

DOE proposal to restrict nuclear information strongly opposed

In yet another attempt by the Reagan Administration to restrict public access to government information, the Department of Energy plans to impose stringent controls on a broad range of data about nuclear materials and weapons that it considers sensitive but has not stamped secret. After the proposed regulation on Identification and Protection of Unclassified Controlled Nuclear Information was printed in the Federal Register on 1 April, DOE received protests from an equally broad range of academics, librarians, environmentalists, labor leaders, state governors, members of Congress and even officials at the normally serene National Archives.

Many details about production and protection of nuclear materials and components, data about building and testing bombs and particulars about substances and shipments are already classified in one way or another under the Atomic Energy Act, various executive orders and special exemptions from the Freedom of Information Act. The new regulation would give the Secretary of Energy authority to withhold virtually any information that is now unclassified or has been declassified, say those who drafted it, to prevent terrorists from making improvised atomic explosives, saboteurs from damaging nuclear plants and foreign agents from stealing nuclear materials.

It was not long after the proposed rule appeared in the Federal Register that DOE began hearing from opponents—notably, 18 Democratic senators and representatives (including two contenders for next year's party nomination as Presidential candidate, Ernest Hollings and Gary Hart) who argued in a letter to Energy Secretary Donald P. Hodel that Congress, by adding Section 148 in December 1981 to the Atomic Energy Act of 1954, had intended to make possible only "minimum restrictions," but DOE "has in fact proposed an extremely broad rule to give itself sweeping powers to withhold a whole new category of information." Section 148, as it happens, directs DOE to protect against unauthorized dissemination of unclassified data relating to

the design of facilities that produce or use nuclear materials as well as the security precautions taken at the sites or during transit of nuclear materials. It also calls for safeguarding any declassified information about the design, fabrication or use of atomic weapons and components.

'Legitimate concern.' Release of such sensitive information would be restricted under the proposed regulation to US citizens with "an established 'need-to-know' . . . in the performance of official duties." The regulation raises "legitimate concern," the members of Congress informed Hodel, that DOE "might withhold or unduly delay the release of information which would be crucial in various legal, legislative, regulatory and public debate forums." What's more, the rule calls for criminal sanctions to be imposed by the DOE secretary without judicial review when unauthorized dissemination is discovered. The penalties seem severe: up to \$100 000 in fines and 20 years in prison. The Congressional letter writers claimed such "almost arbitrary power" by an Energy Secretary, wielded outside the judicial process, "lends itself

rightly or wrongly to interpretations of DOE repressiveness towards legitimate public desires for information." The last time Congress amended the Atomic Energy Act was in 1980 when it wrote Section 147 giving the Nuclear Regulatory Commission authority to prohibit a contractor or licensee engaged in building or operating a commercial nuclear reactor from disclosing unclassified details about nuclear materials and plant equipment. Under Section 147, NRC can only withhold information about facilities it licenses. The provision also requires judicial review of any penalties imposed for violations.

Shortly after Section 147 was enacted, DOE asked Congress for similar power to protect any nuclear information that "could reasonably be expected" to constitute a risk to the health and safety of the public or the security of the nation. The idea was to keep such information out of the hands of terrorists, cranks and foreign adversaries. In proposing the regulation, DOE defined nuclear material as "any material that the secretary determines to be nuclear material." What's more, the



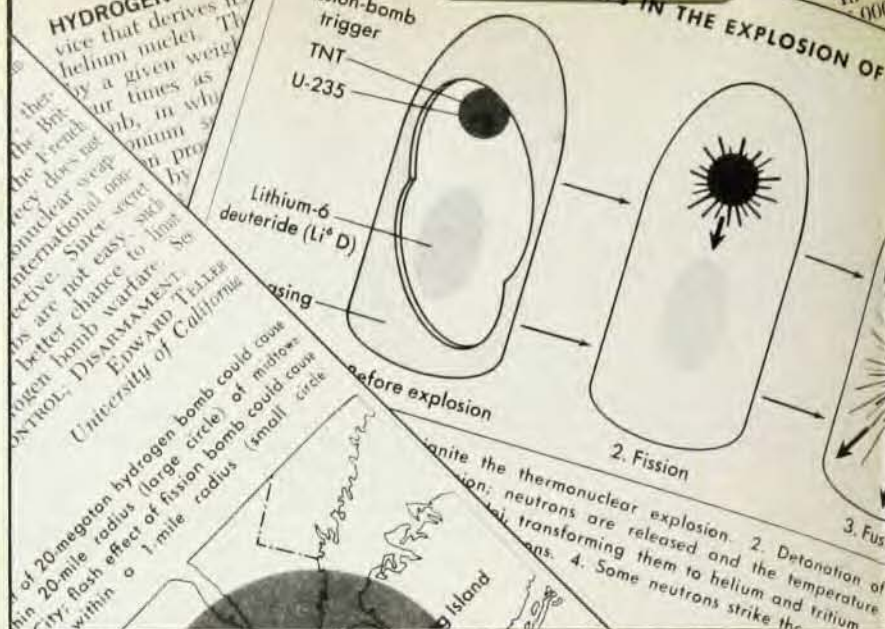
Energy Secretary Donald Hodel would have broad authority to restrict access to unclassified information about nuclear materials and weapons if proposed regulations are adopted.

provision states in Orwellian language: "Nothing in these regulations precludes the secretary or his delegate from designating information not specifically described in this regulation as unclassified controlled nuclear information."

Objections came quickly from university officials. "These regulations are obscure, confusing and inappropriate for university campuses," wrote David A. Wilson, executive assistant to the president of the University of California. Harvard complained that, even given a narrow reading, DOE's proposed rule "would likely chill or thwart academic and public discussion in the nuclear field." From Stanford, Gerald J. Lieberman, vice provost and dean of graduate studies and research, wrote that the definition of information in the DOE rule was so wide it appeared to include much of the ground covered in the university's courses in physics, electrical engineering and materials sciences. "Indeed, the language might be read to reach political-science courses, which include material on arms control," claimed Lieberman. "As an institution maintaining research libraries of some 5 million volumes, we fear that the scope of the proposed regulation is so great that it might encompass an unknowable subset of our collection, which is available to all our scholars. And as a teaching and research institution, we fear that the regulation could chill or threaten the free interchange of information required for the success of fundamental research activities, which are essential to our national and economic security."

'Bad policy.' Usually remaining aloof from such controversy, the National Archives, which stocks thousands of documents on nuclear energy, informed DOE that "it is bad policy to propose to protect a category of information which is yet to be defined." Moreover, the National Archives noted, "imposition of any obligation to review for possible restrictions large quantities of records already in the public domain is an impossible burden."

The situation, observed Allan Adler of the American Civil Liberties Union, recalls the 1979 episode involving *The Progressive* magazine, which sought to publish an article about the "secret" of the hydrogen bomb. DOE, said Adler, invoked the "born-classified" concept in its efforts to impose prior restraint on publication. In the end, DOE withdrew its objections after its officials told a Senate subcommittee that the information in *The Progressive* article could be found in documents on the open shelves of libraries at Los Alamos and Livermore national laboratories, among other places. Somewhat embar-



Hydrogen bomb was explained by Edward Teller in 1970. DOE later claimed some of this information was "born classified." (Adapted with permission from *Encyclopedia Americana*, ©1983 Grolier.)

assed, the agency explained that the article it sought to suppress posed no greater risk to national security than the documents that had been declassified some years earlier, without the standard review procedure, during the government's rush to declassify in the wake of the Supreme Court's decision on the Pentagon Papers.

During *US vs The Progressive*, the defense pointed out that the diary of President Eisenhower's secretary, Ann C. Whitman, which was made available to the public in the Dwight D. Eisenhower Library in 1977, named two of the three concepts of thermonuclear weapons that the government claimed to be secret in the 1979 litigation. It turns out that the two concepts were in open publications even before 1977—portrayed graphically in Edward Teller's article in editions of *Encyclopedia Americana* since 1970.

State fears. South Carolina's health department expressed fear that the new regulation would shut off access to information about DOE's Savannah River nuclear plant—data it recently used to document what it termed "several very serious cases of environmental degradation." The views of Nevada's Governor Richard H. Bryan were made known in a letter by James I. Barnes, director of the state's energy department. Nevada, wrote Barnes, "with its long history of involvement with defense-related nuclear activities," found the rule "unnecessary, extremely vague" and an attempt "to infringe upon the right of the public to gain access to information that belongs in the public view.... Ostensibly, the rule is being proposed to minimize proliferation concerns related to the weapons program. But of concern to

Nevada is the fact that this rule could severely limit or, in some cases, deny access to the public to radiation exposure data for Nevada test-site workers. It could affect the establishment of claims against the Federal government regarding the exposure of southern Nevadans to radiation from the above-ground weapons-testing program and could affect the ability of the state to know about shipments of defense high-level radioactive waste moving through the state."

For months DOE officials attempted to allay the criticisms, insisting they were groundless and based on a "misapprehension of the scope of the rule." But in July the concerns forced the department to delay imposing the regulation and to hold public hearings on 16 August in Washington, 18 August in Denver and 26 September in Chicago.

Among those testifying in Washington was Thomas D. Davies, a retired rear admiral and former assistant director of the Arms Control and Disarmament Agency. Speaking now as a board member of the Nuclear Control Institute, a nonprofit educational organization, Davies argued that the proposed regulation leaves "essentially unfettered discretion" about what types of nuclear data should be withheld from the public to DOE. "The potential for abuse is thus substantial.... All too often withholding information simply represents the bureaucratic path of least resistance in order to avoid the application of rigorous standards, mask potentially embarrassing situations and generally keep the agency out of the public eye, thereby protecting it from public pressure.... Disclosure serves a policing function."

As an example of what he meant,

Davies noted that several years ago DOE was required under the Freedom of Information Act, invoked by *The New York Times*, to disclose the amount of nuclear materials that commercial processing plants could not account for. The disclosure "led to improved material control and accounting practices," said Davies. "Similarly, public disclosure by the General Accounting Office and others of inadequacies in our controls of weapons material has resulted in substantial upgrading of those controls." While he was "keenly aware of the need for security" and endorsed the "judicious use" of limiting access to certain information, Davies said he found "in many cases, the beneficial effects of disclosure, in terms of enhancing security, outweigh the potential risks."

Another witness, Fred Millar, representing the Environmental Policy Institute, claimed the rule's scope infringed the rights of citizens to information about nuclear accidents, waste storage and other currently unclassified data on location and use, which might have adverse effects on air, land and groundwater. DOE classification should be limited, he said, to "detailed security measures for a particular facility or shipment" of nuclear materials and weapons. A parallel argument was made by Robert F. Goss, president of the Oil, Chemical and Atomic Workers International Union. He said the proposed rule "appears to be designed to prevent the public, workers and the families of workers from protecting themselves against unnecessary exposure to ionizing radiation." The union recognized the right and obligation of the government to protect the nation against terrorists and adversaries, he stated, but it would go to court or lobby before Congress if DOE adopted the rule as currently written.

Universities at risk. Universities especially would be at risk because the proposed DOE regulation is so vaguely defined, argued Sheldon E. Steinbach, general counsel of the American Council on Education. "Nuclear material is just what the (DOE) secretary determines to be nuclear material," he said. This reminded a wag in the DOE hearing room in Washington of Humpty Dumpty's patter in *Alice Through the Looking Glass*: "When I use a word... it means just what I choose it to mean—neither more nor less." For his part, Steinbach pointed out that information so broadly defined "is an unworkable concept in an open university setting. For example, the rule attempts to gather up information already in the public domain and to control access to it. However [DOE] will not assume responsibility for re-

viewing or marking this previously released data to indicate clearly what material does or does not constitute Unclassified Controlled Nuclear Information." Thus, universities would be held responsible for designating all such nuclear information in their possession, he continued, and would be liable to penalties should the unidentified material be disseminated.

Jean Hargrave on behalf of the Association of Research Libraries and Sandra K. Peterson for the American Library Association both voiced concern that the rule would reduce the amount of information that scientists, students and public-interest groups needed in their work and would place an impossible administrative burden on the nation's librarians, particularly those in universities. The documents that the rule applies to, said Hargrave, "have been acquired without any prior notice on restriction of access, and in some cases have been freely available in library collections for many years. Retroactive provisions raise objections on philosophical grounds; furthermore, the ambiguities of some of the language create problems even in good-faith efforts to comply." According to Peterson (a government documents librarian at the College of William and Mary), reports and other technical publications from DOE and its predecessor agencies over the past 20 years or so amount to more than 300 000 microfiche on file in 36 academic research libraries.

The target of fiercest criticism at the hearing was not the proposed regulation itself but the Administration's "singular penchant for secrecy," said Adler of ACLU. "Recent efforts to restrict the domestic dissemination of technical data subject to export controls, like its sponsorship of Section 148, further erode the integrity of the classification system by using 'national security' and related 'terrorist threat' in the context of concededly unclassified and often privately generated information—an area where First Amendment protections have traditionally held their greatest sway."

In defense of the proposed regulation, F. Charles Gilbert, DOE's deputy assistant secretary for nuclear materials and defense programs, insisted that the new restrictions were necessary because of the increasing sophistication of terrorist gangs that might attempt to make nuclear explosives or sabotage nuclear facilities. The regulation requires that information be designated for limited access, Gilbert explained at the hearings, only after it is reviewed by people with the "requisite knowledge and judgment to ensure the statutory requirements are properly applied. The sphere of information is limited [to] government-generated in-

formation—that is, information... produced by or for or under the control of the government." In addition, he said, the information withheld "must reasonably be expected to provide assistance to a malefactor" in committing sabotage or theft or otherwise acquiring nuclear technology or information to harm the public or the nation's defense.

Gilbert spoke to some of the objections from academics and librarians. "Let me assure you," he said, "that we understand the concerns of the academic community regarding access to library materials and that we do not intend to impose restrictions on materials which have received widespread public dissemination. We are considering a number of ways... the proposed rules might be revised to clarify their impact on nongovernment libraries.... From the public comments we have received so far, we are keenly aware that the final rule must contain explicit guidance on what DOE expects government contractors and others possessing unclassified controlled nuclear information to do to control and protect it. Let me assure you that we are giving serious consideration to just what standards and procedures should be applied and to drafting a clear and detailed final rule."

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Observing in the high Andes with dollars, planes and bugs

A common complaint about scientific research in Europe is its high cost, Edwin E. Salpeter of Cornell told the National Science Board on 19 August. He could confirm this, he said, with an anecdote from his visit last May to Cerro Tololo Inter-American Observatory, perched 7000 feet up the Andes, about 80 miles from La Serena, Chile. Operated by the Association of Universities for Research in Astronomy under contract with the National Science Foundation, Cerro Tololo has the largest and best telescopes (because of its superb location) in the southern hemisphere, including a 4-meter all-purpose Mayall that is a twin to one on Kitt Peak in Arizona. Cerro Tololo's neighbor on what Chileans call "astronomy ridge" is the European Southern Observatory, a cluster of slightly smaller telescopes run by eight European countries. While Cerro Tololo's current annual budget is \$6.4 million, ESO spends nearly \$4 for every \$1 at the US observatory, according to NSF accounts. "I can illustrate the disparity," said Salpeter as he passed two color snapshots among his NSB colleagues. "The twin-engine, eight-passenger de Havilland in one picture is used to fly ESO astronomers. The other shot shows the Volkswagen beetles we use."