

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of the National Security Archive)
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Filing Date: November 13, 2012) Case No. FIC-12-0003
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Issued: August 7, 2015

Decision and Order

The National Security Archive filed an Appeal from a determination that the Office of Intelligence and Counterintelligence (IN) issued on September 18, 2012 (Request No. HQ FOIA 2006-376). In that determination, IN released a document responsive to a request that the National Security Archive filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. IN withheld portions of that document under Exemptions 1, 3, and 6 of the FOIA. This Appeal, if granted, would require the DOE to release the portions of the document responsive to the National Security Archive's request that were withheld from disclosure due to their classified nature.

I. Background

On June 9, 2006, the National Security Archive filed a FOIA request seeking a copy of “The April 11, 2001 Daily Intelligence Highlight, ‘Iraq: Aluminum Alloy Tube Purchase.’” See FOIA Request from Roger Strother, National Security Archive, to Carolyn Lawson, FOIA/Privacy Act Group (June 9, 2006) (FOIA Request). On September 18, 2012, IN responded to the FOIA Request, releasing the Daily Intelligence Highlight with redactions, which it justified pursuant to FOIA Exemptions 1, 3, and 6. Determination Letter from Steven K. Black, Principal Deputy Director, IN, to Roger Strother, National Security Archive (Sept. 18, 2012).

The National Security Archive challenged IN's determination to withhold information in an Appeal perfected on November 13, 2012. We issued a decision regarding the information withheld from the document pursuant to Exemption 6 on February 4, 2013 (Case No. FIA-13-0003). In its Appeal, the National Security Archive contends that the information withheld pursuant to Exemptions 1 and 3 should be reviewed for possible disclosure because "much information on Iraq's nuclear intentions is already [publicly] available, as discussions and disagreements among agencies have been widely circulated in official reports and in the media." Appeal at 1. Because, as explained below, the information withheld under

Exemptions 1 and 3 is classified information, we referred the portion of the Appeal that challenged those withholdings to what is now the Office of Environment, Health, Safety and Security (EHSS), which, in coordination with IN, reviewed the Exemption 1 and 3 withholdings to determine whether they were properly classified under current guidance. We have now received EHSS's report.

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). To the extent permitted by law, the DOE will release documents exempt from mandatory disclosure under the FOIA whenever it determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 1 of the FOIA provides that an agency may exempt from disclosure matters that are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552(b)(1); *accord* 10 C.F.R. § 1004.10(b)(1). Executive Order 13526 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information (NSI). When properly classified under this Executive Order, NSI is exempt from mandatory disclosure under Exemption 1. 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1).

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . if that statute – (A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes criteria for withholding or refers to particular types of matters to be withheld . . ." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004(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., Greg Marlowe*, Case No. FIC-13-0001 (2013).

The Associate Under Secretary for Environment, Health, Safety and Security is the official who makes the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Order 475.2B §§ 5(b)(7)(Restricted Data and Formerly Restricted Data per the Atomic Energy Act), 5(b)(8)(NSI per Executive Order 13526). Upon referral of this appeal from the Office of Hearings and Appeals, the Associate

Under Secretary reviewed the Daily Intelligence Highlight, focusing on the applicability of Exemptions 1 and 3 to its contents.

The Associate Under Secretary reported the results of his review in a memorandum dated July 7, 2015. In that review, he explained that the requested document is an intelligence analysis of gas centrifuge technology for nuclear material production. He determined that, based on current DOE classification guidance, the information previously withheld as NSI is still properly classified as NSI pursuant to Executive Order 13526. The information that the Associate Under Secretary identified as NSI falls within section 1.4(c) of the Executive Order, which exempts from public disclosure information that reveals “intelligence activities (including covert action), intelligence sources or methods, or cryptology.” He also determined that, based on current DOE classification guidance, the information previously withheld as Secret Restricted Data is still properly classified as such pursuant to the Atomic Energy Act. The denying official for these withholdings is Matthew B. Moury, Associate Under Secretary for Environment, Health, Safety and Security, Department of Energy.

Based on the Associate Under Secretary’s review, we have determined that Executive Order 13526 and the Atomic Energy Act require the DOE to continue withholding portions of the Daily Intelligence Highlight pursuant to Exemptions 1 and 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 these exemptions, the disclosure is prohibited by statute or executive order. Therefore, the previously withheld portions of the Daily Intelligence Highlight must continue to be withheld from disclosure. Accordingly, the National Security Archive’s Appeal will be denied.

It Is Therefore Ordered That:

- (1) The Appeal filed by the National Security Archive on November 13, 2012, Case No. FIC-12-0003, is hereby denied.
- (2) 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.

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