

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

In the Matter of Grant F. Smith)

Filing Date: August 25, 2015)

) Case No. FIC-15-0003
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Issued: February 12, 2016

Decision and Order

Grant F. Smith filed an Appeal from a determination that the Office of Information Resources (IOR) issued to the Institute for Research: Middle Eastern Policy (IRmep) on August 20, 2015 (Request No. HQ-2015-00699-F). In that determination, OIR released a document responsive to a request that IRmep filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. OIR withheld portions of that document under Exemptions 1 and 7(E) of the FOIA. This Appeal, if granted, would require the DOE to release the portions of the responsive document that were previously withheld from disclosure.

I. Background

On February 18, 2015, IRmep filed a FOIA request seeking a copy of “DOE Classification Bulletin WPN-136 on Foreign Nuclear Capabilities.” *See* Determination Letter from Alexander C. Morris, Director, OIR, to Grant F. Smith, IRmep (August 20, 2015). On August 20, 2015, OIR responded to the FOIA request, releasing a document entitled “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability, WPN-136” (Guidance) with redactions, which it justified pursuant to FOIA Exemptions 1 and 7(E). *Id.*

Mr. Smith challenged OIR’s determination to withhold information in an Appeal dated August 25, 2015. In his Appeal, Mr. Smith contends that the information withheld pursuant to Exemptions 1 and 7(E) should be released because “the Executive no longer treats the Israeli nuclear arsenal as classified.” Appeal at 1. Because, as explained below, the information withheld under Exemption 1 is classified information, we referred the Appeal to the DOE Office of Environment, Health, Safety and Security (EHSS), which reviewed that withheld information, to determine whether it was properly classified under current guidance, as well as the information withheld pursuant to Exemption 7(E). We have now received EHSS’s report of its review.

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

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).

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)(8) (NSI per Executive Order 13526). Upon referral of this Appeal from the Office of Hearings and Appeals, the Associate Under Secretary reviewed the Guidance, focusing on the applicability of Exemptions 1 and 7(E) to its contents.

The Associate Under Secretary reported the results of his review in a memorandum dated December 14, 2015. In that review, he explained that the requested document contains information pertaining to the Israeli government that the Department of State has determined to be NSI. He further stated that the DOE coordinated its review with the Department of State at the time of IRmep's initial request, roughly 90 days before the review his office undertook at OHA's request. Because he could find no change in policy in the interim, he determined that the DOE must continue to respect its sister agency's determination that the portion of the Guidance deleted and marked "DOS (b)(1)" is still properly classified by the Department of State as NSI pursuant to Executive Order 13526. As stated above, when NSI is properly classified under that Executive Order, it is exempt from mandatory disclosure under Exemption 1.

Exemption 7(E)

Exemption 7(E) of the FOIA provides that an agency may exempt from disclosure records compiled or recompiled for law enforcement (including national or homeland security) purposes if their production “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E).

The federal courts have interpreted Exemption 7(E) to apply to techniques and procedures used in civil as well as criminal law enforcement investigations. *See, e.g., Nowak v. IRS*, 210 F.3d 384, No. 98-56656, 2000 WL 60067, at *1 (9th Cir. Jan. 18, 2000); *Mosby v. U.S. Marshals Serv.*, No. 04-2083, 2005 WL 3273974, at *5 (D.D.C. Sept. 1, 2005). Moreover, in a Supreme Court concurring opinion, Justice Alito opined that the phrase “compiled for law enforcement purposes” should be construed to encompass not only investigation and prosecution, but also “proactive steps designed to prevent criminal activity and to maintain security. *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1272 (2011). Similarly, other federal courts have upheld the application of Exemption 7(E) in the context of preventative law enforcement. *See, e.g., Asian Law Caucus v. DHS*, No. 08-00842, 2008 WL 5047839, at *4 (N.D. Cal. Nov. 24, 2008) (protecting the details of “watch list” programs); *Judicial Watch, Inc. v. Dep’t of Commerce*, 337 F. Supp. 2d 146, 181-82 (D.D.C. 2004) (approving withholding of firearm and radio details used by agents protecting the Secretary of Commerce).

In his report, the Associate Under Secretary explained that the Guidance contains DOE sensitive unclassified information related to guidance on the handling of certain information pertaining to the Israeli government that the Department of State has determined to be NSI. According to the Associate Under Secretary, this information, which was withheld pursuant to Exemption 7(E), constitutes information that would provide insight into the types of documents the government considers to be classified. If this information were released, it would materially assist efforts to discern classified or sensitive information through comparison with de-classified information. Its release would reduce, and possibly nullify, the effectiveness of the classification procedure described in the Guidance, which is still in effect, and would impair the DOE’s ability to enforce laws related to protecting classified information from public release.

Based on the information presented in that report, we find that Exemption 7(E) was properly applied to withhold the information redacted from the document provided to Mr. Smith. That information is not related directly to law enforcement investigations or prosecutions, but because it is guidance concerning the treatment of certain information as classified or sensitive, it is a form of preventative law enforcement. As such, it falls within the range of information that federal courts have protected by application of that exemption.

Consequently, this information is exempt from mandatory disclosure under Exemption 7(E).

III. Conclusion

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 requires the DOE to continue withholding the portion of the Guidance pursuant to Exemption 1 of the FOIA. Although the DOE regulations at 10 C.F.R. § 1004.1 state that 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 this exemption, the disclosure is prohibited by executive order. Therefore, the portion of the Guidance previously withheld under Exemption 1 must continue to be withheld from disclosure.

We have also determined, based on the Associate Under Secretary's review, that Exemption 7(E) was properly applied to redact the remaining withheld portions of the Guidance. We must, however, consider whether the disclosure of those portions exempt from mandatory disclosure under Exemption 7(E) would nevertheless be in the public interest. 10 C.F.R. § 1004.1. After due consideration, we have determined that the public interest will be best served by protecting, rather than disclosing, the information previously and appropriately withheld pursuant to Exemption 7(E). Accordingly, Mr. Smith's Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Grant F. Smith on August 25, 2015, Case No. FIC-15-0003, 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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