

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

GRANT F. SMITH,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-0777 (TSC)
)	
UNITED STATES OF AMERICA, ¹ <i>et al.</i>)	
)	
Defendants.)	
_____)	

**ANSWER AND AFFIRMATIVE DEFENSES
AS TO DEPARTMENT OF ENERGY**

Defendants the United States Department of Energy (“Defendant” or “DOE”), the United States of America, and Rick Perry, the U.S. Secretary of Energy, hereby answer the Plaintiff Grant Smith (“Plaintiff”) Complaint for Injunctive Relief (“Complaint”) as follows:

AFFIRMATIVE DEFENSES

FIRST DEFENSE

Plaintiff’s Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

DOE denies each and every allegation contained in the Complaint except as hereinafter expressly admitted.

¹ A FOIA complaint is properly directed only to a federal agency. In addition to the United States of America, the Complaint names John J. Sullivan, [former] Acting Secretary, U.S. Department of State and Rick Perry, Secretary, U.S. Department of Energy, none of which are proper parties. In the interests of moving this case forward, undersigned counsel files this answer to the Complaint on behalf of the United States of America, Department of Energy (“DOE”), and U.S. Secretary of Energy Rick Perry today.

THIRD DEFENSE

DOE has not improperly withheld any records under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

FOURTH DEFENSE

Plaintiff is not entitled to any relief beyond that set forth under FOIA, and the Court lacks subject matter jurisdiction over Plaintiff’s requests for relief that exceed the relief authorized under FOIA.

FIFTH DEFENSE

To the extent the Complaint refers to or quotes from external documents, statutes, or other sources, DOE’s responses may refer to such materials for their true and complete contents; however, DOE’s references are not intended to be, and should not be construed as, an admission that the cited materials: (a) are correctly cited or quoted by Plaintiff or (b) are relevant to this or any other action.

SIXTH DEFENSE

DOE respectfully requests and reserves the right to amend, alter, and supplement the defenses contained in this Answer as the facts and circumstances giving rise to the Complaint become known to it through the course of the litigation.

SEVENTH DEFENSE

The United States of America and Rick Perry, the U.S. Secretary, Department of Energy, are not “agencies” within the meaning of the FOIA, 5 U.S.C. § 552(f)(1), and are, therefore, not proper parties defendant.

RESPONSES TO NUMBERED PARAGRAPHS²

DOE admits, denies, or otherwise avers as follows:

1. DOE admits that this is an action under FOIA to obtain full release of the U.S. Department of Energy “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability” (WNP-136). The remainder of Paragraph 1 contains Plaintiff’s characterization of his action, not allegations of fact, to which no response is required. To the extent the remainder of Paragraph 1 is deemed to contain allegations that require a response, they are denied.

2. This paragraph contains conclusions of law to which no response is required. To the extent this Paragraph is deemed to contain allegations that require a response, they are denied.

3. This paragraph contains conclusions of law concerning the jurisdiction for this case to which no response is required; to the extent a response is required, DOE admits that this Court has jurisdiction over this action subject to the terms and limitations of FOIA.

4. This paragraph contains conclusions of law concerning the venue for this case to which no response is required; to the extent a response is required, DOE admits that this Court is a proper venue for claims brought pursuant to FOIA.

5. Paragraph 5 contains characterizations about Defendant DOS. DOS did not receive a FOIA request from Plaintiff and is therefore not a proper party. Defendant DOE is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 5, and therefore they are denied.

² Merely for ease of reference, Defendant replicates the headings contained in the Complaint. Although Defendant believes that no response is required to such headings, to the extent a response is deemed required and to the extent those headings and titles could be construed to contain factual allegations, those allegations are denied.

6. Paragraph 6 contains legal arguments and conclusions about FOIA to which no response is required. To the extent this Paragraph is deemed to contain allegations that require a response, they are denied. DOE respectfully refers the Court to the complete FOIA statute for its full and complete contents.

7. DOE admits that Plaintiff is the requester of the record that DOE is now withholding. DOE denies the remaining allegations of Paragraph 7.

8. DOE admits Paragraph 8.

9. DOE admits Paragraph 9.

10. DOE admits that on August 20, 2015, DOE released a redacted copy of “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability” (WPN-136). The remainder of Paragraph 10 is Plaintiff’s characterization of his case, which does not require a response. To the extent it is deemed that the remainder of Paragraph 10 contains allegations to which a response is required, they are denied.

11. DOE admits Paragraph 11.

12. DOE admits Paragraph 12.

13. DOE avers that WPN-136 is properly classified under Executive Order 13,526 and admits the allegations in Paragraph 13 to the extent they are supported by the February 12, 2016, denial letter, which is the best evidence of its contents; otherwise, the allegations are denied.

14. DOE admits that it coordinated its review with DOS and DOE could find no change in the policy. DOE further admits the allegations in Paragraph 14 to the extent they are supported by the February 12, 2016 denial letter, which is the best evidence of its contents; otherwise, the allegations are denied.

15. Paragraph 15 is a characterization of Plaintiff's case which requires no response. If this Paragraph is deemed to contain allegations that require a response, they are denied.

16. Paragraph 16 consists of a characterization of Executive Order 13526 which requires no response. DOE respectfully refers the Court to the Executive Order quoted as for its full and complete contents.

17. DOE denies Paragraph 17.

18. DOE denies Paragraph 18.

19. Paragraph 19 contains Plaintiff's legal conclusions and argument, which do not require a response. If this Paragraph is deemed to contain allegations that require a response, they are denied.

20. Paragraph 20 contains legal conclusions and Plaintiff's characterization of the Arms Export Control Act, which do not require a response. If this Paragraph is deemed to contain allegations that require a response, they are denied.

21. Paragraph 21 contains Plaintiff's legal conclusions and argument, which do not require a response. If this Paragraph is deemed to contain allegations that require a response, they are denied.

22. Paragraph 22 contains Plaintiff's characterization and legal conclusions regarding 22 U.S.C. § 2799aa-1 and a statement by Congresswoman Eleanor Holmes Norton, which do not require a response. To the extent that this Paragraph is deemed to require a response, DOE admits that Plaintiff has accurately quoted from a portion of Congresswoman Norton's letter dated March 27, 2018 (Plaintiff's Exhibit D, ECF No. 1 at 39), but respectfully refers the Court to the letter and to 22 U.S.C. § 2799aa-1 for their full and complete contents.

23. DOE denies Paragraph 23.

24. The allegations in Paragraph 24 contain characterizations of statements by federal officials contained in an online video. DOE was unable to verify the authenticity of either the depiction of the events in the video or the characterization of the events set forth in this paragraph, and it thus lacks sufficient knowledge and information to admit or deny the allegations in Paragraph 24.

25. The allegations in Paragraph 25 contain Plaintiff's quotes of statements by a former Vice President based on an online video cited in Paragraph 24. DOE was unable to verify the authenticity of either the depiction of the events in the video or the characterization of the events set forth in this paragraph, and thus it lacks sufficient knowledge and information to admit or deny these allegations.

26. The allegations in Paragraph 26 contain Plaintiff's quotes of statements by a former Director of National Intelligence based on an online video cited in Paragraph 24. DOE was unable to verify the authenticity of either the depiction of the events in the video or the characterization of the events set forth in this paragraph, and thus it lacks sufficient knowledge and information to admit or deny these allegations.

27. The allegations in Paragraph 27 contain Plaintiff's quotes of statements by a former Secretary of State based on an online video cited in Paragraph 24. DOE was unable to verify the authenticity of either the depiction of the events in the video or the characterization of the events set forth in this paragraph, and thus it lacks sufficient knowledge and information to admit or deny these allegation.

28. The allegations in Paragraph 28 contain Plaintiff's characterization of President Obama's statements and quotes from a press conference transcript. Defendant DOE admits that Plaintiff has accurately quoted from a portion of the online transcript, but it refers to the press conference transcript for its full and complete contents. Any additional allegations in Paragraph 28 are denied.

29. The allegations in Paragraph 29 contain Plaintiff's characterization of President Obama's statements and quotes from a press conference transcript. DOE admits that Plaintiff has accurately quoted from a portion of the online transcript, but it refers to the press conference transcript for its full and complete contents. Any additional allegations in Paragraph 29 are denied.

30. The allegations in Paragraph 30 contain Plaintiff's characterizations of interviews with a senator and quotes from online videos of the same. DOE was unable to verify the authenticity of either the depiction of the events in the video or the characterization of the events set forth in this paragraph, and thus it lacks sufficient knowledge and information to admit or deny these allegations.

31. DOE avers that WPN-136 is exempt from release under Exemption 7(E), and admits Paragraph 31 to the extent it is supported by the February 12, 2016, denial letter; otherwise, the allegations are denied.

32. The first sentence of Paragraph 32 is Plaintiff's characterization of WPN-136, which requires no response. If this sentence is deemed to contain an allegation that requires a response, it is denied. DOE denies the remainder of Paragraph 32.

33. The first four sentences of Paragraph 33 are Plaintiff's characterizations of WPN-136 and statutory provisions, which do not require response. If it is deemed that these first four sentences contain allegations that require a response, they are denied. With respect to the fifth sentence of Paragraph 33, DOE avers that Los Alamos National Laboratory scientist James Doyle wrote an article in 2013 and denies the remainder of the fifth sentence. DOE denies the sixth and seventh sentences of Paragraph 33. The eighth and final sentence of Paragraph 33 contains a citation to an article, which requires no response. If there are allegations in this eighth and final sentence of Paragraph 33 that require a response, they are denied.

34. Paragraph 34 contains Plaintiff's characterization of WPN-136, which requires no response. If it is deemed that Paragraph 34 contains allegations that require a response, they are denied.

35. DOE denies Paragraph 35.

36. Paragraph 36 contains Plaintiff's characterizations and questions, which require no response. If it is deemed that Paragraph 36 contains allegations that require a response, they are denied.

37. Paragraph 37 contains Plaintiff's allegations regarding DOS. DOE is without knowledge or information sufficient to form a belief as to the truth of the allegations regarding DOS.

38. Paragraph 38 contains Plaintiff's characterization of statements by a DOS official and quotes from an online press briefing in 2016; however, the URL cited in the Complaint does not lead to the video. DOE was unable to verify the authenticity of either the depiction of the events in the video or the characterization of the events set forth in this paragraph, and thus lacks sufficient knowledge and information to admit or deny the allegations in Paragraph 38.

39. Paragraph 39 contains Plaintiff's characterization of a FOIA complaint and a Department of Defense report cited in an article from a website. DOE lacks sufficient knowledge and information to admit or deny this allegation.

40. Paragraph 40 contains Plaintiff's characterization of a FOIA request and response from the Central Intelligence Agency and cited an article from a website. DOE lacks sufficient knowledge and information to admit or deny this allegation.

41. Paragraph 41 contains legal arguments and conclusions, which require no response.

42. Paragraph 42 contains Plaintiff's characterization of his case and legal conclusions, which require no response. If it is deemed that Paragraph 42 contains allegations that require a response, they are denied.

43. Paragraph 43 contains a legal conclusion regarding timeliness to which no response is required. If it is deemed that Paragraph 43 contains allegations which do require a response, they are denied.

44. Paragraph 44 contains legal conclusions and arguments, which require no response. If it is deemed that Paragraph 44 contains allegations that require a response, DOE denies the first sentence in Paragraph 44. DOE avers that it published the February 12, 2016, Decision and Order of its Office of Hearings and Appeals in Case No. FIC-15-0003 online, but otherwise denies the second sentence in Paragraph 44.

45. DOE denies the first and third sentences of Paragraph 45. The second and fourth sentences contain legal argument and conclusions to which no response is required.

46. Paragraph 46 is Plaintiff's quotation of case law to which no response is required.

47. Paragraph 47 contains Plaintiff's legal arguments and conclusions to which no response is required. To the extent it is deemed that Paragraph 47 contains allegations that require a response, DOE denies that there is strong public interest in *in camera* inspection of WPM-136. DOE acknowledges that Plaintiff has accurately cited that the Consolidated Appropriations Act of 2018 contained \$3.1 billion in aid to Israel, but respectfully refers the Court to the sources cited for their full and complete contents.

48. Paragraph 48 contains legal argument and conclusions to which no response is required. To the extent it is deemed that Paragraph 48 contains allegations that require a response, they are denied.

The final unnumbered paragraph constitutes a prayer for relief which requires no response. To the extent this final paragraph is deemed to contain allegations that require a response, DOE denies that Plaintiff is entitled to the requested relief or to any relief whatsoever. Each and every allegation not heretofore expressly admitted or denied is denied.

WHEREFORE, having answered, DOE, the United States, and the Secretary of Energy request judgment or relief against Plaintiff as follows:

1. That the claims against DOE, the United States, and the Secretary of Energy are dismissed with prejudice and that the Plaintiff takes nothing and is granted no relief.
2. That Defendants be awarded their costs and disbursements incurred in defending this matter; and
3. Such other and further relief to which they are entitled.

June 11, 2018

Respectfully submitted,

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