

2010 (Case No. TFA-0402).¹ In its Appeal, Tri-Valley CARES contends that the information withheld pursuant to Exemption 3 was withheld in an internally inconsistent manner, and therefore may have been improperly withheld from disclosure. It further maintains that every Significant Finding Investigation is assigned an unclassified title and number, which was improperly withheld from disclosure under Exemption 3. Because, as explained below, Exemption 3 concerns classified information, we referred the portion of the Appeal that challenged the withholdings under Exemption 3 to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 3 withholdings to determine whether they were properly classified under current guidance. We have now received HSS's report.

II. Analysis

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., National Security Archive*, Case No. TFA-0115 (2006).

The Director of the Office of Security has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed the Study, focusing on the applicability of Exemption 3 to its contents.

The Deputy Chief reported the results of his review in a memorandum dated January 20, 2012. In that review, he determined that, based on current DOE classification guidance, some of the information previously withheld as classified information may be released. Much of the information previously withheld as classified information, however, is still properly classified, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as properly classified concerns design and design-related information regarding the secondary stages of nuclear weapons in the United States enduring stockpile that is classified as Restricted Data (RD) and Formerly Restricted Data (FRD). RD and FRD are forms of classified information the withholding of which is

¹ Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at <http://www.oha.doe.gov/search.htm>.

required under the Atomic Energy Act, and are therefore exempt from disclosure under Exemption 3.

The Deputy Chief has provided this Office with a copy of the Study from which the RD and FRD have been deleted. Beside or within each deletion, "DOE (b)(3)" has been written in the margin of the document. The denying official for these withholdings is William A. Eckroade, Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the Study pursuant to Exemption 3 of the FOIA. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the Study that the Deputy Chief has now determined to be properly identified as RD or FRD must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Chief's findings, we will remand the Study to NNSA for a new review. In that review, NNSA must consider whether it should withhold, under any other authority provided in the FOIA, any portions of the document not determined to be RD or FRD that were previously withheld as such from Tri-Valley CARES.² After completing its review, NNSA should either release those portions or issue a new determination that provides adequate justification for the withholding of any additional information from the version of the Study that it provides to Tri-Valley CARES. Accordingly, Tri-Valley CARES's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Tri-Valley CARES on July 19, 2010, Case No. TFC-0004, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration shall review the redacted version of the "Secondary Lifetime Assessment Study," SAND2001-0063, which bears markings indicating where all Restrict Data and Formerly Restricted Data have been properly deleted. Upon completing its review, the NNSA shall either release to Tri-Valley CARES the redacted version of the document described above, or issue a new determination that

² The copy of the Study that the Deputy Chief has provided indicates the information that NNSA withheld pursuant to Exemption 6 of the FOIA. In its Decision and Order in Case No. TFA-0402, OHA upheld the withholding of some of the information NNSA withheld under Exemption 6 and remanded the matter for further justification of its withholding of other information.

provides adequate justification for the withholding of any additional information from the version it provides to Tri-Valley CARES. It shall furthermore reach a determination, in accordance with the Decision and Order OHA issued in Case No. TFA-0402, regarding the information it previously withheld pursuant to Exemption 6, if it has not already done so, and either release all such information or provide adequate justification for withholding it in full or in part.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 3, 2012