

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

GRANT F. SMITH, <i>PRO SE</i>)	
<i>Plaintiff,</i>)	
)	
)	
vs.)	
)	
UNITED STATES OF AMERICA;)	Case No. 1:18-cv-00777 (TSC)
)	
JOHN J. SULLIVAN, Acting Secretary, U.S. Department of State;)	
)	
RICK PERRY, Secretary, U.S. Department of Energy,)	
<i>Defendants.</i>)	

DECLARATION OF EDITH A. CHALK

I, Edith A. Chalk, declare as follows:

1. My name is Edith A. Chalk. I am employed by the United States Department of Energy (DOE) where I am currently the Director of the Office of Technical Guidance in DOE's Office of the Associate Under Secretary for Environment, Health, Safety and Security (AU), Office of Classification in Germantown, Maryland. I have worked in DOE's Office of Classification for 24 years and have served as the Director of the Office of Technical Guidance in DOE's Office of Classification for 15 years. I report directly to Andrew P. Weston-Dawkes, Director of DOE's Office of Classification.

2. As Director of the Office of Technical Guidance in DOE's Office of Classification, my duties include the management and supervision of a comprehensive program for the development and distribution of classification guides within DOE and to other government agencies. I balance DOE's commitment to maximize the amount of information that

can be made available to the public with the need to protect national security and prevent nuclear proliferation.

3. The statements contained in this declaration are based upon my personal knowledge, information provided to me in my official capacity, and conclusions and determinations reached and made in accordance therewith.

4. Due to the nature of my official duties, I am familiar with the procedures followed by DOE Office of Classification in responding to requests for information pursuant to the provisions of the FOIA, 5 U.S.C. §552. Specifically, I am aware of the search, processing, and production of documents responsive to the FOIA request that is the subject of the above-captioned litigation submitted by Grant Smith.

6. As Director of the Office of Technical Guidance in the DOE's Office of Classification, I oversaw the processing of the request. This declaration will explain the basis for DOE's Office of Classification withholding certain exempted information in its response to Plaintiff's FOIA Request No. HQ-2015-0699. I make this declaration in support of DOE's Motion for Summary Judgment in the above-captioned litigation.

FOIA REQUEST NO. HQ-2015-0699

7. On February 18, 2015, Plaintiff submitted a FOIA request to DOE seeking "DOE Classification Bulletin WPN-136 [sic] on Foreign Nuclear Capabilities."¹ (**EXHIBIT A** – Plaintiff's February 18, 2015 FOIA Request).

8. On February 23, 2015, Alexander Morris, FOIA Officer in DOE's Office of Information Resources (OIR), sent Plaintiff a letter providing the controlled number HQ-2015-0699, and advising Plaintiff that the request had been assigned to the DOE's Office of the

¹ Plaintiff erroneously identified the document as "WPN" in his request; the correct acronym is "WNP."

Associate Under Secretary for the Office of Environment, Health, Safety and Security (AU) to conduct a search. In this letter, Alexander Morris also advised that he had determined that the request satisfied the criteria considered for a waiver of fees. (**EXHIBIT B** – DOE’s Interim Response Letter)

9. On August 20, 2015, DOE’s 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 [sic] (Guidance)” with redactions, which it justified pursuant to Exemptions 1 and 7(E). (**EXHIBIT C** – OIR’s August 20, 2015 Response Letter).

10. On August 25, 2015, Plaintiff appealed DOE’s determination to withhold information pursuant to Exemptions 1 and 7(E) to DOE’s Office of Hearings and Appeals (OHA). (**EXHIBIT D** – Plaintiff’s Appeal).

11. On February 12, 2016, OHA issued a decision and order finding that DOE had properly withheld the redacted information pursuant to Exemptions 1 and 7 (E). (**EXHIBIT E** – OHA’s Decision and Order on Plaintiff’s Appeal).

FOIA Exemption 1

12. Exemption 1 exempts from disclosure matters that are “(A) specifically authorized under criteria established by an Executive order to be kept in 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).

13. 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).

14. AU staff processed the search results for FOIA HQ-2015-0699. During the process, AU staff determined that portions of the one (1) responsive document contained equities from the Department of State. Consistent with DOE's policies in processing records responsive to FOIA requests, AU staff coordinated its review with the Department of State and determined that a portion of the one (1) responsive document should be withheld under Exemption 1.

15. The information withheld under Exemption 1 pertains to the Israeli government and is information that the Department of State has determined to be NSI. The Department of State has indicated that the language remains properly classified. Thus, the information is still exempt from disclosure under Exemption 1 and must be withheld.

Exemption 7 (E)

16. Exemption 7(E) exempts from disclosure "records or information compiled for law enforcement purposes [when disclosure] 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).

17. DOE has asserted Exemption 7(E) to protect from disclosure a portion of the one (1) responsive document. The Guidance in the document contains DOE sensitive unclassified information related to guidance on the handling of certain information pertaining to the Israeli government, some of which the Department of State has determined to be NSI.

18. All DOE classification guides and bulletins are prepared for the sole purpose of assisting the Federal Government in identifying and protecting sensitive information as defined

in the Atomic Energy Act of 1954, as amended, and Executive Order 13526, *Classified National Security Information*. They constitute internal, procedural guidance to assist only Government classification officials and duly appointed contractor classification representatives in the performance of their Executive duties. Neither classified nor Official Use Only (OUO) guides and bulletins were ever intended to be transferred to any party outside of the custody and control of the Executive branch of the Federal Government.

19. Based on established internal Departmental directives, access to classification guidance (classified or OUO) requires a need-to-know. Classification guides and bulletins are only issued to individuals whose duties are directly related to classification. A list of individuals authorized to receive any particular guide or bulletin is maintained within the Office of Technical Guidance. Before an individual can be added to the list, verification of a need for the guidance must be received from the local classification office or classification representative. Then either the Technology Team Lead or the Weapons Team Lead within the Office of Technical Guidance approves an individual to receive the guidance based on their need to conduct official business.

20. Disclosure of the information DOE withheld pursuant to Exemption 7 (E) would provide insight into the types of information the government considers to be classified. If this guidance were released, it would materially assist efforts to discern classified or sensitive information through comparison with declassified 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. Therefore, the DOE properly withheld the information pursuant to Exemption 7 (E).

21. The information redacted and withheld pursuant to Exemption 7 (E) has been reviewed to ensure that all reasonably segregable information in the documents have been released to Plaintiff.

Pursuant to 28 U.S.C. § 1746, I hereby affirm under penalty of perjury that the foregoing declaration is true and correct.

Dated: 7/25/18



Edith A. Chalk
Director, Office of Technical Guidance
Office of Classification

EXHIBIT A

Morris, Alexander

From: WEBMASTER, DOE
Sent: Wednesday, February 18, 2015 9:05 AM
To: FOIA-Central
Subject: Form submission from: DOE Headquarters FOIA Request Form

Submitted on Wednesday, February 18, 2015 - 09:05
Submitted by anonymous user: [69.251.24.141]
Submitted values are:

FEB 18 2015 11/

SCIENTIFIC/EDUCATIONAL/NEWS MEDIA
100 FREE PAGES

--Contact information--

Name: Grant F. Smith
Organization: IRmep
Address:
PO Box 32041
Washington, DC 20007
Fax number:
Phone number: 202-342-7325
Email address: gsmith@irmep.org

--Reasonably Describe Records--

Description:
DOE Classification Bulletin WPN-136 on Foreign Nuclear Capabilities

This is apparently a secret law under which government officials are compelled to mislead the American public (63.9 percent of whom believe Israel has nuclear weapons, see below) on the status of Israel's arsenal in order to defraud them of \$3 billion per year in violation of the Symington and Glenn Amendments to the Foreign Aid Act of 1961.

<http://www.google.com/insights/consumersurveys/view?survey=7gfftskexqbf4&question=1&filter=&rw=1>
Specify preferred form or format: Paper/CD/whatever

--Type of requestor--

Select a description of yourself and the purpose of the request to help determine your category for assessing fees: A representative of the news media and the request is made as part of news gathering and not for commercial use.
Affiliation: Writes regular reports for Antiwar.com
Type of media: Other
Other media type: Web and radio. See:

<https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=grant%20f.%20smith%20antiwar>

Shore

HQ - 2015 - 00699 - AU? F

--Fees and waivers--

Please select the statement that applies: I request a waiver or reduction of fees.

--Waiver factors--

The subject of the request: Americans (and FOIA courts) abhor secret law.

The informative value of the information to be disclosed:

Yes,

forcing government employees to lie wastes reporters time and undermines governance.

Contribution to an understanding by the general public: The public does not understand that this policy is guided by

special

interest politics and not national security.

The significance of the contribution to public understanding:

They will be able to see the how the codification of corruption

really works.

The existence and magnitude of a commercial interest: None.

The primary interest in disclosure:

The truth. See latest report on how this corrupts governance at:

<http://www.wrmea.org/2015-january-february/lawsuit-challenges-u.s.-ambiguity-toward-israels-nuclear-arsenal.html>

--Expedited processing--

Justification: an urgency to inform the public concerning actual or alleged Federal Government activity exists (this option available ONLY for requesters primarily engaged in disseminating information).

Please provide your specific justification for expedited processing:

Americans are being bombarded with propaganda about the Iran nuclear threat, which is non-existent, and do not understand the corruption that enables the Israeli nuclear program through illicit materials transfers:

<http://irmep.org/ila/numec/>

The heavy involvement of foreign leaders in stealing US nuclear tech:

<http://irmep.org/ila/krytons/default.asp>

And the codified cover-up that keeps them in the dark.

The results of this submission may be viewed at:

<http://energy.gov/node/268183/submission/218741>

EXHIBIT B



Department of Energy
Washington, DC 20585

February 23, 2015

Mr. Grant F. Smith
IRmep
PO Box 32041
Washington, DC 20007

Re: HQ-2015-00699-F

Dear Mr. Smith:

This is an interim response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. 552. You requested the "DOE Classification Bulletin WPN-136 on Foreign Nuclear Capabilities."

I have assigned your request to the DOE's Office of the Associate Under Secretary for the Office of Environment, Health, Safety and Security (AU) to conduct a search of its files for responsive documents. Upon completion of the search and review of any records located, you will be provided a response.

In your letter, you requested a waiver of all fees associated with the processing of the request. For purposes of assessment of any fees, you have been categorized under the DOE regulation that implements the FOIA at Title 10, Code of Federal Regulations (CFR), Section 1004.9(b)(3), as a "news media" requestor. Requestors in this category are charged fees for duplication only and are provided 100 pages at no cost.

Pursuant to 10 CFR § 1004.9(8), I have reviewed the information you provided in the request to support your request for a fee waiver. I have determined the information satisfies the criteria considered for a waiver of fees. A waiver, therefore, is appropriate for any fees that may be incurred because the subject of the request relates to a government activity, and information about the activity could lead to greater understanding by the public about the matter. You also have demonstrated the ability and intent of your organization to disseminate the information to the public in a form that can further understanding of the subject matter.

In addition, you also requested expedited processing of your request. You stated that "Americans are being bombarded with propaganda about the Iran nuclear threat, which is non-existent, and do not understand the corruption that enables the Israeli nuclear program through illicit materials transfers."

The FOIA permits agencies to expedite the processing of requests if requesters demonstrate a "compelling need." 5 U.S.C. § 552(a)(6)(E)(i)(I). A "compelling need" is established when one



of two criteria are met. 5 U.S.C. § 552(a)(6)(E)(v)(II). The criteria are met when (1) failure to obtain the records quickly "could reasonably be expected to pose an imminent threat to the life or physical safety of an individual," or (2) if the "requester is primarily engaged in disseminating information" and can demonstrate that there is an "urgency to inform the public concerning actual or alleged Federal Government activity." *Id.*

The reasons you have provided do not adequately address the basis for which a request may be expedited. You have not provided material that establishes that there is any threat to the life or safety of an individual that would justify expeditious processing of the request.

You also have not identified an actual or alleged activity that poses any particular urgency that requires the dissemination of information in an expedited manner. In order to determine whether a requester has demonstrated an "urgency to inform," and hence a "compelling need," courts consider at least three factors: (1) whether the request concerns a matter of current exigency to the American public; (2) whether the consequences of delaying a response would compromise a significant recognized interest; and (3) whether the request concerns federal government activity. *Al-Fayed v. C.I.A.*, 254 F. 3d 300, 310 (D.C. Cir. 2001); *Associated Press v. DOE*, Case No. TFA-0273 (September 11, 2008). Your request does not address factors one or two.

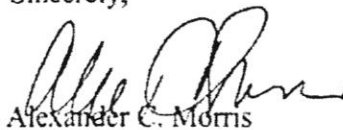
For these reasons, I am denying your request for expeditious processing. The request will be processed in accordance with provisions of the FOIA.

You may challenge the denial of expedited processing by submitting a written appeal to the Director, Office of Hearings and Appeals, at HG-1, L'Enfant Plaza Building, Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-1615. You should submit the appeal within 30 calendar days of receipt of this determination.

The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. The appeal must contain elements required by 10 CFR § 1004.8, including a copy of this letter. Judicial review will thereafter be available in the Federal District Court either (1) in the district where you reside; (2) in the district where you have your principal place of business; (3) in the district where the DOE records are located; or (4) in the District of Columbia.

Please refer to the above referenced number in any communications with the DOE about the request. If you have questions about the processing of the request or this letter, please contact Ms. Yordanos Woldai in this office at MA-90/Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585, or (202) 586-7504.

Sincerely,



Alexander C. Morris
FOIA Officer
Office of Information Resources

EXHIBIT C



Department of Energy
Washington, DC 20585

August 20, 2015

Mr. Grant F. Smith
IRmep
PO Box 32041
Washington, DC 20007

Via email: gsmith@irmep.org

Re: HQ-2015-00699-F

Dear Mr. Smith:

This is in final response to the request for information that you sent to the Department of Energy (DOE) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. You requested "DOE Classification Bulletin WPN-136 on Foreign Nuclear Capabilities."

Your request was assigned to DOE's Office of Environment, Health, Safety and Security (AU) to conduct a search of its files for responsive records. AU began its search for responsive documents on March 12, 2015, which is the cutoff date for responsive records, and located one (1) document responsive to your request. The document is being released to you as described in the accompanying index.

DOE has determined that certain information should be withheld in this document pursuant to Exemption 7(E) of the FOIA, 5 U.S.C. § 552(b)(7)(E). In addition, please be advised that the U.S. Department of State (DOS) has also withheld information in the document pursuant to Exemption 1 of the FOIA, 5 U.S.C. § 552 (b)(1).

Exemption 1 of the FOIA protects from disclosure information that has been deemed classified "under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy" and is "in fact properly classified pursuant to such Executive order." 5 U.S.C. § 552 (b)(1).

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 they could reasonably be expected to "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).

Information withheld pursuant to Exemption 7(E) contains information that would provide insight into the types of documents the Government considers classified. If this information were to be released, it would materially assist efforts to discern classified or sensitive information through comparison of de-classified information. Release would reduce and/or nullify the effectiveness of the still-in-use classification procedure and would impair the DOE's ability to enforce laws related to the protection of classified information from public release.

This satisfies the standard set forth in the Attorney General's March 19, 2009, memorandum that the agency is justified in not releasing material that the agency reasonably foresees would harm an interest protected by



one of the statutory exemptions. This also satisfies DOE's regulations at 10 C.F.R. § 1004.1 to make records available which it is authorized to withhold under 5 U.S.C. § 552 when it determines that such disclosure is in the public interest. Accordingly, we will not disclose this information.

Pursuant to 10 C.F.R. § 1004.7(b)(2), I am the individual responsible for the determination to withhold the information described above. The FOIA requires that "any 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). As a result, a redacted version of the document is being released to you in accordance with 10 C.F.R. § 1004.7(b)(3).

This decision, as well as the adequacy of the search, may be appealed within 30 calendar days from your receipt of this letter pursuant to 10 C.F.R. § 1004.8. Appeals should be addressed to Director, Office of Hearings and Appeals, HG-1, L'Enfant Plaza, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-1615. The written appeal, including the envelope, must clearly indicate that a FOIA appeal is being made. You may also submit your appeal by e-mail to OHA.filings@hq.doe.gov, including the phrase "Freedom of Information Appeal" in the subject line. The appeal must contain all the elements required by 10 C.F.R. § 1004.8, including a copy of the determination letter. Thereafter, judicial review will be available to you in the Federal District Court either (1) in the district where you reside, (2) where you have your principal place of business, (3) where DOE's records are situated, or (4) in the District of Columbia.

The FOIA provides for the assessment of fees for the processing of requests. *See* 5 U.S.C. § 552(a)(4)(A)(i); *see also* 10 C.F.R. § 1004.9(a). In our February 23, 2015, letter, you were advised that your request was placed in the "news media" category for fee purposes. Requesters in this category are charged fees for duplication only and are provided 100 pages at no cost. In that letter, we informed you that the information you provided satisfied your request for a fee waiver. As such, you will not be charged any fees for processing this FOIA request.

If you have any questions about the processing of your request, or this letter, you may contact Mr. Aykut Ozger or me at:

MA-90/ Forrestal Building
1000 Independence Avenue, SW
Washington, DC 20585
(202) 586-5955

I appreciate the opportunity to assist you with this matter.

Sincerely,



Alexander C. Morris
FOIA Officer
Office of Information Resources

Enclosures

INDEX

Request #: HQ-2015-00699-F

Final response to the request from Mr. Grant Smith for:

“DOE Classification Bulletin WPN-136 on Foreign Nuclear Capabilities.”

The Office of Environment, Health, Safety and Security (AU) conducted a search of its files and located one (1) document responsive to your request.

- One (1) document *is being released in part, pursuant to Exemptions (b)(1) and (b)(7)(E)*. Information withheld by DOE pursuant to Exemption 7(E) contains information that would provide insight into the types of documents the Government considers classified.

~~SECRET//NOFORN~~

D00035187



U.S. Department of Energy
Office of Classification
Washington, DC 20585

**OFFICIAL USE ONLY
REDACTED COPY**

September 6, 2012

CLASSIFICATION BULLETIN

WNP-136

**(U) Guidance on Release of Information Relating to the
Potential for an Israeli Nuclear Capability**

(OUO)

[Redacted]

(OUO)

[Redacted]

(OUO)

[Redacted]

[Redacted]

[Redacted]

Derivative Declassifier review
required prior to declassification

Department of Energy Declassification Review	
1 st Review Date: 7/23/15	Determination: [Circle Number(s)]
2 nd Review Date: 8/14/16	1. Classification Retained
Authority: <input type="checkbox"/> DC <input checked="" type="checkbox"/> O	2. Classification Changed To:
Derived From:	3. Classification DOW Classified h/c
Declassify On:	4. Date WRh:
3 rd Review Date: 2/2/18	5. Date Reclassified:
Authority: 00	6. Date Reclassified:
	7. Date Reclassified:
	8. Date Reclassified:
	9. Date Reclassified:
	10. Date Reclassified:
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	49. Date Reclassified:
	50. Date Reclassified:

~~NOFORN~~

Classified By: Glen D. Krc, General Engineer, DOE/HS-62
Derived From: Dept. of State Class. Guide 03-1, D, January 2005

[Redacted]

~~SECRET//NOFORN~~
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September 6, 2012

~~SECRET//NOFORN~~

2



(U) Classifiers should cite Department of State Classification Guide 05-1, D, dated January 2005, as the derivative classification source.

(OUO) [REDACTED] (b)(7)(F)

(OUO) [REDACTED] (b)(7)(F)
[REDACTED] (b)(7)(F)

(OUO) [REDACTED] (b)(7)(F)

(U) This bulletin will be incorporated into future changes or revisions to CG-NP-3.

Andrew P. Weston-Dawkes
Director
Office of Classification
Office of Health, Safety and Security

~~SECRET//NOFORN~~
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EXHIBIT D

From: Grant F. Smith
To: Filings, OHA
Subject: Freedom of Information Appeal
Date: Tuesday, August 25, 2015 12:02:19 PM
Attachments: HQ-2015-00699-F Responsive Documents - Final.pdf
HQ-2015-00699-F Response Letter -Final.pdf
Importance: High

This is an appeal of the DOE's decision to withhold portions of WPN-136 and is filed within 30 calendar days from my receipt of the August 20, 2015 agency release letter pursuant to 10 C.F.R. § 1004.8.

DOE has determined that certain information should be withheld in WPN-136 pursuant to Exemption 7(E) of the FOIA 5 U.S.C. § 552(b)(7)(E).

The substance of the information withheld, that Israel has a nuclear weapons program and arsenal, is no longer considered by the Executive to be classified.

The Executive has allowed the release of CIA National Intelligence Estimates which clearly state Israel is a nuclear weapons state. <http://nsarchive.gwu.edu/NSAEBB/NSAEBB240/snie.pdf>

This year, the Executive allowed release of a detailed 1987 Department of Defense overview of Israel nuclear weapons production infrastructure and hydrogen bomb program.
<http://www.courthousenews.com/2015/02/12/nuc%20report.pdf>

For years, Israel has diverted nuclear weapons materials, technology and know-how from the United States. Law enforcement records document this clearly in the case of NUMEC, The Arnon Milchan/Benjamin Netanyahu/Richard Smyth smuggling ring and the case of Telegy. Despite their appearance, the passage of time has revealed such records are not actually compiled or recompiled for the purposes of law enforcement, because the US does not uphold the relevant statutes when Israel is involved. Despite overwhelming, ongoing evidence of violations of the Atomic Energy Act and the Nuclear Non-Proliferation Treaty, a single criminal indictment for such smuggling has yet to be filed.

The U.S. public overwhelmingly believes that Israel is a nuclear weapons state, according to recent polls. <http://www.google.com/insights/consumersurveys/view?survey=7gfftskexqbf4&question=1&filter=&rw=1> The claim that classification protocols might be somehow jeopardized is therefore invalid. Indeed, under another relevant declassification protocol, GEN-16, in such cases about something as widely known as the existence of Israel's nuclear weapons, the "DOE Deputy Director for Operations, Office of Health, Safety and Security, shall examine the possibility of declassification." http://energy.gov/sites/prod/files/2013/06/fl/GEN-16_Revision_2011.pdf

The U.S. Department of State (DOS) has also withheld information in the document pursuant to Exemption I of the FOIA, 5 U.S.C. § 552 (b)(I). This, like Exemption 7(e), is a misapplication because the Executive no longer treats the Israeli nuclear arsenal as classified.

Over classification, FOIA delays and FOIA denials are not supposed to be used to cover-up failures stated President Barack Obama upon entering office, "The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public."

Maintaining a cloud of secrecy prohibiting public review of a "gag order" such as WPN-136 while rigidly enforcing it appears to be a key enabler in the ongoing violation of amendments to the 1961 U.S. Foreign Aid Act. Perhaps that is why the gag order was originally implemented and so rigorously enforced. If so, the governed must know about it in order to give informed advice and consent.

US Congress passed the Symington Amendment to the Foreign Aid Act in 1976. The Symington Amendment to the Foreign Assistance Act of 1961 prohibits most U.S. foreign aid to any country found trafficking in nuclear enrichment equipment or technology outside international safeguards. The Glenn Amendment of 1977 to the Foreign Assistance Act of 1961 calls for an end to U.S. foreign aid to countries that import nuclear reprocessing technology. The public has an interest in knowing why Congress and the President do not observably hold current annual foreign aid to Israel of more than \$3 billion per year subject to Symington and Glenn. Or, as in the case of Pakistan, execute the proper waivers to make such aid compliant with these laws. Adjusting for inflation, and assuming the value of secret intelligence support, since 1976 U.S. taxpayers have delivered \$234 billion in aid since 1976 to nuclear-armed Israel.

It is important to note under Executive Order 13526 §3.1(a) that documents may not be classified in order to “(1) conceal violations of law, inefficiency or administrative error; (2) prevent embarrassment to a person, organization or agency; (3) restrain competition; or (4) prevent or delay the release of information that does not require protection in the interest of national security.”

WPN-136 appears to function primarily as a gag order designed to conceal violations of the Symington and Glenn Amendments and therefore cannot legally be withheld from public review. I demand the Department of Energy fully release an un-redacted digital copy of WPN-136 within 20 working days.

Please confirm receipt of this electronic communication.

Grant F. Smith | Director | Institute for Research: Middle Eastern Policy, Inc.

Tel: 202.342.7325 | Twitter: @IRmep | gsmith@irmep.org | <http://www.IRmep.org> | Podcast Feed <http://irmep.org/irmep.xml>

To research and improve US-Middle East policy formulation.

● Research ● Awareness ● Accountability

cc: Barack Obama, White House

Attachments: Copy of Determination Letter
Redacted scan of WPN-136

From: Ozger, Aykut (CONTR) [mailto:Aykut.Ozger@Hq.Doe.Gov]
Sent: Thursday, August 20, 2015 4:33 PM
To: gsmith@irmep.org
Subject: Final Response for FOIA Request HQ-2015-00699-F
Importance: High

Mr. Smith,

I attach the Department of Energy's final response letter, together with the requested information,

for your FOIA request # HQ-2015-00699-F.

Thank you,

Aykut Ozger, Esq.
FOIA Analyst
Central Research, Inc. Contractor
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585

EXHIBIT E



Department of Energy

Washington, DC 20585

FEB 12 2016

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Grant F. Smith
IRmep
P.O. Box 32041
Washington, DC 20007

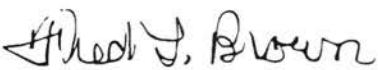
Re: OHA Case No. FIC-15-0003
FOIA Case No. HQ-2015-00699-F

Dear Mr. Smith:

The Department of Energy has considered the Freedom of Information Act Appeal you filed on August 25, 2015, regarding DOE Classification Bulletin WPN-136. As the enclosed Decision and Order indicates, the DOE has determined that your submission be denied.

If you have any questions regarding this Decision and Order, please call or write to William Schwartz, Staff Attorney, Office of Hearings and Appeals, U.S. Department of Energy, Washington, DC 20585-1615, telephone number (202) 287-1522. You may also reach him by e-mail at William.Schwartz@hq.doe.gov.

Sincerely,


Poli A. Marmolejos
Director
Office of Hearings and Appeals

Enclosures





Department of Energy

Washington, DC 20585

**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

Issued: FEB 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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E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448



for Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: FEB 12 2016