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

In the Matter of Caroline Lucas, MP)
)
Filing Date: November 17, 2015)
) Case No. FIC-15-0006
)
_____)

Issued: September 29, 2016

Decision and Order

Caroline Lucas, Member of Parliament, filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on October 28, 2015 (Request No. FOIA 11-00047-H). In that determination, NNSA identified two documents responsive to a request that Ms. Lucas filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld two documents under Exemptions 1 and 3 of the FOIA. This Appeal, if granted, would require the DOE to release the information that it previously withheld from disclosure.

I. Background

On November 22, 2010, Ms. Lucas filed a FOIA request seeking information relating to future commitments from the United States government to supply tritium to the United Kingdom government for the purpose of the U.K.'s nuclear weapons program. On October 28, 2015, NNSA responded to the FOIA request, withholding in their entirety a letter addressed to Dennis L. Hayes (Hayes letter) and a report on highly enriched uranium (HEU report), and justifying its redactions pursuant to FOIA Exemptions 1 and 3. Determination Letter from Jane Summerson, Authorizing Official, to Caroline Lucas, MP (October 28, 2015).

In her Appeal, Ms. Lucas requested a review of NNSA's determination to establish whether the information it withheld might be released to her. Specifically, Ms. Lucas requested information concerning the author, date, subject, and length of the Hayes letter and questioned the accuracy and completeness of the determination. Appeal at 1. Because, as explained below, the information withheld under Exemptions 1 and 3 is classified information, we referred the Appeal that challenged those withholdings to the Office of

Environment, Health, Safety and Security (EHSS), which 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 particular 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 Hayes letter and the HEU report, focusing on the applicability of Exemptions 1 and 3 to their contents.

The Associate Under Secretary reported the results of his review in a memorandum dated July 28, 2016. In that review, he explained that the two documents identified as responsive to Ms. Lucas's request concern United States/United Kingdom commitments. He determined that, based on current DOE classification guidance, most of the information previously withheld as NSI, classified as Secret, is still properly classified as such pursuant to Executive Order 13526. The information that the Associate Under Secretary identified as NSI falls within section 1.4(d) of the Executive Order, which exempts from public disclosure information that reveals "foreign relations or foreign activities of the United States, including confidential sources." He also determined that, based on current DOE classification guidance, most of the information previously withheld as Restricted Data, classified as Secret, is still properly classified as such pursuant to the Atomic Energy Act. The Associate Under Secretary has, however, determined that a small portion of the HEU report and significant portions of the Hayes letter that were previously withheld as NSI and Restricted Data could now be released, while the remaining withheld portions were still properly classified and must continue to be withheld from disclosure. 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 Hayes letter and the HEU report 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. *See, e.g., The National Security Archive*, OHA Case No. TFC-0002 (June 1, 2011). Therefore, those portions of the two documents that the Associate Under Secretary has now determined to be properly identified as NSI or Restricted Data must continue to be withheld from disclosure. Nevertheless, the Associate Under Secretary has reduced the extent of the information previously redacted from the Hayes letter and the HEU report to permit releasing the maximum amount of information consistent with national security considerations. Accordingly, Ms. Lucas's Appeal will be granted in part and denied in part.*

It Is Therefore Ordered That:

* I note that the newly released portions of the Hayes letter address Ms. Lucas's specific concerns regarding that document. As for whether the correct documents have been identified and reviewed in this matter, I have confirmed that the three pages withheld virtually in full constitute the responsive HEU report. Memorandum of Telephone Conversation between Kirstin Benson, Office of Classification, and William Schwartz, Staff Attorney, OHA (September 26, 2016). Finally, Ms. Lucas asks why NNSA mentioned a document entitled "Index to Nuclear Accidents" in its response to her and now seeks a copy of that document. The FOIA does not require an agency to respond to questions. *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985). If Ms. Lucas wishes to obtain a copy of that document, she may file a request for it with NNSA.

(1) The Appeal filed by Caroline Lucas, MP, on November 17, 2015, Case No. FIC-15-0006, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the responsive documents will be provided to Ms. Lucas.

(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.

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Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: On September 29, 2016