

NOT YET SCHEDULED FOR ORAL ARGUMENT

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

GRANT F. SMITH,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, et al.,

Defendants-Appellees.

No. 17-5091

**DEFENDANTS' OPPOSITION TO MOTION FOR IN CAMERA  
REVIEW OF CLASSIFIED INFORMATION**

Plaintiff Grant F. Smith has moved for this Court to “obtain an unredacted copy” of a Department of Energy Classification Bulletin, No. WNP-136, titled “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability,” and to review that Bulletin *ex parte* and *in camera* while the Court hears plaintiff’s appeal of the dismissal of his claims for lack of standing. The motion should be denied. Plaintiff lacks standing, and under such circumstances this Court should not

exercise jurisdiction with respect to the merits of his claims to review classified material that was not before the district court, is not part of the record, and is not relevant to the issues on appeal.

1. Plaintiff brought suit against the President and multiple cabinet secretaries, claiming that defendants must cease disbursing foreign aid to Israel because Israel allegedly has engaged in conduct involving nuclear technologies specified in 22 U.S.C. § 2799aa-1. ECF No. 17, at 10-13, 37. Plaintiff also alleges that the United States has implemented a policy of “nuclear ambiguity” with respect to Israel, under which the government improperly classifies information regarding Israel’s nuclear status and withholds such information from requests for disclosure under the Freedom of Information Act (FOIA). *Id.* at 3, 12-34, 37.

2. Plaintiff’s complaint references a particular Department of Energy Classification Bulletin, which he alleges creates a “gag rule” on “any information officially confirming that Israel is a nuclear weapons state.” *Id.* at 20. Plaintiff received a redacted copy of the Classification Bulletin in response to a FOIA request submitted to the Department of Energy. He

attached that document to his amended complaint in district court, *see* ECF No. 17-1 (Exh. 6), and to a filing in this Court on May 26, 2017, *see* Document No. 1676971. The Bulletin contains information that is classified by the Department of State in order to protect the national security.<sup>1</sup> The Bulletin provides guidance to derivative classifiers in the Department of Energy to protect that classified information in Department documents without having to submit each such document to the Department of State for classification review.

3. This Court should deny plaintiff's motion for the Court to review an unredacted copy of the Bulletin *ex parte* and *in camera*. This is not a FOIA action alleging that the Department of Energy improperly withheld information when it released a redacted version of the Bulletin to plaintiff. Rather, plaintiff appears to argue that the Bulletin is part of a broader

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<sup>1</sup> The redacted version of the Bulletin withholds this classified information pursuant to FOIA Exemption 1, 5 U.S.C. § 552(b)(1). *See* Document No. 1676971, at 2, 4. The Bulletin also contains sensitive law enforcement information "that would provide insight" into the classified information. *Id.* at 4. That information was withheld from the redacted version of the Bulletin pursuant to FOIA Exemption 7(E). *Id.* at 2, 4.

policy of “nuclear ambiguity,” which he seeks to bring to an end with this suit. As the district court correctly held, *see* ECF No. 26, at 2, 5, 7, plaintiff lacks standing to bring his claims involving 22 U.S.C. § 2799aa-1 and the alleged policy of nuclear ambiguity. *See* Opposition to Motion for Emergency Injunctive Relief, May 15, 2017, Doc. No. 1675251, at 11-13, 15-16. Dismissal was also appropriate for alternative reasons. *See id.* at 13-15, 16-17.

Under these circumstances, this Court clearly should not exercise jurisdiction with respect to the merits of plaintiff’s claims to review classified and sensitive material that was not before the district court, is not part of the record, and is not relevant to the issues on appeal. Any *in camera, ex parte* review of classified material necessarily risks unauthorized disclosure of that material. For this reason, even where the government invokes the state secrets privilege—and it has not done so in this case—a district court will not compel *in camera* review of classified material unless doing so is necessary to adjudicate the claim of privilege. *United States v. Reynolds*, 345 U.S. 1, 10-11 (1953). *In camera* review is not appropriate in

this case because the classified content of the Bulletin is not relevant to the issues to be heard in this appeal: plaintiff's lack of standing, and alternative grounds for affirmance. Even if plaintiff were to prevail in this appeal, the proper course would be for litigation on the merits of plaintiff's claims to proceed in district court in the first instance on remand.

Respectfully submitted,

SHARON SWINGLE

(202) 353-2689

/s/ Joseph F. Busa

JOSEPH F. BUSA

(202) 353-0261

Attorneys, Appellate Staff

Civil Division

U.S. Department of Justice

950 Pennsylvania Ave., N.W.

Room 7537

Washington, D.C. 20530

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### CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2017, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Joseph F. Busa

JOSEPH F. BUSA

Counsel for Defendants

### CERTIFICATE OF COMPLIANCE

This filing complies with the length requirement established by Federal Rule of Appellate Procedure 27(d)(2)(A), because it contains 781 words. This filing also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2013 in Palatino Linotype 14-point font, a proportionally spaced typeface.

/s/ Joseph F. Busa

JOSEPH F. BUSA

Counsel for Defendants