

September 8, 2006

MEMORANDUM TO: Luis A. Reyes
Executive Director for Operations

FROM: Stephen D. Dingbaum **/RA/**
Assistant Inspector General for Audits

SUBJECT: AUDIT OF NRC'S PROCESS FOR RELEASING
COMMISSION DECISION DOCUMENTS
(OIG-06-A-22)

This report presents the results of the subject audit. The formal comments provided by your office on August 2, 2006, are presented in their entirety as Appendix B to this report. Appendix C contains OIG's response.

Please provide information on actions taken or planned on each of the recommendations within 30 days of the date of this memorandum. Actions taken or planned are subject to OIG follow-up as stated in Management Directive 6.1.

If you have any questions or wish to discuss other issues, please call Anthony Lipuma at 415-5910 or me at 415-5915.

Attachment: As stated

AUDIT REPORT

Audit of NRC's Process for Releasing
Commission Decision Documents

OIG-06-A-22 September 8, 2006



All publicly available OIG reports (including this report) are accessible through
NRC's Web site at:

<http://www.nrc.gov/reading-rm/doc-collections/insp-gen/>

EXECUTIVE SUMMARY

BACKGROUND

The Office of the Inspector General (OIG) became aware of a November 2004 staff issue paper to the Commission, commonly known as a SECY Paper, which proposed a new Nuclear Regulatory Commission (NRC) policy for assessing the effectiveness of security measures of material licensees. In the subject SECY Paper, staff expressly requested a "Commission policy decision" before proceeding further on a framework for future agency actions. In a subsequent Staff Requirements Memorandum (SRM), the Commission approved the staff's proposal and the mechanism for implementing the new policy.

Although it seemed appropriate to inform the public of a proposed new policy, OIG determined that NRC did not inform the public or solicit its comments. Therefore, OIG initiated an audit to examine NRC's process for making certain Commission decision documents, specifically SECY Papers and SRMs, available for public review and/or comment.

PURPOSE

The purpose of this audit was to assess the agency's process for evaluating SECY Papers and SRMs for public release pursuant to relevant legal and regulatory requirements.

RESULTS IN BRIEF

NRC has a process for handling Freedom of Information Act (FOIA) requests. However, the agency lacks the internal controls needed to ensure compliance with the FOIA automatic disclosure requirements found in 5 U.S.C. 552(a)(1) and (a)(2). Specifically, NRC lacks a systematic process to identify if SECY Papers and SRMs should be released to the public pursuant to FOIA automatic disclosure requirements because:

- NRC does not consider these documents to convey policy or other FOIA automatic disclosure-type material, and
- no agency organization is specifically assigned process ownership of FOIA automatic disclosure responsibilities.

Absent adequate controls for a systematic review process, the agency may inappropriately withhold decision making documents that meet the threshold for public disclosure. The lack of a rigorous review process jeopardizes NRC's compliance with FOIA automatic disclosure requirements and hampers the agency's ability to fully achieve its strategic goal of regulatory openness, thereby undermining public confidence in the agency. Two recommendations were developed in conjunction with this audit. Their implementation, including a systematic review of the agency's previously unpublished SECY Papers and SRMs, will provide the agency the reasonable assurance needed to report full FOIA compliance.

RECOMMENDATIONS

This report makes recommendations to the Executive Director for Operations (EDO) to 1) develop a program for NRC compliance with FOIA's automatic disclosure requirements, and 2) conduct a documented 552(a)(1) and (a)(2) review of previously unpublished SECY Papers and SRMs.

OIG Analysis of Agency Comments

On August 2, 2006, the EDO provided the agency's formal response to this report stating general disagreement with the report's finding and conclusions. The agency did agree, in part, to Recommendation 1 but disagreed with Recommendation 2. The agency's comments are included in their entirety as Appendix B.

The agency response cites a number of document reviews that ensure the "NRC operates in compliance with both the letter and the spirit of the automatic disclosure provisions" of FOIA. However, none of the processes (described on page 5 of their response) specifically addresses how the agency reviews SECY Papers or SRMs to meet these requirements. Thus, the agency fails to support its argument that it fully complies with FOIA's automatic disclosure requirements.

No changes were made to this report based on the agency's response. Because OIG takes exception to a substantial portion of the comments, Appendix C contains OIG's detailed analysis of the agency's written response.

ABBREVIATIONS AND ACRONYMS

CAN	Citizen's Awareness Network
DOJ	U.S. Department of Justice
EDO	Executive Director for Operations
FOIA	Freedom of Information Act
NRC	Nuclear Regulatory Commission
OGC	Office of the General Counsel
OIG	Office of the Inspector General
OIS	Office of Information Services
OMB	Office of Management and Budget
SECY	Office of the Secretary of the Commission
SISP	Sensitive Information Screening Project
SRM	Staff Requirements Memorandum/Memoranda
U.S.C.	<i>United States Code</i>

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I. BACKGROUND

The Office of the Inspector General (OIG) recently completed a multi-tier review of the Nuclear Regulatory Commission's (NRC) oversight of byproduct materials and sealed sources.¹ During the course of these reviews, OIG became aware of a November 2004 staff issue paper to the Commission (commonly known as a SECY Paper) that proposed a new NRC policy for assessing the effectiveness of security measures of material licensees. The proposed new policy established a "decision-making framework" for vulnerability assessments of materials licensees to judge the effectiveness of security requirements.

In the subject SECY Paper, staff expressly requested a "Commission policy decision" before proceeding further on a framework for future agency actions. Specifically, the staff requested that consideration of security event consequences for the proposed framework be limited to prompt deaths noting that impacts from other consequences such as economic, environmental and latent deaths were omitted. In a subsequent Staff Requirements Memorandum (SRM), the Commission approved the staff's proposal and the mechanism for implementing the new policy. Because it seemed appropriate to inform the public of a proposed new policy, OIG sought to determine if the public was aware of and had input to the policy. OIG determined that NRC did not inform the public nor solicited its comments. Therefore, OIG initiated an audit to examine NRC's process for making certain Commission decision documents, specifically SECY Papers and SRMs, available for public review and/or comment.

The Freedom of Information Act of 1966 (FOIA) requires Federal agencies, including NRC, to make information available to the general public by request or through automatic disclosure. In addition, NRC has a tradition of commitment to the principles of openness, fairness and due process which are embodied in legal, regulatory and

¹The byproduct review resulted in three audit reports: OIG-06-A-10, *Audit of the Development of the National Source Tracking System*, dated February 23, 2006; OIG-06-A-11, *Audit of the NRC Byproduct Materials License Application and Review Process*, dated March 10, 2006; and OIG-06-A-12, *NRC's Oversight of Agreement States' Licensing Actions*, dated April 14, 2006.

procedural requirements that govern policy making. According to NRC, "to participate in a meaningful way, the public must have access to information about the design and operation of regulated facilities and use of nuclear materials."²

The Freedom of Information Act³

In enacting the Freedom of Information Act, Congress established the presumption that any person has the right to submit a written request for access to records or information maintained by the Federal Government. In 1996, Congress revised the FOIA statute by passing the Electronic Freedom of Information Act amendments, which include provisions for public access to information in an electronic format, as well as establishment of electronic FOIA reading rooms through agency FOIA sites on the Internet.

FOIA explicitly provides two distinct ways for the public to gain access to records maintained by Federal agencies: (1) by a FOIA request and (2) through the less commonly known automatic disclosure requirements of FOIA (5 U.S.C. 552(a)(1) and (a)(2)).

NRC's Strategic Goal of Openness

Ensuring openness in its regulatory process is one of NRC's five strategic goals. According to NRC's *FY 2004-2009 Strategic Plan*, the agency's openness goal explicitly recognizes that the public must be informed about and have a reasonable opportunity to participate meaningfully in the agency's regulatory processes.⁴ Among other things, NRC promotes the following Openness Strategies:

²Regulatory Issue Summary 2005-31, *Control of Security-Related Sensitive Unclassified Non-Safeguards Information Handled by Individuals, Firms, and Entities Subject to NRC Regulation of the Use of Source, Byproduct, and Special Nuclear Material*, dated December 22, 2005.

³FOIA, enacted in 1966, is a Federal law set forth in Title 5, Section 552, of the *United States Code* (5 U.S.C. 552), as amended. FOIA is a companion to the Privacy Act (5 U.S.C. 552a), enacted in 1974, which balances the Government's need for information about individuals with the need to protect those individuals against unwarranted invasions of their privacy by Federal agencies stemming from the collection, maintenance, use, and disclosure of personal information.

⁴ NRC's *FY 2004-2009 Strategic Plan*, **GOAL: Ensure Openness in Our Regulatory Process.**

- ❖ Provide a fair and timely process to allow public involvement in NRC decision-making in matters not involving safeguards, classified, or proprietary information.
- ❖ Obtain early public involvement on issues most likely to generate substantial interest and promote two-way communication to enhance public confidence in the NRC's regulatory processes.

Commission Level Decision Documents

SECY Papers and SRMs are the primary Commission level documents used by the staff and Commission to communicate with each other.

SECY Papers

The primary decision making tool of the Commission is the written issue paper submitted by the Office of the Executive Director for Operations, the Chief Financial Officer, or other offices reporting directly to the Commission. Policy, rulemaking, and adjudicatory matters, as well as general information, are provided to the Commission for consideration in a document style and format established specifically for the purpose. Such documents are referred to as "SECY Papers."

The following are types of SECY Papers available for staff use depending on its subject matter:

- Rulemaking Issue papers - promulgation of agency rules;
- Adjudicatory Issue papers - granting, suspending, revoking, or amending of licenses; and
- Policy Issue papers - formulation of policy.

Staff Requirements Memoranda⁵

NRC's public website states that Staff Requirements Memoranda, more commonly known as SRMs, are documentation of the Commission's decision on written issue papers such as a SECY Paper. SRMs include any:

- approved modifications to the staff's recommendation;
- additional requirements or tasks to be performed by the staff together with appropriate action due dates and a priority designation, if appropriate; and
- exceptions to the immediate public release of the SRM.

Public Availability of SECY Papers and SRMs

NRC's "stated" policy is to immediately release SECY Papers and SRMs to the public after Commission action is completed unless they contain specific, limited types of information which warrant protection. Specifically, NRC's *Internal Commission Procedures*⁶ states that SECY Papers will be released 10 business days after issuance or receipt by the Commission. At its discretion, the Commission may authorize release of a SECY Paper at an earlier time than the normal practice to allow earlier public access. Conversely, the Commission and staff may recommend withholding SECY Papers and SRMs using a number of specific withholding categories. However, the procedures state that because the Commission's stated policy is to release papers whenever possible, "*the use of this withholding category should be limited and, when used, requires solid justification for withholding on a case by case basis*" [emphasis added].

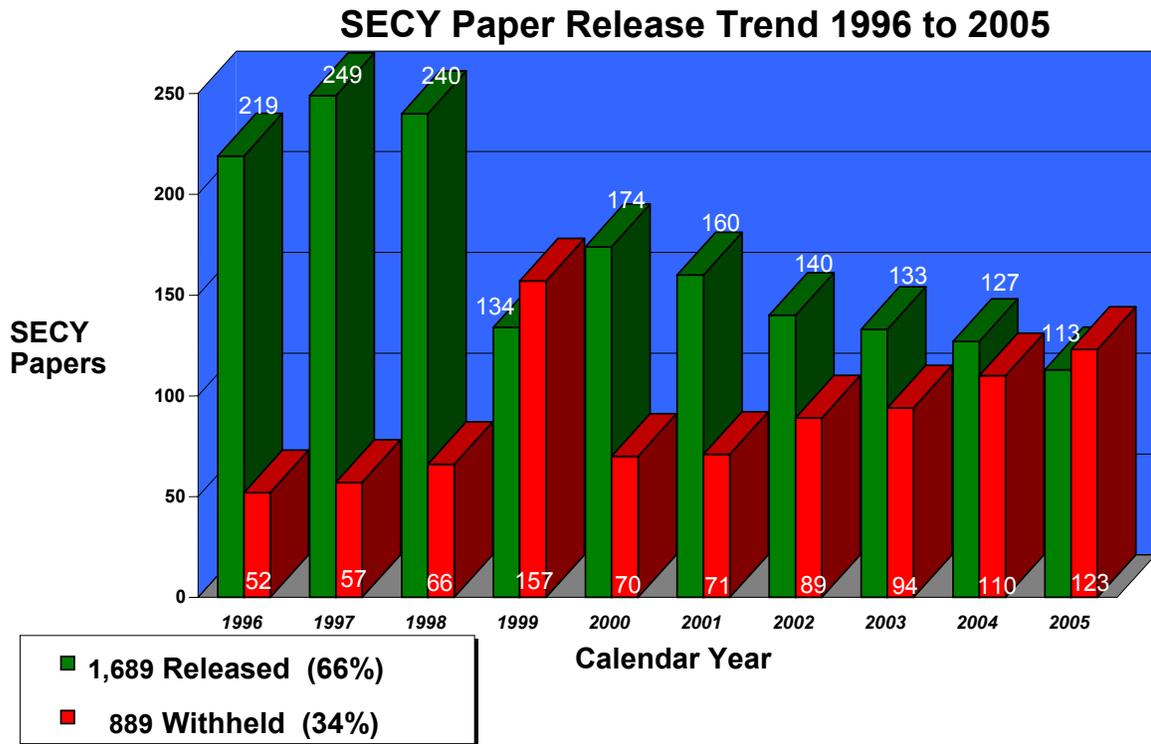
⁵There are two types of Commission-produced SRMs. In addition to the "Staff Requirements Memoranda" discussed in this section, there are "Meeting SRMs." As indicated, "Meeting SRMs" which may or may not be related to a staff SECY Paper, contain meeting-related information and are generally released to the public. Because "Meeting SRMs" do not impact the public in the manner identified in this report, OIG excluded them from further discussion.

⁶NRC's *Internal Commission Procedures, Chapter II "Decision Documents."*

Trends in Disclosing SECY Papers and SRMs⁷

According to information provided to OIG by the Office of the Secretary of the Commission, there were 2,578 SECY Papers generated at the NRC from calendar year 1996 through 2005⁸ of which 66 percent were released to the public. However, Figure 1 indicates an increasing trend for withholding SECY Papers from 1996 to 2005.

Figure 1



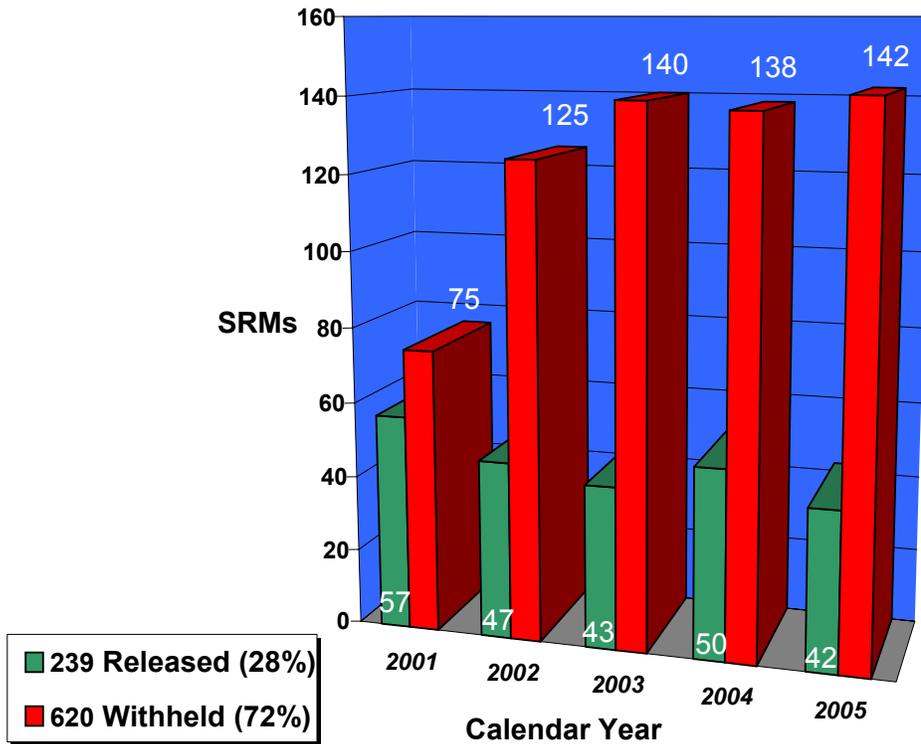
⁷OIG did not conduct a detailed analysis of the full population of SECY Papers and SRM to determine which ones should or should not have been released to the public.

⁸The 1996 to 2005 SECY Papers were examined to evaluate trends in withholding of SECY documents.

According to the information provided by the Office of the Secretary of the Commission and supplemented by the agency's public website, NRC issued 1,076 total SRMs from calendar year 2001 through 2005, of which 859 were SECY-related SRMs. When averaged over the specified 5-year period, 72 percent of SECY-related SRMs was withheld from the public.⁹ Figure 2 reflects a consistent pattern of withholding the majority of SECY-related SRMs from public release.

Figure 2

SECY-Related SRM Release Trend 2001 to 2005



⁹ As previously noted on page 4, "Meeting SRMs" do not impact the public in the same manner identified throughout this report. Therefore, OIG excluded "Meeting SRMs" from consideration in Figure 2. However, if factored into the overall SRM universe, the percentages of SRMs released and withheld from the public become 42 percent and 58 percent, respectively.

II. PURPOSE

The purpose of this audit was to assess the agency's process for evaluating SECY Papers and SRMs for public release pursuant to relevant legal and regulatory requirements.

Appendix A provides a detailed description of the audit's scope and methodology.

III. FINDING

While NRC has a process for handling FOIA requests, the agency lacks the internal controls needed to ensure compliance with FOIA's automatic disclosure requirements. Furthermore, the lack of controls challenges NRC's commitment to its strategic goal of openness to keep the public informed of regulatory matters that affect them.

A. NRC Lacks Adequate Internal Controls Needed to Ensure FOIA Compliance

NRC lacks adequate internal controls needed to ensure compliance with FOIA's "automatic disclosure" requirements. Specifically, NRC lacks a systematic process to identify if SECY Papers and SRMs should be released to the public pursuant to FOIA automatic disclosure requirements because:

- NRC does not consider these documents to convey policy or other FOIA automatic disclosure-type material, and
- no agency organization is specifically assigned process ownership of FOIA automatic disclosure responsibilities.

Absent adequate controls for a systematic review process, the agency may inappropriately withhold decision making documents that meet the threshold for public disclosure. As a result, NRC's ability to ensure full compliance with FOIA requirements is subject to challenge. Furthermore, not providing the public with sufficient information to understand and participate in NRC's actions that affect them compromises the agency's commitment to regulate in an open and transparent environment.

Internal Control Standards and FOIA Requirements

Internal controls are vital to ensure NRC's compliance with the FOIA automatic disclosure requirements and to meet the agency's strategic goal of openness.

OMB Circular A-123

The Office of Management and Budget (OMB) Circular A-123, *Management's Responsibility for Internal Control*, cites three objectives of internal controls, one of which is to ensure compliance with applicable laws and regulations. OMB Circular A-123 prescribes that agency internal controls include the plan of organization, methods and procedures adopted by management to ensure its goals are met.

FOIA Automatic Disclosure Requirements [552(a)(1) and (a)(2)]

The FOIA acknowledges that agencies need to strike a balance between broad disclosure of government information and protection of public interest and national security. Nonetheless, FOIA subsections 552(a)(1) and (a)(2) require automatic disclosure of documents which impact the public and have the "force and effect of law."¹⁰

The U.S. Department of Justice (DOJ) cautioned Federal agencies to be mindful of their statutory obligations under subsections 552(a)(1) and (a)(2) as they administer FOIA programs that deal overwhelmingly with subsection (a)(3) FOIA requests. According to DOJ guidance, agencies need to remember that the information and records encompassed by FOIA's first two subsections must be "automatically available for public inspection; no demand is necessary." Subsections 552(a)(1) and (a)(2) are sometimes referred to as FOIA's "publication" and "reading room" requirements.

Publication Requirements

5 U.S.C. subsection 552(a)(1)(A-E) deal with the publication of agency information and requires each agency to publish a range of basic information regarding its structure and operations in the Federal Register for the guidance of the public. This FOIA subsection explicitly provides that no person may be "adversely affected" by any agency action as a result of an agency's failure to meet its publication obligations.¹¹

¹⁰FOIA Update Vol. XIII No. 3, *The "Automatic" Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)*, dated 1992 [NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 153 (1975) (quoting H.R. Rep. No. 1497, 89th Cong., 2d Sess. 7 (1966))].

¹¹FOIA Update Vol. XIII No. 3, *The "Automatic" Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)*, dated 1992.

Reading Room Requirements

5 U.S.C. 552 subsections (a)(2)(A)-(C) provide what is commonly referred to as "reading room" access and applies to the types of agency records that, while not automatically published, should routinely be available to the public. As noted by a former U.S. Attorney General, "reading room" requirements require disclosure by agencies of what might otherwise be regarded as an agency's "secret law."¹²

Through these subsections FOIA seeks to prevent agencies from attempting to make binding that which has not been disclosed to the public.

Scope of Documents Subject to FOIA 552(a)(1) and (a)(2)

Specifically, FOIA subsection 552(a)(1) requires each agency to publish, among other things, information regarding its "organization," "functions," "rules of procedure," "substantive rules" and "statements of general policy" in the Federal Register for the guidance of the public. In addition, the groups of documents listed below are subject to FOIA's (a)(2) reading room requirements. The types of information referenced in this section *shall* be made "available for public inspection and copying --

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register [emphasis added];
- (C) administrative staff manuals and instructions to staff that affect a member of the public;
- (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and

¹² FOIA Update, Vol. XIII No. 3, *Automatic Disclosure Provisions of FOIA: Subsections (a)(1) & (a)(2)*; Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act, US Department of Justice, (February 1975).

which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and

- (E) a general index of the records referred to under subparagraph (D).”

In addition, all “reading room” records must be indexed to provide identifying information for the public. In this regard, FOIA specifically states:

“A final order, opinion, statement of policy, interpretation, or staff manual or instruction that effects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if –

- (i) it has been indexed and either made available or published as provided by this paragraph; or
- (ii) the party has actual and timely notice of the terms thereof.”¹³

➤ ***NRC Lacks a FOIA Review Process for SECY Paper/SRM Release***

Representatives from NRC’s Offices of the Secretary of the Commission and General Counsel (OGC) state that procedures are in place for determining which SECY Papers and SRMs are released, and conversely, withheld. While OIG recognizes that some procedures are in place describing how to prepare SECY Papers and SRMs, the agency’s existing guidance provides no evaluation criteria for public release determinations for SECY Papers and SRMs pursuant to the automatic disclosure requirements of FOIA [i.e., 552(a)(1) and (a)(2)]. Without an established process for compliance with FOIA requirements, the agency risks the likelihood that documents have been withheld from public disclosure which if properly reviewed would have been made available.

¹³ FOIA Update, Vol. XVII, No. 4, *The Freedom of Information Act*, 5 U.S.C. 552, As Amended by Public Law No. 104-231, 110 Stat. 3048 (1996).

Review of Agency Guidance for Designation of 552(a)(1) and (a)(2) Responsibilities

There should be a clear, formal process for assessing whether a document should or should not be released to the public while expressing a need for balance between protecting public openness (an agency goal) and common defense and security (the agency's mission). OIG reviewed the entire index of NRC management directives and manual chapters to identify any documents that address FOIA requirements, specifically the public release of documents. Although references to FOIA activities were found, none of the internal guidance documents at the time of our review designated a person or group responsible for a process designed to identify documents subject to 552(a)(1) or (a)(2) automatic release, the subsequent redaction review of such documents, their release in whole or part, or the required indexing.

In a March 2006 revision to NRC's Management Directive 3.1, *Freedom of Information Act*, the Director of the Office of Information Services (OIS) was identified with responsibilities for ensuring that a "program to administer the FOIA and the PA [Privacy Act] is effectively implemented within NRC." OIS also has responsibility for managing the NRC web site that allows the public to inspect and copy records as required by subsection (a)(2) of FOIA. However, OIG notes that this Management Directive does not identify who in the agency has responsibility for developing or implementing a process that defines what documents should be reviewed for FOIA automatic disclosure compliance and what criteria to apply during such a review.

With the public's need to know as its premise, FOIA guidance states that agency information that affects the public must be subject to the automatic disclosure requirements of subsections 552(a)(1) and (a)(2). And, while many Commission decision documents direct the staff regarding purely internal agency operations, this is not exclusively the case. As a result, some SECY Papers and SRMs which ultimately affect the public are withheld from automatic disclosure without being subject to a FOIA review.

No Systematic Review for 552(a)(1) and (a)(2) Compliance

According to OGC officials, SECY Papers and SRMs *do not* contain the type of information subject to FOIA's automatic disclosure requirements, and therefore, do not need to be reviewed for public

release. Consequently, no process exists for conducting a systematic review of SECY Papers or SRMs pursuant to FOIA automatic disclosure requirements. The decision to make some SECY Papers and SRMs available to the public while others are withheld depends on the judgment of individuals rather than a systematic review process.

NRC's *Internal Commission Procedures* and management directives provide guidance and procedures for the preparation and distribution of SECY Papers and SRMs. The internal guidance does not provide evaluation criteria needed to determine if in fact these decision documents contain material subject to FOIA's automatic disclosure requirements. In other words, the guidance discusses 'who' is responsible for ensuring a review takes place, but not 'how' or 'what' to measure regarding the substance or sensitivity of the content. For example,

- NRC's *Internal Commission Procedures* states that the Office of the Secretary will adopt the sensitivity markings of the source SECY Paper for the associated SRM and subsequently treat the release of both documents accordingly. However, the procedures do not include a requirement to evaluate the accuracy or appropriateness of a SECY Paper's markings or whether the SRM should be handled differently for release purposes.
- Similarly, while Management Directive 3.4, *Release of Information to the Public*, identifies that staff (in each NRC program office) is responsible for conducting releasability reviews, it does not define the criteria to be used for such a review and specifically says, in part, that "this directive does not govern public disclosure of information required by or requested under FOIA."

The inherent risk in relying on individuals rather than a defined process is that individuals may use differing or inaccurate criteria to assess the sensitivity of the document which ultimately determines the releasability of SECY Papers and SRMs.

➤ ***NRC Does Not Consider SECY Papers/SRMs Subject to Automatic Disclosure***

According to agency managers and attorneys, SECY Papers and SRMs are only intended to provide guidance, clarifications and instructions to staff which do not affect the public. For these reasons, agency officials take the position that neither of these type documents requires a review for 552(a)(1) or (a)(2) subject matter. This position

effectively establishes a “safe harbor” from the requirements of FOIA automatic disclosure whereby compliance is never at issue. However, there is no documented agency legal position and the agency did not cite any legal authority in support of this position.

The agency’s “safe harbor” approach to compliance hinges on the claim that SECY Papers and SRMs do not exceed their intended use of providing guidance, clarifications and instructions to the staff that do not adversely affect the public. However, OIG identified that some SECY Papers and SRMs withheld from the public appear to satisfy the FOIA disclosure criteria under 552(a)(1) or (a)(2), including impacting the public. These documents contain regulatory interpretations, instructions to the staff, and statements of agency policy - each a type of FOIA information subject to automatic release to the public. Yet, NRC has not identified any internal controls that provide direction to staff members developing SECY Papers and SRMs to ensure that the information included in these documents does not exceed their intended use as described above.

According to OGC, the lead agency for providing guidance on government FOIA procedures and policy is the Department of Justice. Therefore, OIG contacted a DOJ attorney who is a recognized authority on 5 U.S.C. 552(a)(2) to discuss the status of SECY Papers and SRMs. The DOJ representative stated that it is problematic that NRC has predetermined that FOIA automatic disclosure requirements do not apply to a large class of documents (i.e., SECY Papers and SRMs) without a thorough review. As pointed out by DOJ, automatic disclosure requirements are applicable based on the statutory criteria, regardless of the titles the NRC has chosen for these documents.

DOJ’s brief review of NRC’s website index of SECY Papers and SRMs revealed that these documents cover a large range of topics, including several that appeared to be “instructions to the staff” or policy statements (i.e., material possibly subject to automatic disclosure). According to the DOJ representative, the clearest basis of compliance with FOIA would require a case-by-case review of SECY Papers and SRMs to determine 552(a)(2) applicability, or alternatively, designation of 552(a)(2) status by document authors (once trained on applicable standards) at the time of document creation. But, at a minimum, NRC would benefit from some type of screening process for SECY Papers and SRMs.

In addition, there is at least one other class of agency documents exempted from public disclosure without a specific FOIA request,

regardless of potential impact to the public. Per Commission directive, and similar to SECY Papers and SRMs, agency documents marked sensitive “security-related information” are automatically unavailable for public view without benefit of a review pursuant to FOIA criteria for automatic disclosure.¹⁴

Practice and Treatment Inconsistent with “Safe Harbor” Claim

Although NRC has adopted the position that SECY Papers and SRMs are not subject to FOIA automatic disclosure, a 1994 court case renders that position questionable. In the court case, NRC acknowledged that SECY Papers and SRMs do contain interpretations and policy changes, FOIA automatic disclosure-type material as identified in 5 U.S.C. 552(a)(1) and (a)(2).

The above referenced court case provides one of the most notable examples of the agency’s varied uses of SECY Papers and SRMs. The specifics follow:

- In a 1994 lawsuit,¹⁵ the Citizen’s Awareness Network (CAN) appealed an NRC denial of a petition to the First Circuit Court on the grounds that the issues presented in a series of Commission documents, specifically SRMs, should have been subject to NRC hearings. In its argument before the First Circuit, agency attorneys took the position that the subject SRMs *were policy changes or “interpretations of its [NRC’s] own regulations”* [emphasis added]. As such, NRC attorneys argued that the agency was entitled to great deference and that hearings did not apply to these types of actions.
- The court agreed with the NRC characterization of the SRMs as changes in policy or interpretations of agency regulations. However, the court also found that these changes in policy effectively constituted rulemaking, were “arbitrary and capricious,”

¹⁴ Memorandum, A. Vietti-Cook to L. Reyes and K. Cyr, re: *Staff Requirements – SECY-05-0101, Withholding from Public Disclosure Sensitive Unclassified Information Concerning Materials Licensees and Certificate Holders*, dated October 7, 2005.

¹⁵ Citizen’s Awareness Network, Inc., Petitioner, v. U.S. Nuclear Regulatory Commission, Respondent, and Yankee Atomic Electric Company, Intervenor. No. 94-1562, U.S. Court of Appeals for the First Circuit; Decided July 20, 1995.

and not in accordance with the hearing requirements of the Atomic Energy Act (42 U.S.C. § 2239(a)(1)(A)). The court remanded the matter back to the agency in accordance with notice and comment requirements.

The SRMs referenced in the above case (and their associated SECY Paper) dealt with allowing licensees to start decommissioning work prior to approval of a decommissioning plan, something the court found to have a clear effect on the public. As policy statements or interpretations that affect the public, these documents should be subject to FOIA automatic disclosure. Thus, as early as 1995, the agency acknowledged that SECY Papers and SRMs can contain statements of NRC policy and interpretations.

Recent SECY Paper and SRM Contain Policy

NRC SECY Papers and SRMs continue to have apparent policy implications. As previously noted in this report, during an ongoing audit OIG learned of a November 2004 SECY Paper and its associated SRM which established a new NRC policy for assessing the effectiveness of licensees' security measures, an issue that has eventual impact on the public. In the subject SECY Paper, staff requested that consideration of the impacts of security event consequences be limited to prompt deaths. The staff noted that other consequences such as economic and environmental impacts and latent deaths were omitted from consideration when developing the proposed decision-making framework. In their SRM response, the Commission approved the staff's proposed new framework and a mechanism for use in implementing the new policy.

A subsequent SECY Paper, dated March 1, 2006, documented the agency's extensive use of the mechanism (i.e., a decision matrix) presented in the approved decision-making framework to evaluate the security vulnerability of various materials and research and test reactor licensees. This March 2006 SECY Paper communicated the results of the initial assessments to the Commission, stating in part:

The staff used the Commission-approved decision making framework to evaluate the results which indicated that the security measures already taken by the Commission are sufficient to ensure adequate protection of the public and promote common defense and security. The results also indicated that some select enhancements to NRC's regulatory framework may be warranted [emphasis added].

The above statement clearly indicates that the NRC staff adopted and implemented the new criteria presented in the November 2004 SECY Paper. The statement also demonstrates the impact on the public. The decision-making framework and the subsequent evaluation results regarding the adequacy of regulatory requirements were communicated through the subject SECY Papers and SRM thereby constituting either policy or instructions to staff, both which affect the public. Therefore, evidence indicates that the SECY Papers and SRM discussed above meet the criteria for automatic disclosure in whole or in part pursuant to 5 U.S.C. 552 (a)(2).

➤ ***Inadequate Controls Lead to Uncertain FOIA and Openness Compliance***

As described earlier, SECY Papers and SRMs lack the appropriate reviews to determine whether individual documents should be automatically disclosed pursuant to 552(a)(1) or (a)(2). OIG did not conduct a comprehensive inventory or review to determine whether other NRC documents may be missing the same disclosure reviews. However, evidence indicates that other examples exist leading to a level of uncertainty regarding the agency's compliance with FOIA and its own strategic goal for open, transparent regulation. For example, a 2005 Commission SRM directed staff to automatically exclude from public release another entire class of documents marked as "sensitive security information" without a systematic review to validate the sensitive treatment.

As one Commissioner recently stated, there are a couple of classes of information (i.e., documents marked as sensitive internal and sensitive security-related) that at least need to be reviewed on a periodic basis to better insure that the agency is making the right determination about what gets marked [for public release] and what doesn't. However, to date, similar to SECY Papers and SRMs, there is no review of these classes of information for FOIA automatic disclosure considerations.

Summary/Conclusion

NRC internal controls pertaining to FOIA's automatic disclosure requirements are inadequate. Specifically, NRC lacks a defined review process applicable to SECY Papers and SRMs to ensure full compliance with FOIA requirements because they are considered "safe harbor" documents. In addition, no organizational unit within the

agency has been clearly identified with ownership of a process designed to ensure agency documents are properly reviewed for FOIA automatic disclosure compliance. As a result, SECY Papers and SRMs are designated for public release by individual determination rather than by a systematic evaluation for applicability of FOIA automatic disclosure requirements. The inherent risk in relying on individuals rather than a defined process is that individuals may use differing criteria to assess the sensitivity and releasability of the document.

Historically, NRC has made SECY Papers and SRMs available to the public at its discretion. Numerous SECY Papers and SRMs are available for public view on the agency's website. However, as of the date of this report, there is an extensive collection of SECY Papers and SRMs that have not been reviewed for public availability per FOIA 552(a)(1) and (a)(2) because they were marked as "sensitive" information. As the CAN court case illustrates, NRC used a SECY Paper and SRMs to convey policy which, by affecting the public, meets the threshold for FOIA automatic disclosure. A recent set of related SECY Papers and SRMs contain policy and/or staff instructions which affect the public, thereby meeting the automatic disclosure requirements. However, these unclassified documents have not been disclosed to the public.

Since 1995, NRC has had direct evidence that its "safe harbor" position on SECY Papers and SRMs is questionable. Yet the agency has taken no action to institute a review process (internal controls) to ensure public notification as required by law. Therefore, NRC fails to meet one of the primary objectives of internal controls as stated in OMB Circular A-123: reasonable assurance of NRC's compliance with laws and regulations.

NRC lacks the internal controls to determine whether SECY Papers and SRMs meet the specific requirements for FOIA compliance. As a result, the agency has exempted an entire class of documents without an adequate review process or documented justification for withholding. The lack of a rigorous review process jeopardizes NRC's compliance with FOIA automatic disclosure requirements and hampers the Commission's ability to fully achieve its *strategic goal* of regulatory openness, thereby undermining public confidence in the agency.

IV. RECOMMENDATIONS

OIG recommends that the Executive Director for Operations:

1. Develop a program for NRC compliance with FOIA's automatic disclosure requirements.
2. Conduct a documented FOIA 552(a)(1) and (a)(2) review of previously unpublished SECY Papers and SRMs.

V. AGENCY COMMENTS

On June 20, 2006, OIG issued its draft report to the Executive Director for Operations. OIG subsequently met with managers from the Office of the Secretary of the Commission regarding data on the public release of SRMs and clarified the final report as appropriate.

On August 2, 2006, the EDO provided the agency's formal response to this report stating disagreement with the report's finding and conclusions. The agency agreed, in part, to Recommendation 1 which calls for development of a program designed to ensure SECY Papers and SRMs are reviewed against criteria presented in FOIA's automatic disclosure sections (i.e., 552(a)(1) and (a)(2)). However, the agency disagreed with Recommendation 2 to perform a documented 552(a)(1) and (a)(2) review of previously unpublished SECY Papers and SRMs. The agency's comments are included in their entirety as Appendix B.

The central message of OIG's report is that the agency lacks the internal controls to review SECY Papers and SRM documents to ensure compliance with FOIA's automatic disclosure requirements. OMB Circular A-123 emphasizes that effective internal controls provide a basis for reasonable assurance of compliance with legal requirements. Conversely, ineffective management controls eliminate an agency's reasonable assurance of compliance with legal requirements. The agency response cites a number of document reviews; however, *none* of these processes provides for a review of SECY Papers or SRMs against FOIA's automatic disclosure requirements. Therefore, the agency reviews do not provide reasonable assurance of compliance with the legal requirements of FOIA automatic disclosure.

The agency response also implies that the large number of documents that NRC makes public is evidence of compliance and caused confusion on the part of the OIG regarding discretionary release. In this regard, the agency response cites an example of non-compliance but asserts, without evidence, that such an example would be rare.

In summary, the agency failed to support its argument that it fully complies with FOIA's automatic disclosure requirements. OIG reiterates its finding that NRC lacks the internal controls needed to reasonably assure full compliance with FOIA and the agency's own openness policy.

No changes were made to this report based on the agency's response. Appendix C contains OIG's detailed analysis of the agency's formal comments.

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SCOPE AND METHODOLOGY

During a previous audit, NRC identified an issue regarding the agency's apparent use of a SECY Paper and SRM to effect a change in NRC policy. OIG determined that the SECY Paper and related SRM in question were not vetted in a public forum although they represent a policy change. Because SECY Papers and SRMs historically cover a broad range of information, it is important to ensure that they are properly reviewed to ensure all applicable regulatory requirements are met.

The purpose of this audit was to:

- ❖ assess the agency's process for evaluating SECY Papers and SRMs for public release pursuant to relevant legal and regulatory requirements

To address the audit objective, OIG reviewed relevant management controls, related documentation, and Federal statutes, including reviews of:

- Management Directives and Manual Chapters
- The Freedom of Information Act
- OMB Circular A-123
- GAO's Internal Control Standards
- SECY Papers and related SRMs
- Code of Federal Regulations, Title 10
- NRC's public website

Auditors conducted interviews with agency and other Federal individuals, including:

- Headquarters' senior managers and staff from the Offices of:
 - the Commission,
 - the Secretary of the Commission,
 - the General Counsel,
 - Information Services,
 - Nuclear Reactor Regulation,
 - Nuclear Security and Incident Response, and
 - Nuclear Material Safety and Safeguards

➤ Department of Justice

OIG conducted this audit between November 2005 and March 2006 in accordance with generally accepted Government auditing standards and included a review of management controls related to the objective of this audit. The major contributors to this report were Anthony Lipuma, Team Leader; Catherine Colleli, Audit Manager; Michael Cash, Senior Technical Advisor, and James McGaughey, Senior Management Analyst.

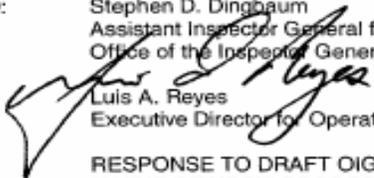
FORMAL AGENCY COMMENTS



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

August 2, 2006

MEMORANDUM TO: Stephen D. Dingbaum
Assistant Inspector General for Audits
Office of the Inspector General

FROM: 
Luis A. Reyes
Executive Director for Operations

SUBJECT: RESPONSE TO DRAFT OIG AUDIT REPORT ENTITLED
"AUDIT OF NRC'S PROCESS FOR RELEASING
COMMISSION DECISION DOCUMENTS"

Thank you for the opportunity to comment on the draft report by the Office of the Inspector General (OIG). This memorandum will not specify the statistical data errors on release of Commission decision documents in the draft report; those have been addressed separately with the OIG audit team by the Secretary of the Commission (SECY).

Our primary concern is the conclusory notion that the Nuclear Regulatory Commission (NRC) may not be in full compliance with its legal obligations to make certain documents publicly available in accordance with statutory requirements, or that the agency may not be acting in accordance with its strategic goal of openness, thereby undermining public confidence. We find that the draft audit report has set forth scant factual or legal support for its conclusions. We remain convinced that the NRC operates in compliance with both the letter and the spirit of the automatic disclosure provisions of the Freedom of Information Act (FOIA).

The NRC has long enjoyed the reputation in the FOIA community as one of the most open agencies in the federal government, and NRC is on the forefront of providing public access to agency records via electronic document technology. Indeed, even the draft audit report recognizes the NRC's "tradition of commitment to the principles of openness, fairness and due process embodied in the legal, regulatory and procedural requirements that govern policy making" (at page 2). We believe that, beyond satisfying our legal obligations under the law, the NRC handily meets, or exceeds, the agency's strategic goal on openness. In fact, before the year 2000, the NRC reportedly became the first federal agency to establish an electronic system as its official record keeping system, with other federal agencies slow to follow suit. During the audit process, we made a conscientious effort to provide the OIG with our views about the issues on which we fundamentally disagree; however, we still are not in complete accord with the finding and conclusion of your report. Nonetheless, we have given the ideas in your recommendations our thoughtful consideration and we will make a good faith effort to incorporate them in our program to the extent practicable. The information below is intended to provide the OIG the details it should have in order to appropriately modify the draft report to more accurately reflect the facts and the NRC's practices.

BACKGROUND:

According to the draft audit report, in the course of conducting a review of NRC oversight of byproduct materials and sealed sources, the OIG learned about a classified staff issue paper that discussed a decision-making framework for assessing the effectiveness of materials licensees' security measures. This document is a type of Commission decision-making document known as a **SECY** paper, in this case, denominated a Policy Issue Paper (described in Internal Commission Procedures as relating to the **formulation** of policy) and a Notation Vote Paper (under the same procedures, requiring consideration by the Commission, or consultation, before staff action, but not requiring collegial deliberation or a formal vote in a Commission meeting). See Internal Commission Procedures, Chapter II—Decision Documents, (Oct. 29, 2003, rev.).

A subsequent Staff Requirements Memorandum (SRM) documented the Commission's approval of the staff's decision-making framework for security vulnerability assessments, among other things, and directed the staff to report the results of the assessments and any associated recommendations to the Commission in nine months' time. The SRM was marked "Official Use Only—Sensitive Internal Information" by determination of SECY and the Office of Nuclear Security and Incident Response (NSIR) on the basis of FOIA exemptions 2 and 5, and the Commission approved that designation before the SRM was issued. Therefore, like the classified staff issue paper, it was withheld from public disclosure in accordance with established procedures. The OIG interpreted these papers as reflecting a "proposed new policy" about which it considered it appropriate to inform the public, notwithstanding that both papers were non-public and marked as protected information under FOIA standards.

As the OIG looked further into this subject, it focused attention on how the NRC complies with the FOIA's automatic disclosure requirements and the agency's process for releasing Commission documents, specifically SECY papers and SRMs. While the draft OIG report notes that the Commission has a policy governing the release and withholding of SECY papers and SRMs, it takes issue with the Commission's application of this policy on the discretionary release of these papers. It suggests the trend is for the agency to withhold ever-increasing amounts of information through these documents.

OIG FINDING:

The stated OIG finding in the draft audit report is, "NRC Lacks Adequate Internal Controls Needed to Ensure FOIA Compliance." The premise of the finding is that the NRC lacks a systematic process to identify documents that should be released to the public under FOIA automatic disclosure requirements, which may frustrate the NRC in meeting its strategic goal of openness. The finding particularly concerns SECY papers and SRMs. The OIG appears concerned because the NRC does not generally consider these documents to be policy statements subject to the FOIA's automatic disclosure requirements. The OIG also is concerned because a particular organizational component is not designated as responsible for all the agency's FOIA automatic disclosure determinations.

RESPONSE TO OIG FINDING:

As the draft audit report indicates, Office of Management and Budget (OMB) Circular A-123, *Management's Responsibility for Internal Control* provides for internal controls to ensure compliance with applicable laws and regulations and these controls include the plan of organization, methods and procedures by which management ensures its goals are met. The OIG also acknowledges that the agency must strike a balance between the right of the public to be informed about the activities of its government and the agency's responsibility to protect information in the interest of national security and ultimately, the public. Against this backdrop, the FOIA imposes automatic disclosure obligations on the federal agency.

At the outset, the FOIA provides for each federal agency to publish in the Federal Register organization descriptions and the means by which the public may obtain information from it; statements of the way in which its functions are channeled and determined, including requirements for formal and informal procedures; rules of procedure, description and availability of forms, instructions on scope and content of papers, reports and examinations; substantive rules of general applicability and statements of general policy or interpretations of general applicability; and amendments, revisions or repeal of the foregoing. 5 U.S.C. §552(a)(1), as amended. In addition to the Federal Register publication requirements, under subsection 552(a)(2) of the FOIA, the agency must make available to the public certain other types of documents without the need for specific requests (the documents subject to specific requests being the domain of subsection 552(a)(3) of the FOIA). In pertinent part, these include the following:

- (A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;
- (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;
- (C) administrative staff manuals and instructions to staff that affect a member of the public;
- (D) copies of all records, regardless of form or format, which have been released to any person under paragraph (3) and which, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; and
- (E) a general index of the records referred to under subparagraph (D).

5 U.S.C. §552(a)(2), as amended. These public access rights under subsection 552(a)(2) are also known as "reading room" requirements. The OIG correctly points out that the (a)(1) publication requirements and (a)(2) routine access/reading room requirements are designed to prevent the agency from creating "secret law" by requiring disclosure of any matter the agency intends to make binding on those affected by it.

The OIG is well aware, although the draft audit report fails to acknowledge it, that the NRC has mechanisms for ensuring that a large universe of its documents, if not the bulk of agency

records, are regularly considered for routine public disclosure. A brief survey of other federal agencies' public web sites and their meager (a)(2) listings certainly reveals the NRC to be typically ahead of the curve in this area. We found no other federal agency had placed their equivalent of SECY papers or SRMs among their (a)(2) records. In fact, in a discussion prior to issuance of the draft audit report, the OIG representatives conceded that few agencies had (a)(1) or (a)(2) web site information of comparable quality to the NRC's. The fact that the Department of Justice (DOJ) has responsibility for interpreting the FOIA for the federal government and has not included similar documents in its own reading room is instructive. We find the conclusions of the draft audit report to be undermined by the lack of citation to comparable documents being considered (a)(2) records by other federal agencies.

The NRC routinely releases to the public most of the documents it generates or receives. The mechanisms for doing so were discussed with the OIG over the course of several meetings conducted on the subject and include procedures for agency determinations on requests for withholding from public disclosure submitted under agency regulations at 10 CFR §2.390, statements of policy under the procedures for designating agency records public or non-public in the Agencywide Documents Access and Management System (ADAMS) and the ADAMS schedule for releasing documents to the public, as well guidelines for making determinations under agency policy on handling Sensitive Unclassified Non-Safeguards Information (SUNSI). The OIG was also advised of guidance specific to SECY papers and SRMs outlined in NRC Management Directive (MD) 3.4 on Release of Information to the Public and in Internal Commission Procedures. All this guidance is available through the agency's public web site.

A subelement of the audit finding is the OIG assertion that the NRC lacks a FOIA review process for SECY paper/SRM release, yet the draft audit report itself cites the NRC's Internal Commission Procedures to the effect that agency "policy is to immediately release SECY papers and SRMs to the public after Commission action is completed unless they contain specific, limited types of information which warrant protection" (draft Audit Report at page 6) and that is what happens. The draft audit report is critical of the fact that the agency's existing guidance provides no evaluation criteria for (a)(1) and (a)(2) public release determinations of SECY papers and SRMs. The OIG seeks a "clear, formal process for assessing whether a document should or should not be released to the public while expressing a need for balance between protecting public openness (an agency goal) and common defense and security (the agency's mission)." (at page 16) NRC MD 3.4 (currently under scheduled revision) provides for routine public release of all SECY papers "that do not contain withholdable (adjudicatory, enforcement or investigatory, attorney-client or legal work product, classified or proprietary, and personal privacy) or particularly sensitive material...." SRMs are not stand-alone documents; they are extensions of the related SECY papers. Commission procedures provide that SRMs on **releasable** SECY papers are to be released after final Commission action. (Exhibit 1 to MD Handbook 3.4, Release of Information to the Public, M.1.a. and M.2., respectively, on page 60, and standards echoed in Chapter II of the Internal Commission Procedures.)

In light of the classified designation of the particular SECY paper in question and that the SRM upon which it was based was denoted "sensitive" under long-established FOIA criteria, there should have been no question that protection of these documents was well within the parameters of legally justifiable withholding from public disclosure. However, the reality that some subset of SECY papers/SRMs is withheld from public disclosure in course of conducting the balancing referred to above, does not diminish the fact that informed reviews for public

release of these papers are accomplished in accordance with carefully considered criteria by those in the best position to make such assessments. That this function has not been expressly documented as an (a)(2) activity does not diminish its quality or effectiveness in achieving the end result, which is the appropriate disclosure of unclassified, non-sensitive, non-exempt material. Moreover, the NRC's public web site contains information on agency compliance with (a)(1) and (a)(2) and direct links to such information to assist the public in this area, along with general Electronic Reading Room access in a user-friendly format.

The draft audit report asserts the lack of a process for a systematic review of SECY papers or SRMs pursuant to FOIA automatic disclosure requirements, yet systematic review is precisely what occurs in the normal course. The Commission understands that there is no substitute for the informed, considered examination of an experienced reviewer on a document-by-document basis. We have no disagreement with the OIG's discussion on this point in the draft audit report (at page 21) nor with the position of the DOJ's (a)(2) authority to that effect mentioned in the draft audit report. The NRC process works smoothly and systematically. In conformance with long-standing practice, the creator of the document makes an initial assessment of suitability for public release, in consultation with technical experts or appropriate advisers, as necessary, such as information security specialists or legal counsel. This assessment is then reviewed by managers and subsequently considered by agency officials, such as the Secretary of the Commission, and finally reviewed by the Commission itself. At any point along the line, the assessment may be questioned, so that by the time the document is issued, there have been reviews at every level and multiple opportunities for consideration of all factors bearing on public release. This provides ample occasion for reversal of the determination and a correspondingly high degree of assurance that the disclosure determination is sound. This may fairly be deemed to be a systematic and reliable review process.

The draft audit report asserts (at page 18) that some SECY papers and SRMs that ultimately affect the public are withheld from automatic disclosure without being subject to a FOIA review. However, this is a circular argument, in that the OIG assumes what it sets out to prove, without any independent support for the veracity of the statement. This charge may result from a misunderstanding of the agency's exercise of its authority to make discretionary disclosure of documents that it otherwise has no obligation to release to the public. In this context, it should be understood that the NRC routinely releases a great many of these documents, over and above its legal obligation to do so, in the interest of providing the public a window on a broad spectrum of its activities. But this approach does not constrain the Commission to take such action, and it does not adjust the legal requirements in any sense, such that the Commission no longer reserves the right to withhold that which it properly deems not suitable for public release.

The SECY paper at the center of this audit does not purport to establish policy and is not an (a)(2) document. By its very terms, it proposes a decision-making framework to the Commission for which it solicits Commission views. It is, in the description of the Internal Commission Procedures, and as reflected in the draft audit report (at page 4), the Commission's primary decision-making **tool**. It is but an instrument in the decision-making process, whose goal is for all the various inputs in the process to culminate in a decision. Likewise, SRMs in response to SECY papers often provide actions to be completed and analyzed by the staff, with an assessment reported to the Commission upon which it may draw in formulating a decision in a particular area. Thus, SRMs are not stand-alone documents; they are extensions of the related SECY papers. They represent, for the most part, works in

progress. It should be clear, therefore, that since these documents are not the end result, it will be the rare SECY paper or SRM that will embody such statements of policy as are required to be published under (a)(1) or released under (a)(2).

The Commission takes its commitment to openness very seriously. It takes equally seriously its concern about inappropriate disclosure of sensitive, security-related information. It is beyond argument that release of such information serves neither the interests of the government nor of the public. However, balancing the tension between these occasionally competing interests is not a simple or methodical process. Historically, the NRC had routinely made available to the public large amounts of information, more than required by law. In the post-September 11, 2001 environment, however, like many other agencies, the NRC found it necessary to be more judicious in what it voluntarily releases, so as not to inadvertently provide assistance to those who might use the information for malevolent acts. The dilemma of where to draw this line is a subject that has received a considerable amount of Commission attention in recent times.

This was the motivation behind several Commission initiatives in the past few years, including, among other things: development of staff guidance, consistent with Department of Homeland Security procedures, on withholding from public disclosure of sensitive unclassified information concerning nuclear power reactors and materials licensees and certificate holders, also known as Sensitive Information Screening Project (SISP) reviews; establishment of several Task Force initiatives to review the application of FOIA criteria to security-related information; and development of staff guidance on identifying and marking SUNSI, along with development and implementation of associated agency-wide training. The goal of all these efforts was to provide clarifying staff guidance on criteria for withholding sensitive information that could be useful or could reasonably be expected to be useful to an adversary (terrorist). One of the Task Force initiatives specifically inquired into the Commission's obligations and authority under subsection (a)(2) of the FOIA, drawn directly from applicable DOJ guidance. (SECY-05-0091, Task Force Report on Public Disclosure of Security-Related Information, May 18, 2005.) As summarized in that report, under 5 U.S.C. §552(a)(2), the NRC is not required to make publicly available records that have no precedential value and do not constitute the working law of the agency. By the same token, documents that have the force and effect of law must be disclosed. (Task Force Report at page 2.)

The mechanism for making release determinations under these standards is the same as for any other information requested under FOIA. Determinations must be made on a case-by-case basis, with the disclosure decisions in many cases largely driven by technical or security policy considerations. The question of whether public disclosure of information could increase threats to homeland security is often a matter of judgment based on a full understanding of the technical issues underlying the determination, including consideration of such factors as the nature of the threat, the likelihood of harm or degree of risk posed by the public disclosure of the information and the relative usefulness of the information towards accomplishing the potential harm, balanced against whether the benefit to the public from the release of the information would outweigh the security threat. For example, release of information about evacuation routes in a nuclear emergency could be of use to terrorists, but withholding the information from the public may render the emergency plan ineffective for protecting the public. Thus, independent determinations must be made in each instance after weighing all the pertinent considerations. Knowledgeable individuals made these assessments regarding the papers in question and determined that public disclosure was inappropriate. The suggestion

that an (a)(2) review was not accomplished merely because the OIG disagreed with the outcome of these assessments is unfounded.

Apart from any concerns over inappropriate disclosure of sensitive, security-related information, there are other equally compelling considerations weighing against the unthinking release of predecisional material, such as where premature disclosure of internal deliberative exchanges would send conflicting messages about Commission policy still in the process of being formulated. This would actually be a disservice to the public, confusing it about Commission policy and direction. This frustrates the core purpose of the FOIA, which is to shed light on the activities of government, rather than to expose all the internal recommendations, opinions, and consultations that lead up to a final agency decision. Exposure of this kind of information is completely contrary to FOIA principles and serves no legitimate public interest, yet this is the very nature of the communications involved in the SECY paper and the SRM that gave rise to this OIG audit.

We would vehemently disagree with the proposition that SECY papers and SRMs may contain "secret law" of the agency. The NRC does not expect SECY papers and SRMs to constitute policy statements. Neither does the nuclear community or others who regularly interact with the NRC, as evidenced by the fact that participants filing regulatory submissions invariably rely on the NRC's regulations, adjudicatory decisions, or guidance documents posted as (a)(1) and (a)(2) material on NRC's web site as authority, not on SECY papers and SRMs, even if many of those documents are public. The draft audit report does cite an instance from years ago in which the NRC apparently revised its decommissioning policy through an SRM, which policy was to be formally adopted by subsequent amendment to regulations. Citizens Awareness Network, Inc., v. Nuclear Regulatory Commission, 59 F. 3d 284 (1st Cir. 1995). In that case the court considered the policy change that was supposedly effected through the SRM to be improper and remanded the case for further proceedings in accordance with notice and hearing requirements. The court's decision thus indicated that SRMs were not a suitable means of establishing or amending agency policy and we endorse that principle.

We agree with the proposition that there is **no categorical exclusion** from the ambit of the (a)(2) requirement for a class of records, such as SECY papers or SRMs and we strive to avoid creating agency policy through these mechanisms, which are designed to be a means to an end. By the same token, there would be **no categorical inclusion** of a class of records within the (a)(2) requirement, so the suggestion that thousands of past SECY papers and SRMs must be reviewed in order to assure the Commission that no statement of policy has gone unnoticed to the public would be redundant. At best, it would be overkill. At worst, it would be extraordinarily wasteful of agency resources.

RESPONSE TO AUDIT REPORT RECOMMENDATIONS:

Recommendation 1: Develop a program for NRC compliance with FOIA's automatic disclosure requirements.

Response:

Agree in part. The agency's process provides amply for compliance with the FOIA's (a)(2) automatic disclosure requirements, with review under applicable standards at the time of

document creation in accordance with Department of Justice guidance. However, we believe it may be appropriate to revise MD 3.4 and Chapter II of the Internal Commission Procedures to include an explicit reference to screening SECY papers and SRMs for FOIA subsection (a)(2) considerations. We also will designate a central authority or organizational component in the agency to be responsible for placement of (a)(1) and (a)(2) documents on the NRC's public web site.

Recommendation 2: Conduct a documented FOIA 552(a)(1) and (a)(2) review of previously unpublished SECY Papers and SRMs.

Response:

Disagree. The Commission has a robust program in place to ensure that Commission documents receive the widest possible dissemination consistent with protection of sensitive information, including review of the staff's non-public determination by management officials. SECY papers and SRMs are carefully examined for public disclosure suitability under applicable law and policy and that will continue. A review of past papers would be superfluous because those reviews already have been conducted under requisite legal criteria. No sensible purpose would be served thereby and this would be a great waste of limited agency resources.

CONCLUSION:

We disagree with the finding and conclusion in the draft audit report. We do not believe the agency's process to release documents is portrayed accurately and we believe the conclusions elevate form over substance. The agency's desired goal of openness is achieved, i.e., appropriate levels of disclosure and openness, so the fact that there is no central authority responsible for conducting (a)(1) and (a)(2) reviews is a technicality. The NRC not only fully complies with its legal obligations to make Commission documents readily available to the public, but it goes well beyond its statutory obligations in ensuring public access to agency records, consistent with its responsibilities to protect sensitive information under the law. Moreover, the Commission's practices under the FOIA's automatic disclosure provisions fully comport with its strategic goal of openness. Still, we recognize that even good programs have room for improvement. Therefore, we will consider adopting some aspects of the recommendations in the draft audit report, as modified for efficiency and practicability. This memorandum was coordinated with the General Counsel, who concurs in it.

cc: SECY
OGC

DETAILED OIG ANALYSIS OF AGENCY COMMENTS

On June 20, 2006, OIG issued its draft report to the Executive Director for Operations. OIG subsequently met with managers from the Office of the Secretary of the Commission regarding data on the public release of SRMs and clarified the final report as appropriate. On August 2, 2006, the EDO provided a formal response to this report (see Appendix B).

Below is OIG's detailed analysis of the agency's formal comments. Page numbers referenced correspond to those in the agency response included as Appendix B.

Overview

OIG's central message is that the agency does not have a process mechanism (internal controls) to review SECY Papers and SRM documents to determine whether they are subject to FOIA automatic disclosure under 552(a)(1) and (a)(2). Absent such a process, the agency lacks reasonable assurance, as specified in OMB Circular A-123, that it fully complies with FOIA's automatic disclosure requirements.

The OIG report also questions the agency's categorical exemption of SECY Papers and SRMs from FOIA automatic disclosure consideration. This exemption was asserted repeatedly by the Office of the General Counsel during our audit. However, the EDO's response acknowledges that a categorical exclusion is inappropriate and that no specific procedure currently exists for conducting FOIA automatic disclosure reviews of SECY Papers and SRMs.

The agency's response further implies that a document marking practice satisfies the FOIA automatic disclosure review requirements. Yet, no explanation or basis as to how marking documents as "may be exempt from release" satisfies the FOIA requirement that the documents be reviewed to determine whether any portion of a document is releasable. The agency, therefore, has no basis upon which to assert full compliance with FOIA automatic disclosure requirements based on the review discussed in its response.

In summary, OIG remains convinced that NRC lacks the internal controls needed to ensure full compliance with FOIA's automatic disclosure requirements and the agency's own openness policy. Therefore, no changes have been made to the report based on the agency's formal comments.

NRC Comment on Page 1, Paragraph 1

"This memorandum will not specify the statistical data errors on release of Commission decision documents in the draft report; those have been addressed separately with the OIG audit team by the Secretary of the Commission (SECY)."

OIG Response

OIG met with managers in the Office of the Secretary of the Commission to clarify the statistics on the release of SRMs. The SECY staff concurred with the total numbers of SRMs issued, but disagreed with the percentage of SRMs released to the public because "Meeting SRMs," which are available but not identified on the public "SRM" index, were not reflected in the draft report's SRM chart. If factored in the totals, the overall percentage of SRMs withheld from the public drops from 78% to 58%. However, Meeting SRMs do not carry the same significance as SRMs related to SECY Papers. Therefore, to provide a more accurate understanding of the public availability of SRMs which may have impact on the public (i.e., SECY-related SRMs), OIG's audit report will NOT reflect the population of Meeting SRMs. As a result, OIG's report was revised to state that 72% of SECY-related SRMs were withheld from the public over the period 2001-2005.

NRC Comment on Page 2, Paragraphs 1 and 2

The agency states that the subject SECY Paper, and related SRM, was classified and therefore withheld from public disclosure on the basis of FOIA exemptions 2 and 5.

OIG Response

With respect to application of the FOIA exemption, the SRM contains a marking on the cover that states inter alia, "OFFICIAL USE ONLY May be Exempt from public release under the Freedom of Information Act (5 U.S.C. 552) Exemption number[sic] 2, 5 Nuclear Regulatory Commission review required before public release." (emphasis added)

During our audit, OIG determined that the subject SECY Paper itself was not classified; only three of the six SECY Paper attachments were classified documents. The SECY Paper states that it is an "OFFICIAL USE ONLY" document upon separation from the three classified attachments. The decision-making framework (attachment 2) also was not a classified document. Therefore, the classification status of the attachments is not relevant to the SECY Paper, its three unclassified attachments, or the related SRM. As a result, given the agency's own Internal Commission Procedure requirements, it appears that the SECY Paper and SRM should have been released to the public. Furthermore, under 552(a)(1) and (a)(2) requirements (i.e., FOIA automatic disclosure), the classified attachments should have been reviewed and released in redacted form, *if possible*.

OIG notes that markings are added to documents in anticipation of a potential FOIA request to alert a FOIA reviewer of the potential for non-releasable material. These markings do not represent a determination as to the ultimate disposition of the document. If these documents were requested under FOIA, then a detailed review would occur to determine whether any "reasonably segregable portion" could be released under FOIA. This review is mandated by FOIA and is incorporated into Management Directive 3.1 which governs FOIA procedures for requested documents. There is no detailed procedure for review of FOIA automatic disclosure materials for reasonably segregable portion release. The marking process does not accomplish this statutorily required purpose.

NRC Comment on Top of Page 4

The agency states that the draft audit report is "undermined by the lack of citation to comparable documents being considered (a)(2) records by other federal agencies" and that DOJ's failure to include documents similar to SECY Papers and SRMs in its own reading room "is instructive."

OIG Response

OIG does not dispute that a large volume of documents are publicly available on NRC's website and OIG did credit the agency for the organizational structure of the FOIA website. However, OIG also noted concerns about the withholding of SECY Papers and SRMs from this website. In addition, the EDO's comments do not explain the means for determining what other Federal agency documents would be "comparable." The practice of other agencies was not the subject of OIG's review.

NRC Comments on Page 4, last paragraph and Page 5, Paragraphs 1 and 2

The agency's response states that "informed reviews for public release of these papers are accomplished in accordance with carefully considered criteria by those in the best position to make such assessments" and "in conformance with long-standing practice, the creator of the document makes an initial assessment of suitability for public release, in consultation with technical experts or appropriate advisers, as necessary." Summarizing, the agency states that "this may fairly be deemed to be a systematic and reliable review process."

OIG Response

This response provides no indication that anyone in the determination or review chain explicitly evaluates SECY Papers or SRMs against the FOIA automatic disclosure criteria. In this regard, the reviews described by the agency are not systematic or reliable because they do not specifically evaluate for FOIA automatic disclosure determinations. In fact, discussions with staff and managers throughout this audit determined that most were not familiar with the specific criteria for automatic disclosures.

NRC Comment on Page 5, Paragraph 3

The agency comments on OIG's assertion that "some SECY papers and SRMs that ultimately affect the public are withheld from automatic disclosure without being subject to a FOIA review" as being a circular argument, in that "OIG assumes what it sets out to prove, without any independent support for the veracity of the statement. This charge may result from a misunderstanding of the agency's exercise of its authority to make discretionary disclosure of documents that it otherwise has no obligation to release to the public."

OIG Response

The OIG reasoning is as follows. The agency has had no internal reviews to determine whether SECY Papers or SRMS are subject to automatic disclosure under 552(a)(1) and (a)(2). Additionally, the agency has no established basis for categorically exempting SECY Papers and SRMs from automatic disclosure consideration. This lack of internal controls and lack of valid exemption creates a risk that documents are improperly withheld. In support, the OIG report documents

two cases where SECY Papers and SRMs would meet the FOIA automatic release criteria. Absent evidence demonstrating that the remaining SECY Papers and SRMs are not subject to release, in whole or in part, it is more likely than not that other SECY Papers and SRMs were improperly withheld.

NRC Comment on Page 5, Paragraph 4 and Top of Page 6

The agency response states that the “SECY paper at the center of this audit does not purport to establish policy and is not an (a)(2) document.” Likewise, SRMs in response to SECY Papers often provide actions to be completed and they represent, for the most part, works in progress. “It should be clear, therefore, that since these documents are not the end result, it will be the rare SECY paper or SRM that will embody such statements of policy as are required to be published under (a)(1) or released under (a)(2).”

OIG Response

Regarding the SECY Paper analyzed in the OIG report, it is clear from the face of the document that the staff was seeking policy guidance from the Commission. In addition, the “instructions to the staff” provided in the associated SRM resulted in actions that in the staff’s own words “ensure adequate protection of the public and promote common defense and security.” The finality of these determinations and the nexus to public effect is clear. There is no additional information provided in the agency response that alters the OIG opinion regarding the applicability of FOIA’s automatic disclosure status to these documents.

The remaining analysis is largely a restatement of the agency’s position that SECY Papers and SRMs generally do not contain policy. The agency response provided earlier (on page 5, 2nd paragraph) acknowledges the risk this poses, agreeing with the DOJ expert cited in the OIG report. However, the agency’s response admits that in some cases SECY Papers and SRMs will meet the automatic disclosure requirements for FOIA albeit a “rare” occurrence. The response provides no basis as to why this would be a “rare” result. Without a structured document-by-document review process this conclusion is not supported.

NRC Comment on Page 6, 2nd Full Paragraph

The agency response states that several initiatives were undertaken to review the application of FOIA criteria to security-related information and to provide “clarifying staff guidance on criteria for withholding sensitive information...” One particular task force “specifically inquired into the Commission’s obligations and authority under subsection (a)(2) of the FOIA.” The agency summarizes in SECY-05-0091, “Task

Force Report on Public Disclosure of Security-Related Information” that “under 5 U.S.C. §552(a)(2), the NRC is not required to make publicly available records that have no precedential value and do not constitute the working law of the agency.”

OIG Response

OIG acknowledges the agency’s efforts to find an appropriate balance between its goal of openness and the need to protect sensitive security-related information. However, the agency continues to erroneously equate a review for security sensitivity with a review for application of the FOIA requirements. In addition, the agency’s response in this section does not address the need to review SECY Papers and SRM documents against FOIA’s automatic disclosure criteria.

The cited task force report (SECY-05-0091) did note that wide discretion is available under a Sensitive Information Screening Project (SISP) review of documents subject to the prompt disclosure requirements of 552(a)(2). Yet the task force report also stated that (regarding current staff practices with SISP reviews) “this approach does not satisfy the requirements of FOIA.” (The emphasis is in the original text of the report.) Going further, the task force notes that SISP reviews do not undertake a redaction review whereas FOIA requires, “all reasonably segregable material that is not exempt under the statute must be disclosed.”

More recently, a senior agency attorney told the Commission that when an actual FOIA request is received, a determination of whether or not a document is exempt from disclosure is made by the officials assigned that responsibility (as opposed to the staff’s predetermination when creating a SECY Paper). The attorney added that in the security area, initial release designations “might not necessarily be accurate because they’re not undergoing legal review at that time.”

NRC Comment on Page 6, 3rd Full Paragraph to Page 7

The agency response highlights a number of considerations to be given to the release of documents including homeland security and technical or security policy considerations. According to the response, determinations must be made on a case-by-case basis. The section concludes that OIG disagreement with the outcome of these assessments is the basis of finding that “an (a)(2) review was not accomplished.”

OIG Response

This response provides no indication that anyone in the determination or review chain explicitly considered the SECY Papers and SRMs against the criteria for automatic disclosure. The lack of review of this entire class of Commission decision documents against FOIA's automatic disclosure requirements underlies the OIG finding.

NRC Comment on Page 7, 1st Full Paragraph

The agency response states that the premature disclosure of internal deliberative exchanges between the Commission and the staff would send conflicting messages to the public about Commission policy still in the process of being formulated. The agency further states that the core purpose of the FOIA is to "shed light on the activities of government, rather than to expose all the internal recommendations, opinions, and consultations that lead up to a final agency decision." The agency contends that the latter is the "very nature of the communications involved in the SECY paper and the SRM that gave rise to this OIG audit."

OIG Response

OIG recognizes the need for the exchanges between the staff and Commission and does not dispute the sensitivity of pre-decisional information. However, OIG disagrees with the agency's contention that the SECY Paper and SRM which served as the basis for this audit were nothing more than pre-decisional exchanges. In fact, OIG found that the SECY Paper in question served as an end result in that it presented specific criteria which the agency used to assess licensees' security measures. The subsequent SRM served as the final implementing tool which sanctioned the agency's use of the proposed framework.

The agency's response in this section did not address the need to review SECY Papers and SRM documents against FOIA's automatic disclosure criteria. Further, in recognition that certain documents contain material appropriately subject to non-disclosure, FOIA provides that a document may be redacted or fully withheld.

NRC Comment on Page 7, 2nd and 3rd Full Paragraphs

The agency response states that it "vehemently" disagrees with the proposition that SECY Papers and SRMs may contain the "secret law" of the agency.

OIG Response

Agency action based on unpublished documents within the statutory scope of FOIA's automatic disclosure sections has been referred to in court decisions as "secret law" of the agency. The agency response states that NRC does "strive to avoid creating agency policy" through SECY Papers and SRMs but does acknowledge that such material may exist. *OIG found that such material does exist, further supporting OIG's conclusion that SECY Papers and SRMs may have been inappropriately withheld from public disclosure.*

NRC Comment on Page 7, 3rd Full Paragraph

The agency response states that it agrees that there is no categorical exclusion of a class or records such as SECY Papers and SRMs. With respect to the recommendation that all such documents, previously unpublished, undergo some form of review, the agency states that "At best it would be overkill. At worst, it would be extraordinarily wasteful of agency resources."

OIG Response

The agency acknowledges the problem created by the failure to review documents by acknowledging that there is "no categorical exemption." Without such an exemption the agency must have internal controls to establish a reasonable basis of compliance. However, NRC has no internal controls for evaluating the applicability of 552(a)(1) and (a)(2) standards as they pertain to SECY Papers and SRMs and as such no reasonable basis for demonstrating compliance.

Costs considerations cannot be used as a basis for non-compliance. OIG does not suggest the specific means of evaluating documents and the report notes that DOJ's expert suggested that the agency might benefit from some form of screening process.

NRC Response to Recommendation 1, Bottom of Page 7, Top of Page 8

The agency agrees, in part, to this recommendation stating that the "agency's process provides amply for compliance with the FOIA's (a)(2) automatic disclosure requirements" at the time of document creation. Yet, the agency believes "it may be appropriate to revise MD [Management Directive] 3.4 and Chapter II of the Internal Commission Procedures to include an explicit reference to screening SECY papers and SRMs for FOIA subsection (a)(2) considerations."

OIG Response

The agency recognizes that SECY Papers and SRMs have not previously been evaluated to determine the applicability of FOIA's automatic disclosure requirements which reinforces OIG's finding that full compliance with FOIA was jeopardized. OIG notes that the current version of NRC's Management Directive 3.4, *Release of Information to the Public*, states "This directive does not govern public disclosure of information required by or requested under FOIA." Therefore, it is imperative to revise Management Directive 3.4 and the Internal Commission Procedures to include explicit reference to screening SECY Papers and SRMs for 552(a)(2) applicability.

The agency also agrees to designate a central authority or organization as responsible for placing 552(a)(1) and (a)(2) documents on NRC's public web site.

OIG Response

The agency's response does not address OIG's concern.

As noted in the draft report, NRC's Office of Information Services already has responsibility for placing the releasable documents on the agency's public web site. OIG re-emphasizes its concern that the agency does not have a central authority or organization responsible for implementing a process designed "to identify documents subject to 552(a)(1) or (a)(2) automatic release, the subsequent redaction review of such documents, their release in whole or part, or the required indexing."

NRC Response to Recommendation 2 on Page 8

The agency disagrees with this recommendation to conduct a review of previously unpublished SECY Papers and SRMs for 552(a)(1) or (a)(2) applicability citing a current "robust program" that ensures SECY Papers and SRMs "are carefully examined for public disclosure suitability under applicable law and policy." The agency states that "no sensible purpose would be served" by a review of past documents and that a "great waste" of agency resources would result.

OIG Response

The sensible purpose to be served by this recommendation is the agency's reasonable assurance of full compliance with the FOIA law.

As the OIG report establishes, none of the agency's current reviews evaluate SECY Papers or SRMs to ascertain whether they should be automatically disclosed under FOIA. The agency also does not identify any review that determines whether portions of SECY Papers or SRMs can be released, another requirement of FOIA. Because there are no management controls directing the review of documents against the specific statutory requirements of FOIA automatic disclosure, the agency has no basis of reasonable assurance of compliance with these statutory requirements. In this regard, the agency response cites an example of non-compliance but asserts, without evidence, that such an example would be rare.

Releasing thousands of documents does little for public confidence if it is later discovered that even a small number of documents of great public interest and importance were improperly withheld. This is especially the case when documents are withheld in whole and not identified in publicly available indexes. For these reasons, although the OIG report acknowledges that the NRC makes many documents available, resource strain does not serve as a basis for ignoring FOIA automatic disclosure requirements.