

In response to the request, OSTI located responsive records but withheld them in their entirety. Its determination letter had two components. In the main body of the determination, pertaining to the unclassified records it had located, OSTI stated that it was withholding records under Exemptions 3 and 4 of the FOIA. Determination Letter from Brian A. Hitson, Director, OSTI to Michael Ravnitzky (May 11, 2016) (Determination) at 1-2. With respect to its Exemption 3 withholdings, OSTI indicated that the unclassified records included information that is exempt from disclosure under the Atomic Energy Act (AEA) of 1954, as amended, §§ 57(b)(2) and 161. *Id.* In an attachment to the determination, OSTI indicated that the DOE's Office of Classification had reviewed the records. *See* Determination at Attachment One. That part of the determination stated the Office of Classification was withholding information under Exemption 3.² *Id.*

In this Decision, we use the term “bibliographic record” to describe a record containing bibliographic information—such as the title, author or publication date—pertaining to a single report held by OSTI. On appeal, the Appellant challenges the adequacy of OSTI's determination as well as OSTI's decision not to release any bibliographic records. Regarding the determination, the Appellant contends that the determination should have identified the number of bibliographic records found by OSTI. Appeal from Michael Ravnitzky to Office of Hearings and Appeals (June 17, 2016) (Appeal) at 2. He further indicates that he is uncertain as to whether the individual who signed the determination letter reviewed the withheld records and calls this “procedurally troubling.” *Id.* As to OSTI's withholdings, the Appellant makes several arguments. First, he argues that the bibliographic records should not be withheld simply because they provide bibliographic information about classified reports. *Id.* at 1. He asserts that the bibliographic records could be releasable even if the reports are not. *Id.* Second, he notes that the bibliographic records refer to reports that are decades old and asserts that the records therefore could not all consist of sensitive material. *Id.* Third, he contends that OSTI should release more information because there is a public interest in its disclosure. *Id.* at 2. Fourth, he argues that OSTI should have segregated and released information not exempt from disclosure. *Id.* at 1.

Given that OSTI's determination involves decisions on both classified and unclassified material, we have bifurcated this Appeal. This Appeal will only consider OSTI's decision to withhold unclassified material pursuant to Exemptions 3 and 4. In another matter, Case No. FIC-16-0004, we will consider OSTI's decision to withhold information that was determined to be classified.

II. Analysis

According to the FOIA, after conducting a search for responsive documents, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency's intentions to withhold responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552(a)(6)(A)(i).³ The statute

² The determination also states that the Office of Classification was withholding information pursuant to Exemption 1 of the FOIA. On appeal, OSTI informed us that, in fact, no information was withheld pursuant to Exemption 1 and that classified information was withheld under Exemption 3 only. Memorandum of Telephone Conversation between David Gottholm, OSTI, and Gregory Krauss, OHA (July 25, 2016).

³ 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 agencies may withhold. 5 U.S.C.

further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*; *see also The Oregonian*, Office of Hearings and Appeals (OHA) Case No. VFA-0467 (1999) (“The written determination letter informs the requester of the results of the agency’s search for responsive documents and of any withholdings that the agency intends to make. In doing so, the determination letter allows the requester to decide whether the agency’s response to its request was adequate and proper and provides this office with a record upon which to base its consideration of an administrative appeal.”).

An agency, therefore, has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld and (3) specify the exemption or exemptions under which information was withheld. *See, e.g., Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 (2014); *Tom Marks*, OHA Case No. TFA-0288 (2009); *F.A.C.T.S.*, OHA Case No. VFA-0339 (1997). A determination letter must also “specifically indicate which exemptions . . . are being applied to each withholding.” *The Oregonian*, OHA Case NO. VFA-0467 (1999). Finally, a determination must adequately justify the withholding of information by explaining briefly how the claimed exemption applies to the withheld document. *See, e.g., State of New York*, OHA Case No. TFA-0269 (2008); *see also* 10 C.F.R. § 1004.7(b)(1) (responses denying a request for a record must include “a brief explanation of how the exemption applies to the record withheld”).

In cases where we determine that an office did not provide an adequate determination in response to a FOIA request, we usually remand the request to the office with instructions to issue a new determination. *See, e.g., Great Lakes Wind Truth*, OHA Case No. FIA-14-0066 (2014); *Idaho Conservation League*, OHA Case No. FIA-12-0040 (2012). In the instant matter, we find no merit to the Appellant’s concerns regarding the degree to which the individual who signed the determination letter also reviewed the records.⁴ However, our review found a number issues with the content of the determination that we believe OSTI should address, both so that the Appellant can file an informed Appeal and so that we can conduct a review. We describe those issues below so that, on remand, OSTI may address them.

A. Description of Search Results

In response to this Appeal, OSTI provided us with three separate, lengthy documents, each composed of unclassified bibliographic records with the classified records redacted. It is clear, therefore, that OSTI conducted a search and compiled the records sought by the Appellant. The determination, however, does not describe the results of OSTI’s search.

§ 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9).

⁴ DOE’s FOIA regulations state that a denial of a request for records may be signed by either a FOIA Officer or a Denying Official. 10 C.F.R. § 1004.7(b). A “Denying Official” in a DOE field office such as OSTI “refers to the head of a field location.” 10 C.F.R. § 1004.2(b); *see also* 10 C.F.R. § 1004.2(h). OSTI’s determination was signed by OSTI’s Director, who meets the definition of a Denying Official. Accordingly, OSTI’s determination was signed by the proper person under DOE regulations. Further, those regulations clearly permit DOE supervisors who do not work exclusively on FOIA matters to sign determinations withholding records.

The Appellant argues that the determination should have disclosed the number of bibliographic records that OSTI located. We agree. In a revised determination, OSTI should state that number. In addition, without revealing information that is exempt from disclosure, OSTI's determination should provide a description of the information found in the bibliographic records. *See, e.g., Idaho Conservation League*, OHA Case No. FIA-12-0040 (2012); *State of New York*, OHA Case No. TFA-0269 (2008).

B. Specification of the Exemptions that Apply to Each Record

OSTI's determination indicates that OSTI withheld the unclassified bibliographic records under Exemptions 3 and 4 of the FOIA. Nevertheless, the determination does not identify which exemptions apply to which records. On remand, OSTI should specify, for each unclassified record or portion of a record that it withholds, whether material has been withheld under Exemption 3, Exemption 4 or both exemptions.⁵

C. Explanation of Withholdings under Exemption 3

Exemption 3 of the FOIA exempts 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 particular criteria for withholding or refers to particular types of matters to be withheld . . ." 5 U.S.C. § 552(b)(3); *see also* 10 C.F.R. § 1004.10(b)(3). OSTI cites this legal standard in its determination. Determination at 1. In addition, OSTI identifies two provisions of the AEA that it claims are applicable, indicates what these statutes prohibit and describes the national security risks that could result from the disclosure of exempt information. *Id.* at 1-2. Nevertheless, we find that the determination does not provide an adequate explanation of how Exemption 3 applies to the withheld information.

We have identified a few elements that should be present in a revised determination. First, it appears that OSTI may not have correctly cited or described the statutory provisions in its determination.⁶ Second, the determination does not identify the statutory provisions that apply to each withholding. For each bibliographic record, OSTI should indicate which statutory provision or provisions apply. Third, the determination does not sufficiently explain why the withheld material is the kind of information that is specifically exempted from disclosure by the statutes.

⁵ If OSTI segregates and releases some material, but redacts other information, it may be able to indicate directly on the redacted records the exemptions that apply to each withholding. We discuss the issue of segregability below.

⁶ OSTI withheld information under Exemption 3 pursuant to Sections 57(b)(2) and 161 of the AEA, or 42 U.S.C. §§ 2077(b)(2) and 2201, respectively. It appears that OSTI may have inaccurately described these provisions. For example, the determination states that Section 161 pertains to the control of special nuclear material. *See* Determination at 2. However, Section 161 is titled "General Duties of Commission" and describes the duties of the Atomic Energy Commission, a DOE predecessor agency. *See* 42 U.S.C. § 2201. It appears that Section 57(b)(2), not Section 161, regards the control of special nuclear material. *See* 42 U.S.C. § 2077(b)(2). Thus, we believe that OSTI should review its descriptions of the provisions that it cited. In addition, for any provision that OSTI cites as an Exemption 3 statute, OSTI should identify the language in the statute or legal precedent that qualifies it as an Exemption 3 statute.

OSTI should describe the characteristics of the withheld material that make it fall within the parameters of what the relevant statute exempts from disclosure. OSTI's analysis should be specific enough so that it is possible to understand its rationale for each withholding. However, OSTI need not perform a separate analysis for each bibliographic record, or portion of a record, that it withholds. If OSTI finds that certain records share common elements and that the same rationale applies to all of those records, it may provide a single explanation for that group of records.

Finally, one OSTI official raised the possibility that the bibliographic records might reveal more information when considered in combination with each other, or with information that is publicly available, than if examined in isolation; he called this a "mosaic" effect. *See* Memorandum of Telephone Conversation between David Gottholm, OSTI, and Gregory Krauss, OHA (June 29, 2016) (Gottholm Memo). There is precedent for withholding information under Exemption 3 based on a mosaic theory. *See, e.g., Berman v. CIA*, 501 F. Supp. 2d 1136, 1143 (9th Cir. 2007) (finding that CIA could assert a "mosaic theory" as part of its Exemption 3 justification for withholding reports dating to Johnson presidency). However, in *Berman*, the Ninth Circuit found that the CIA's use of a mosaic theory "does not excuse it . . . from its obligation to provide a reasonably specific explanation of why the exemption applies." *Id.* Similarly, if OSTI is basing its withholdings on a mosaic theory, it should indicate this in the determination and explain its reasoning to the extent possible without revealing exempt information.

D. Explanation of Withholdings under Exemption 4

Exemption 4 shields from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4); 10 C.F.R. § 1004.10(b)(4). Accordingly, in order to be withheld under Exemption 4, a document must contain either (a) trade secrets or (b) information that is "commercial" or "financial," "obtained from a person" and "privileged or confidential." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 766 (D.C. Cir. 1974) (National Parks).

The analysis as to whether information is "privileged or confidential" depends on whether it was voluntarily or involuntarily submitted. If the information was voluntarily submitted, it may be withheld under Exemption 4 if the submitter would not customarily make such information available to the public. *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). If the information was involuntarily submitted, the agency must show that release of the information is likely to either (i) impair the government's ability to obtain necessary information in the future; or (ii) cause substantial harm to the competitive position of the person from whom the information was obtained. *National Parks*, 498 F.2d at 770; *Critical Mass*, 975 F.2d at 879.⁷

⁷ Conclusory and generalized allegations of substantial competitive harm are unacceptable and cannot support an agency's decision to withhold requested documents. *State of New York*, OHA Case No. TFA-0269 (2008); *Public Citizen Health Research Group v. Food & Drug Admin.*, 704 F.2d 1280, 1291 (D.C. Cir. 1983); *National Parks & Conservation Ass'n v. Kleppe*, 547 F.2d 673, 680 (D.C. Cir. 1976).

OSTI's determination cites the legal standard for Exemption 4, but the determination does not contain an analysis of how Exemption 4 applies to the withheld material. *See* Determination at 2. For each bibliographic record or portion of a record that OSTI identifies as exempt from disclosure under Exemption 4, OSTI must conduct an Exemption 4 analysis. Accordingly, OSTI should identify whether the information consists of trade secrets or whether it consists of information that is "commercial or financial," "obtained from a person," and "privileged or confidential." It should also explain why the material it is withholding meets the legal criteria it has identified.⁸

E. Reasonably Segregable Information

The FOIA requires that "[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt" 5 U.S.C. § 552(b). Further, DOE's FOIA regulations require that determinations include "[a] statement or notation addressing the issue of whether there is any segregable nonexempt material in the documents or portions thereof identified as being denied." 10 C.F.R. § 1004.7. OSTI's determination does not address whether any reasonably segregable information not exempt from disclosure can be released, as the Appellant argues it should be.

On remand, we ask OSTI to conduct such an analysis and include it in its determination. Our own review indicates that there may be some material that is reasonably segregable. For example, standard terms in each bibliographic record would not appear to be exempt from disclosure.⁹

III. Conclusion

For all the reasons stated above, we will remand the matter to OSTI to issue a new determination. Therefore, we will grant the Appeal in part and remand it to OSTI.

It Is Therefore Ordered That:

- (1) The Appeal filed on June 17, 2016, by Mr. Michael Ravnitzky, Case No. FIA-16-0039, is hereby granted as specified in Paragraph (2) below.
- (2) This matter is hereby remanded to the Department of Energy's Office of Scientific and Technical Information, which shall issue a new determination in accordance with the instructions set forth in the foregoing Decision.

⁸ We have stated that, with respect to its explanations of its Exemption 3 withholdings, OSTI may decide to provide explanations for groups of bibliographic records sharing common attributes. If OSTI finds it feasible and desirable, it may take the same approach with its Exemption 4 analysis.

⁹ The Appellant has made other arguments regarding why additional material should be released, such as the age of the reports that the bibliographic records refer to as well as the public interest in disclosure. Given that we have found that OSTI's determination should be revised before we can review the exemptions that OSTI applied, we decline to address these arguments now. The Appellant may choose to raise these arguments again in a future Appeal.

- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 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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