not identify any written policies or guidance prohibiting such discussions.

(b)(7)(C) reported two instances where (b)(7)(C) may have leaked predecisional information to DOE. In the first instance, in February or March 2010, the Board began drafting a letter to (b)(7)(C), on proposed changes to the Waste Treatment Plant Hydrogen Pipes and Ancillary Vessel Safety Design Strategy. The letter raised concerns about the proposed changes to prevent hydrogen explosions at the facility. Prior to the letter's issuance, (b)(7)(C) and another Board member contacted (b)(7)(C) to tell her that she would be receiving a letter on this issue, which (b)(7)(C) was the Board's practice. However, (b)(7)(C) (b)(7)(C) said (b)(7)(C) began to refute what was in the letter, which the Chairman felt was "strange" because DOE had not seen the letter. (b)(7)(C) said the Board ultimately never sent the letter because DOE "put so much pressure on the Board."

(b)(7)(C) said he was later told by the (b)(7)(C) of the Board that (b)(7)(C) read the entire letter, or portions of the letter, on the phone to a DOE official, whom he later learned was (b)(7)(C). (b)(7)(C) believed that had (b)(7) (b)(7)(C) not shared the details of the letter, the letter "probably would have been sent to the Department." (b)(7)(C) noted that while DOE never received the letter, DOE formed an external review team to look at the issue. He said the changes DOE made were very close to what the Board was seeking in the draft letter.

The second instance where (b)(7)(C) may have leaked predecisional information to DOE pertained to NNSA's Governance Initiative. (b)(7)(C) stated that in March 2010, DOE launched an aggressive effort to make significant changes to its directive system. Subsequently, NNSA launched a Governance Initiative that would select seven directives and make significant changes in how NNSA contactors would implement those directives. This matter was of great concern to the Board. In November 2010, the Board met with (b)(7)(C) and said that if actions were not dramatically changed, DOE would likely get a communication from the Board. He stated at the time of the meeting, the Board had already drafted a letter. (b)(7)(C) said (b)(7)(C) did not like the version the Board had put together and subsequently wrote his own draft letter regarding the issue.

On November 19, 2010, (b)(7)(C) wrote a letter to (b)(7)(C) in which he told NNSA to "stand down moving forward with the directives reform for the seven directives." (b)(7)(C) said when (b)(7)(C) issued the letter, it was a concern for the Board because the Board received many press calls asking what the (b)(7)(C) letter meant. (b)(7)(C) said that nobody understood what the

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(b)(7)(C) was responding to because the Board had not yet sent him a letter. On December 7, 2010, the Board issued (b)(7)(C) a letter "asking for more than what was in (b)(7)(C) letter, such as their criteria used to make decisions."

(b)(7)(C) said that in late November 2010, he called all the Board members and the Board's legal counsel into the Board room. He confronted (b)(7)(C) and asked him if he shared information from the two letters with DOE. (b)(7)(C) said (b)(7)(C) response was, "I don't recall."

Interview of Board Members

(b)(7)(C)

(b)(7)(C), told OIG that (b)(7)(C) recalled (b)(7)(C) convening a meeting in late November 2010 with the Board members and the legal counsel. During the meeting, (b)(7)(C) asked whether anyone had shared draft information with DOE, and he specifically asked (b)(7)(C) if he had done so. (b)(7)(C) said that (b)(7)(C) initially said, he had not. Then (b)(7)(C) asked (b)(7)(C) why (b)(7)(C) would say this if it were not true. (b)(7)(C) then changed his answer to he could not recall.

(b)(7)(C) said that when the meeting ended, (b)(7)(C) and (b)(7)(C) stayed in the conference room to talk. (b)(7)(C) told (b)(7)(C) that he could share any information he wanted to share, to which (b)(7)(C) replied, "No you can't because predecisional information really takes away the opportunity for the Board to act as a body in communicating with the Department. It interferes with the relationship." (b)(7)(C) (b)(7)(C) then told (b)(7)(C) that he only shared his version of the letter. (b)(7)(C) (b)(7)(C) told (b)(7)(C) that he had "no version of the letter" because there is no letter until the Board commits. (b)(7)(C) told OIG that the impact of sharing draft correspondence was that DOE could and has reacted to things that the Board has not even communicated, which has created a tense relationship. (b)(7)(C) said that any communication the Board has with DOE must be publicly visible.

(b)(7)(C) said that (b)(7)(C) did not believe the Board had any internal procedures or rules on how it should operate. (b)(7)(C) said training is usually verbal. However, (b)(7)(C) said during the summer of 2010, (b)(7)(C) specifically asked the Board members to be sensitive to not sharing drafts with the Department.

(b)(7)(C) said the Board members meet each morning and raise issues that the Board might want to consider. (b)(7)(C) stated that when (b)(7)(C) is present, Board members are hesitant to talk because they are afraid that before the Board can review a matter, the Department is already responding to the matter in advance.

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(b)(7)(C)
recalled (b)(7)(C) convening a meeting in late November 2010 with the Board members and the legal counsel. At the meeting, (b)(7)(C) asked (b)(7)(C) if he was sharing draft letters with DOE. He said (b)(7)(C) did not say "Yes or no," but something to the effect of, "I don't see anything wrong with it." After the meeting, (b)(7)(C) (b)(7)(C) went to (b)(7)(C) office and told him the Board members did not think he should discuss draft letters with DOE because it ruins the collegiality of the Board. He told (b)(7)(C) that it was a betrayal of the Board's confidence and interfered with its oversight activities. (b)(7)(C) response to (b)(7)(C) was, "I'll talk to anybody I want."

(b)(7)(C) told OIG that if (b)(7)(C) were reappointed, it would be hard to trust him. (b)(7)(C) could not identify any written policies or guidance prohibiting Board members from sharing draft letters with DOE.

(b)(7)(C) told OIG that the Board, to his knowledge, has never had a split vote on concurring on a letter or recommendation. If there is a redraft of a letter, an attempt is made to find "common ground." He said the problem with DOE seeing a draft letter is that it would have "no knowledge of where that stood in the process of preparation." (b)(7)(C) also said that "DOE had a habit of trying to find out what we are preparing to send, and then to try and preempt our sending a letter." He further stated that it was "not really helpful, because what they could put out is something that purports to address the subject, but is not adequate in our eyes, and it really complicates what we're trying to do, which is to put on the record our position in a simple, clear, direct manner." (b)(7)(C) could not identify any written policies or guidance prohibiting Board members from sharing a draft letter with DOE.

(b)(7)(C) believed that (b)(7)(C) was trying to "constitute himself as the independent Board member," and (b)(7)(C) was willing to negotiate with DOE, which (b)(7)(C) felt was not appropriate.

Interview of the (b)(7)(C)

(b)(7)(C) told OIG that in November 2010, a Board employee reported to her that (b)(7)(C) had read to (b)(7)(C) extensive portions of the Board's draft letter on NNSA's Governance Initiative. (b)(7)(C) stated she had never before heard of a Board member reading a draft letter to DOE, although she had heard of Board and staff members alerting DOE that they were not pleased about an issue and that correspondence would be forthcoming.

(b)(7)(C) related (b)(7)(C) pre-release of a draft letter to DOE undermined the effectiveness of the Board and caused confusion within DOE. (b)(7)(C) (b)(7)(C) November 19, 2010, letter to the Board created confusion at the various NNSA facilities. (b)(7)(C) believed that some NNSA officials thought the letter was

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meant to cease the initiative, while others believed the letter meant to continue executing the initiative. (b)(7)(C) related that the Board issues opinions (letters) based on agreement by majority of the Board, and if a Board member does not agree with a letter, he or she abstains from concurring on the letter. The receiver of the Board's letter does not know who did or did not concur on the letter. (b)(7)(C) (b)(7)(C) stated, "It is a general working practice that the Board does not provide drafts to non-Board employees, particularly without knowledge of the Board." However, he could not identify any written policies or guidance that prohibited such action.

(b)(7)(C) stated that he believed (b)(7)(C) pre-release of a draft letter to DOE damaged the Board's transparency. (b)(7)(C) stated that had the Board finalized and issued its draft letter on the Governance Initiative, it would have put the issue in the public domain. However, (b)(7)(C) letter preempted this from occurring.

(b)(7)(C) believed that (b)(7)(C) actions caused a chilling effect in the office. He said in the past, the Board functioned in such a way that everything and anything was openly discussed. However, he said this dynamic no longer exists. (b)(7)(C) stated that DOE benefits by receiving a predecisional letter because it can look at the problem and correct it in such a way that lessens its offensiveness so DOE would not be embarrassed by the matter. DOE would say, "Look, we've got this already. Don't send the letter." (b)(7)(C) said the problem with that situation is that it "really negates why the Board is issuing the letter in the first place, or the recommendation." When asked what potential violations were committed by (b)(7)(C), (b)(7)(C) answered that (b)(7)(C) may have violated the Atomic Energy Act. (b)(7)(C) stated, "Unless you have a need to know, you should not be getting this information because it could trigger panic or misunderstandings."

Interview of the Board's Technical and Security Staff

(b)(7)(C) prepare draft letters and recommendations that are sent to DOE in final by the Board members. (b)(7)(C) believed that until the Board concurs on a draft letter, it is only a draft document from the technical staff and is not for public release. (b)(7)(C) stated that (b)(7)(C) does on occasion receive drafts from his staff that are not submitted to the Board. (b)(7)(C) provided an example whereby (b)(7)(C) staff wrote an information paper and opted to share it with DOE without referring it to board members. In this situation, the technical staff observed some things that were wrong, but decided to handle it directly with DOE. (b)(7)(C) stated that the Board operates on the principle that "action should be taken at the lowest level that can accomplish the desired results." (b)(7)(C) also said that if his technical staff in the field observe a problem, (b)(7)(C) informs his DOE counterpart, and if the problem is corrected, the Board does not need to send a letter.

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(b)(7)(C) further stated that the "Board is not interested in getting credit for things. They just care that it be done correctly." (b)(7)(C) said that there should not be any Board correspondence issued that the Department has not already seen and had two or three chances to correct before signature.

(b)(7)(C) provided several examples where it seemed that DOE may have received predecisional information concerning a Board letter before it was issued. For example, (b)(7)(C) advised that in October 2009, Board staff started having discussions with DOE staff regarding deposition velocity at waste treatment plants. DOE's (b)(7)(C) (b)(7)(C) was in charge of developing DOE's response to the Board's concerns. In January 2010, the technical staff began developing a letter to issue to DOE on this matter. The letter was rewritten multiple times because (b)(7)(C) wanted the Board to continue to hear (b)(7)(C) point-of-view on the issue. (b)(7)(C) said during the course of discussions with (b)(7)(C) (b)(7)(C) knew (b)(7)(C) must have had a copy of the draft letter. (b)(7)(C) said (b)(7)(C) also knew that there was an alternative path for (b)(7)(C) to get a copy of the letter because a DOE staff member who was conducting sensitivity reviews of the draft letter gave (b)(7)(C) a copy of the letter. (b)(7)(C) commented that the Board letter was eventually sent in May 2010.

Regarding the issue of hydrogen pipes and ancillary vessel safety design at waste treatment plants, (b)(7)(C) stated that in January 2010, the technical staff began preparing a letter; however, the letter was never sent to DOE. (b)(7)(C) said the reason it was not sent was because while the letter was undergoing review by Board members, (b)(7)(C) had received comments from (b)(7)(C) that led the technical staff to believe it was going to be difficult for it to be finalized. DOE subsequently conducted an independent review of the issue.

(b)(7)(C) stated with respect to NNSA's Governance Initiative, DOE has a set of directives that are used to ensure it safely operates in a nuclear environment. NNSA wanted to improve the governance of its sites. It decided to decrease the number of requirements levied on its contractors by striking certain directives from its contracts. This concerned Board staff and as a result, (b)(7)(C) staff talked to the Board about the initiative. The Board subsequently had discussions with senior NNSA and DOE officials. The technical staff decided that the Board needed to communicate forcefully to DOE regarding the Board's concerns. As a result, (b)(7)(C) staff generated a draft letter on this issue. (b)(7)(C) stated that (b)(7)(C) thought the letter written by (b)(7)(C) technical staff would give DOE a "black eye, and basically either embarrass (b)(7)(C) and (b)(7)(C) or make the Department and/or NNSA look bad." (b)(7)(C) stated that (b)(7)(C) sent a letter to the Board regarding this issue before the Board's letter was sent. (b)(7)(C) said (b)(7)(C) letter was so brief that there was no public airing of what the issue was because the Board's initial letter was never sent to DOE. (b)(7)(C) stated the Board's governing legislation has specific direction to put things in the public domain.

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(b)(7)(C) recalled the November 2010 discussion with the Board members and the General Counsel when (b)(7)(C) asked (b)(7)(C) whether he had given the draft letter to (b)(7)(C) (b)(7)(C) stated that at first, (b)(7)(C) refused to answer the question, but then answered with, "Well, what if I did." (b)(7)(C) stated that up until this point, (b)(7)(C) was his "biggest impediment" in getting a letter sent to DOE on an issue. (b)(7)(C) also stated that (b)(7)(C) would "sit on things for weeks at a time." (b)(7)(C) further stated that he could not do anything with a draft letter until he received comments back from all Board members. However, (b)(7)(C) said following the November 2010 discussion, (b)(7)(C) stopped being an impediment and no longer made comments on draft documents. (b)(7)(C) also said (b)(7)(C) no longer said much during (b)(7)(C) discussions with Board members on issues. He would not participate, or if he did, it was minimally.

(b)(7)(C) and (b)(7)(C) for the Board's technical staff, reported their awareness of a draft letter being leaked to DOE by (b)(7)(C) (b)(7)(C) (b)(7)(C), stated that in 2009, the Board staff came to the conclusion that the deposition velocity being used to calculate dose consequences to the public at the Hanford Waste Treatment Plant was not appropriately conservative. The staff began preparing an issue report and a letter that objected to the technical paper sent out by (b)(7)(C). The letter was drafted in late 2009 and given to the Board members to review. He later learned that (b)(7)(C) shared the draft letter with (b)(7)(C) From his perspective, this caused the Board to delay issuance of the letter until May 2010. (b)(7)(C) stated that DOE does not like to get correspondence from the Board; therefore, if they can get advance copies of correspondence, they can potentially prevent the Board from issuing a letter by issuing their own guidance to resolve the issue.

(b)(7)(C) stated that regarding deposition velocity at Hanford Waste Treatment Plant, he believed that (b)(7)(C) may have seen the draft letter because (b)(7)(C) talked with (b)(7)(C) about it. (b)(7)(C) was trying to help (b)(7)(C) set up a briefing with the Board to address the Board's concerns before the letter was to be sent in final to DOE. (b)(7)(C) never briefed the Board because the Board did not want to get into the practice of having its draft documents critiqued by DOE before their issuance. He acknowledged that staff do, under some circumstances, talk about issues that are "pretty close to being done" to make sure their facts are correct; however, once a letter is with the Board members to review for action, the staff does not invite DOE to critique the draft letter. (b)(7)(C) stated that while the Board did not send out the draft letter, the Board subsequently sent DOE two additional letters on the issue. He stated that when DOE receives an advance copy, it gives the agency a chance to try to defeat the issues before they are documented.

(b)(7)(C) added that all of the Board's correspondence, including letters, goes to DOE for classification and sensitivity review while under review by the Board members because the Board does not have classification review capability. He stated that the

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Board had problems in the past with letters sent to the DOE Office of Classification being leaked to other DOE staff members so that DOE could make counter agreements to the Board before the correspondence was issued. (b)(7)(C) stated that it is very frustrating for the staff when DOE gets the work products before they are issued. The staff feels that it has become a waste of time for them to draft the letters. He said the staff put a lot of effort into drafting documents that they believe are important enough to put out in the public record, instead of quietly working the issues behind the scenes.

(b)(7)(C) for the Board, told OIG that DOE's Office of Classification reviews Board documents so that the Board does not have to employ its own derivative classifiers. Therefore, (b)(7)(C) sends all reports and letters that are going to be made public to DOE to verify that documents do not contain classified or sensitive information. (b)(7)(C) reported that within the last 5 or 6 years, there have been several occasions where DOE program managers who review draft documents for sensitivity leaked the documents to other DOE staff. Therefore, during spring 2010, the Board's General Counsel intervened to resolve the issue. (b)(7)(C) believed that draft reports were no longer being leaked by DOE during classification and sensitivity reviews. (b)(7)(C) added that when draft letters are reviewed by the Board, there are no sensitivity markings on the documents.

Interview of (b)(7)(C)

(b)(7)(C) provided OIG with a signed, sworn statement (see Enclosure 1) admitting having discussed information in draft correspondence on several occasions with DOE on issues that they were aware of, or should have been aware of, before he contacted DOE. He said his discussions with DOE of draft correspondence were:

> . . . either to move the issue closer to resolution, to gather additional technical information about the concern, to ensure that DOE decisionmakers were informed of issues that he had been assured by Board staff had been discussed at the staff-to-staff level, or to better understand the other side of the issue.

(b)(7)(C) told OIG the discussions were during his decisionmaking process and before making his decision to authorize the correspondence. (b)(7)(C) stated that there is an "extensive exchange of information constantly taking place between the Board staff and DOE prior to, during drafting, and after issuance of all relevant correspondence."

Regarding NNSA's Governance Initiative, (b)(7)(C) said he e-mailed a copy of his redraft of the letter only to (b)(7)(C) because he wanted to "urge rapid action" to resolve the issue. Regarding the issue of default value for deposition velocity in accident analysis at waste treatment plants, (b)(7)(C) stated he first became aware of the issue when he was forwarded a proposed draft letter. He said he contacted (b)(7)(C), and believed he read him excerpts of the draft letter because he (b)(7)(C)

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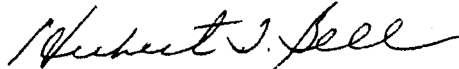
was unfamiliar with the issue and desired additional information from (b)(7)(C), (b)(7)(C) (b)(7)(C) concluded the subject required more study by Board staff. Once the additional study was completed, he concurred on the letter.

(b)(7)(C) stated he was unaware of any written Board instruction, directive, or memorandum placing a restraint on Board members regarding draft Board correspondence, or restrictions on general discussions with senior DOE leadership about Board issues. He also stated there was no protocol for sensitivity marking or caveats on either Board correspondence or the folder in which correspondence circulated for Board approval, internally. (b)(7)(C) further stated that such markings are rarely used and none of the correspondence in question had such markings.

Additionally, (b)(7)(C) provided OIG, a letter dated May 20, 2011, that he (see Enclosure 2) sent to the Secretary of Energy and Board Chairman regarding his belief that there is a "deterioration of the consultative relationship between DOE and DNFSB." In the letter, he opined that "draft correspondence should be provided to the targeted federal government office not only for a factual accuracy check, but also to ensure that the DOE program's concerns are understood and considered prior to the correspondence becoming final." He believed that the "pseudo-secrecy" of internal Board staff correspondence is "counter-productive and corrosive" to the Board's mission.

If you have any questions regarding this report, please contact Joseph A. McMillan, Assistant Inspector General for Investigations, at 301-415-5929, or Rossana Raspa, Senior Level Assistant for Investigative Operations, at 301-415-5954. Please note that this report is marked, "Official Use Only" and, consequently, all persons having access to this report should be made aware that it must not be publicly released and must be distributed only to those who have a need-to-know to conduct official business.

Sincerely,



Hubert T. Bell
Inspector General

Enclosures:
1. Signed, Sworn Statement from (b)(7)(C) dated March 16, 2011
2. Letter from (b)(7)(C), dated May 20, 2011

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