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Clerk, U.S. District and
Bankruptcy Courts

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH, *PRO SE*

IRmep

P.O. Box 32041

Washington, D.C. 20007

202-342-7325

Plaintiff,

vs.

UNITED STATES OF AMERICA;

JOHN J. SULLIVAN, Acting Secretary

U.S. Department of State

2201 C Street NW

Washington, DC 20520;

RICK PERRY, Secretary

U.S. Department of Energy

1000 Independence Avenue SW

Washington, DC 20585;

Defendants.

Case: 1:18-cv-00777

Assigned To : Chutkan, Tanya S.

Assign. Date : 4/5/2018

Description: FOIA/Privacy Act (I-Deck)

COMPLAINT FOR INJUNCTIVE RELIEF

1. This is an action under the Freedom of Information Act, 5 U.S.C. § 552, to obtain full release of the secret, two-page U.S. Department of Energy “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability” (WNP-136) which the Defendant Department of Energy (“DOE”) and U.S. Department of State (“DOS”) have improperly withheld from the Plaintiff.

2. This court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B).

3. Venue is appropriate under 5 U.S.C. §§ 552(a)(4)(B), 703 and 28 U.S.C. § 1391.

4. Defendant U.S. Department of Energy (“DOE”) is an agency within the meaning of 5 U.S.C. § 552(e) and is in possession and/or control of the records requested by Plaintiff which are the subject of this action.

5. Defendant U.S. Department of State (“DOS”) is an agency within the meaning of 5 U.S.C. § 552(e), consulted by DOE in the FOIA administrative phase, and the originator of the now unclassified classification Guide 05-1, D, dated January 2005 (available online at <https://fas.org/sgp/othergov/dos-class.pdf>) from which Defendants claim the still-secret WNP-136 is derivative.

6. The Plaintiff has a legal right under FOIA to obtain the information he seeks, and there is no legal basis for the denial by Defendants of said right.

7. Plaintiff, Grant F. Smith, is an author and public interest researcher and founder of the Institute for Research: Middle Eastern Policy, Inc. (IRmep) and is the requester of the records which Defendant(s) are now withholding.

8. On February 18, 2015 the Plaintiff filed a FOIA describing records sought as “DOE Classification Bulletin WPN-136 on Foreign Nuclear Capabilities.”

9. On February 23, 2015 Defendant DOE acknowledged the request and assigned it number HQ-2015-00699-F. (Exhibit A)

10. On August 20, 2015 Defendant DOE released an almost completely redacted copy of “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability” (WPN-136) (Exhibit B)

11. On August 25, 2015 the Plaintiff filed an administrative appeal demanding a complete and unredacted release of WPN-136.

12. On February 12, 2016 the Defendants denied Plaintiff’s administrative appeal. (Exhibit C) citing FOIA Exemptions 1 and 7(E).

13. The Defendant DOE claims that WPN-136 is “properly classified under Executive Order 13526” because an Associate Under-Secretary who reviewed the document claims it “contains information pertaining to the Israeli government that the Department of State has determined to be NSI [national security information].”

14. Defendant DOE claims it coordinated this review with the Department of State and could “find no change in policy in the interim, he determined 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.”

15. Plaintiff alleges that the function of WPN-136 is not protecting NSI, but rather to conceal violations of law, which is expressly forbidden under EO 13526.

16. The White House issued Executive Order 13526 Classified National Security Information on December 29, 2009. It specifically prohibits the use of classification to cover-up wrongdoing stating, “(a) In no case shall information be classified, continue to be maintained as classified, or fail to be declassified in order to: (1) conceal violations of law, inefficiency, or administrative error.”

17. WPN-136 unlawfully restricts the release of U.S. government information about Israel’s nuclear weapons program, and gags knowledgeable government employees and contractors from engaging in public policy discussions about Israel’s nuclear weapons program. This in turn enables other unlawful activities.

18. Whenever U.S. government information about Israel’s clandestine nuclear weapons program is publicly released, it raises public concerns about U.S. compliance with Arms Export Control Act sections restricting and conditioning U.S. foreign aid to foreign countries that have not signed the Nuclear Non-Proliferation Treaty, yet are known to have nuclear weapons programs, specifically *22 USC §2799aa-1: Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations.*

19. Israel is the largest cumulative recipient of U.S. foreign aid, having received over \$250 billion in inflation-adjusted aid since 1948. This is more aid than was used to rebuild postwar Europe under the Marshall Plan. This aid is opposed by the majority of Americans,

possibly due to Israel's poor human rights record. (See "81 of Americans Oppose \$38 Billion Pledge to Israel" Antiwar.com, September 20, 2016 <https://original.antiwar.com/smith-grant/2016/09/19/81-americans-oppose-38-billion-pledge-israel/>)

20. The Arms Export Control Act is very clear about what measures must apply to any non-NNPT U.S. foreign aid recipient found to have a nuclear weapons program. Under *22 USC §2799aa-1* If a president nevertheless wishes to provide U.S.-taxpayer-funded foreign aid, he must, a bare minimum, "determine and certify in writing to the Committee on Foreign Affairs of the House of Representatives that the application of such sanctions against such country would have a serious adverse effect on vital United States interests. The President shall transmit with such certification a statement setting forth the specific reasons therefor."

21. U.S. presidents have issued such notifications and waivers to allow U.S. foreign aid to Pakistan and India. Subsequent legislation specifically exempted these countries from *22 USC §2799aa-1* provisions.

22. According to the office of Congresswoman Eleanor Holmes Norton on March 27, 2018, "No president has exercised his authority to waive the nuclear enrichment transfer prohibition for Israel" under *22 USC §2799aa-1*. (Exhibit D).

23. Instead, U.S. presidents and officials of executive agencies, such as DOS, have engaged in elaborate evasions and circumlocutions to avoid answering direct public-policy related questions about U.S. law and Israel's nuclear weapons program.

24. George W. Bush administration officials dodged questions about Israel's nuclear program put to them by the Communications Director of the Institute for Public Accuracy,

Sam Hussein. As the founder of the website WashingtonStakeout.com, Hussein repeatedly asked executive branch officials during media opportunities, as they left Sunday morning talk shows and other venues, to confirm or deny the existence of an Israeli nuclear weapons program. The following transcripts were derived from a video documentary of his efforts. See Sam Hussein and Chris Belcher, Stakeout: Israel Nuclear. Sam Hussein asks U.S. government officials why they won't acknowledge the existence of Israel's nuclear arsenal at <https://youtu.be/vmw0rHZlQKg>

25. September 10, 2006 Vice President Dick Cheney

Sam Hussein "Welcome!

Vice President Dick Cheney "Good morning."

Sam Hussein "Do you know that Israel has nuclear weapons, Mr. Vice President?"

Cheney enters vehicle but does not respond.

Sam Hussein "Does Israel have nuclear weapons?"

26. December 20, 2006, John Negroponte, Director of National Intelligence

Sam Hussein "Do you know that Israel has nuclear weapons?"

John Negroponte, Director of National Intelligence: "I'm. I don't (shaking head) want to get into a discussion about, uh..."

Sam Hussein "You can't comment on whether or not Israel has nuclear weapons?"

John Negroponte "...about Israel's nuclear powers, thank you very much."

Sam Hussein "How can you expect to have any credibility on the Middle East if you can't say whether Israel has nuclear weapons?"

John Negroponte walks away.

Sam Hussein "Mr. Ambassador, you're head of National Intelligence. You can't say whether Israel has nuclear weapons?"

Security detail [unintelligible]

Sam Hussein "No, he didn't answer the question. If he answered the question I'd go away."

27. February 25, 2007 Secretary of State Condoleezza Rice

Sam Hussein "Secretary Rice, please, it's an important question. I don't think you've been asked this question. How do you reconcile. Madam Secretary, does Israel have nuclear weapons? Can you answer that? It's a very simple question.

Secretary of State Condoleezza Rice does not respond.

Sam Hussein: "Secretary [of Defense Robert] Gates said that they did, implied it in his confirmation hearings. Please? Please? They're two very simple questions."

28. Veteran White House reporter Helen Thomas asked President Barack Obama about Israel's status as a nuclear weapons state on February 9, 2009: See CNN Transcript, "Obama takes questions on the economy," February 9, 2009.

<http://www.cnn.com/2009/POLITICS/02/09/obama.conference.transcript/>

Helen Thomas: Mr. President, do you think that Pakistan and -- are maintaining the safe havens in Afghanistan for these so-called terrorists? And, also, do you know of any country in the Middle East that has nuclear weapons?

29. President Obama chose to answer the first question, but offered no specifics on the second, as revealed in CNN's official transcript:

Obama: Well, I think that Pakistan -- there is no doubt that, in the FATA region of Pakistan, in the mountainous regions along the border of Afghanistan, that there are safe havens where terrorists are operating.

And one of the goals of Ambassador Holbrooke, as he is traveling throughout the region, is to deliver a message to Pakistan that they are endangered as much as we are by the continuation of those operations and that we've got to work in a regional fashion to root out those safe havens.

It's not acceptable for Pakistan or for us to have folks who, with impunity, will kill innocent men, women and children. And, you know, I - - I believe that the new government of Pakistan and -- and Mr. [President Asif Ali] Zardari cares deeply about getting control of the situation. We want to be effective partners with them on that issue.

Question: (off mic)

Obama: Well, Mr. Holbrooke is there, and that's exactly why he's being sent there, because I think that we have to make sure that Pakistan is a stalwart ally with us in battling this terrorist threat.

With respect to nuclear weapons, you know, I don't want to speculate. What I know is this: that if we see a nuclear arms race in a region as volatile as the Middle East, everybody will be in danger.

And one of my goals is to prevent nuclear proliferation generally. I think that it's important for the United States, in concert with Russia, to lead the way on this.

And, you know, I've mentioned this in conversations with the Russian president, Mr. [Dmitry] Medvedev, to let him know that it is important for us to restart the -- the conversations about how we can start reducing our nuclear arsenals in an effective way so that...

(CROSSTALK)

Obama: ... so that we then have the standing to go to other countries and start stitching back together the nonproliferation treaties that, frankly, have been weakened over the last several years. OK.

Question: Why do you have to speculate on who has...

(CROSSTALK)

Obama: All right. Sam Stein, Huffington Post. Where's Sam? Here. Go ahead.

30. One member of Congress in a position to know, who is not bound by WPN-136,

was recently been pressed to respond truthfully when publicly asked about Israel's nuclear weapons program. The following exchange took place at the National Press Club on February 27, 2017: See *Truthdig* "Sen. Schumer: It's a well-known fact that Israel has nuclear weapons" March 2, 2018 <https://www.truthdig.com/videos/sen-schumer-its-a-well-known-fact-that-israel-has-nuclear-weapons-video/> and "Sen. Check Schumer admits Israel has nuclear weapons at the National Press Club." YouTube video, <https://youtu.be/RSIpAPWEJFI>

Sam Husseini: You voted for the 2002 Iraq War Resolution, claiming Iraq was vigorously pursuing nuclear weapons. Do you acknowledge that Israel has nuclear weapons? [another question directed at Nancy Pelosi]

SH: Senator Schumer -- on Israel's nukes -- do you acknowledge --

Chuck Schumer: I didn't get your question.

SH: Do you acknowledge that Israel has nuclear weapons, sir?

CS: I'm not -- you can -- go read the newspapers about that. [walks away from podium]

SH: You can't acknowledge that Israel has nuclear weapons, sir?

Chuck Schumer: It is a well-known fact that Israel has nuclear weapons, but the Israeli government doesn't officially talk about what kinds of weapons and where, etc.

SH: Should the U.S. government be forthright?

Chuck Schumer: Ok, that's it.

Jeff Ballou (National Press Club President, news editor at Al Jazeera): Ok, we'll move on.

31. Defendants further claim WPN-136 is exempt from release as “compiled for law enforcement purposes” under Exemption 7(E). Defendants cite that the Supreme Court holds that such coverage includes “proactive steps designed to prevent criminal activity and to maintain security.” The DOE’s Associate Under-Secretary claimed that WPN-136 “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 which would impair the DOE’s ability to enforce laws related to protecting classified information from public release.” (Exhibit C)

32. WPN-136, at its core, is a legislative rule in the form of a classification guide advanced by the Defendants to violate U.S. law, specifically *22 USC §2799aa-1*, rather than enforce the law. The record is clear that Defendant DOE has fired, penalized and discredited agency officials who, while in office, publicly and unequivocally stated that Israel has a nuclear weapons program. However, they do so not in the name of preserving

“techniques and procedures used in civil as well as criminal law enforcement investigations,” but as a means to violate *22 USC §2799aa-1* in order to deliver U.S. foreign aid to Israel.

33. Core provisions of *22 USC §2799aa-1* have been the law since 1976. Until 2012, there was no single formal mechanism for punishment of those who forthrightly discussed Israel’s nuclear weapons program. Since enactment (which Plaintiff has argued in the past, was an unlawful legislative rule, not a true “classification guidance”) WPN-136 has been used to harshly punish (and therefore deter) any covered party (federal government employees and contractors) who dares to officially confirm that Israel is a nuclear weapons state, whether that covered party’s sources are public domain or government sources. Punishment under WPN-136 is swift and harsh. Los Alamos National Laboratory nuclear analyst James Doyle wrote candidly about Israel’s nuclear weapons for a scholarly magazine in 2013. After a congressional staffer read the article, which had passed a classification review, it was referred to classification officials for a second review. Doyle’s pay was then cut, his home computer searched, and he was fired. See “Nuclear weapons lab employee fired after publishing scathing critique of the arms race. Los Alamos lets a 17-year employee go after retroactively classifying his published article,” Douglas Birch, The Center for Public Integrity, July 31, 2014 <https://www.publicintegrity.org/2014/07/31/15161/nuclear-weapons-lab-employee-fired-after-publishing-scathing-critique-arms-race>.

34. Even the title of WPN-136 “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability” belies Defendant assertions it is a classification guidance. Israel’s “nuclear capability” has long been fully realized. But the Orwellian title

suggests that despite decades of official and unofficial confirmation of that fact, the nuclear program is merely “potential.”

35. That WPN-136 is therefore not really a classification guidance, but itself a “technique and procedure” to violate law is also revealed in the DOS source from which it is derived, Guide 05-1, D, dated January 2005 which recommends that, “Reporting on and analysis of the internal affairs or foreign relations of a country is a central function of U.S. foreign service posts and is vital to the formulation and execution of U.S. foreign policy. This reporting should be unclassified when the subject matter is routine, already in the public domain, or otherwise not sensitive.”

36. There are many public policy questions about Israel’s nuclear weapons program of growing concern to Americans. Should Israel’s nuclear weapons facilities be inspected by the International Atomic Energy Agency? Where does Israel dispose of the toxic waste its program generates? Is the U.S. still vigorously investigating (though not prosecuting) diversions of materials and technologies to Israel, as it did in the past over nuclear triggers (The Milchan-Netanyahu krytron smuggling ring), weapons grade uranium (NUMEC), oscilloscopes and other weapons development technology diversions (Telogy LLC)? Can Israeli ballistic nuclear missiles now reach the U.S.? Are Israel’s nuclear weapons used to coerce the U.S. into making adverse policy decisions? Besides apartheid South Africa, has Israel offered any of its nuclear weapons for sale to other foreign countries? Does the U.S. fear “suitcase” or other types of Israeli nuclear weapons might be used in “false flag” attacks designed to be crisis initiators to provoke U.S. actions against Israel’s enemies? Has Israel mounted nuclear weapons onto its German-supplied Dolphin-class submarines?

37. Israel's nuclear weapons program is a fact with important public policy implications, but Defendant Department of State in particular acts in bad faith to pretend otherwise.

38. On September 16, 2016 State Department Spokesperson John Kirby responded to a reporter's persistent questions about the legality of aid to Israel. The reporter inquired about leaked emails written by former Secretary of State Colin Powell confirming that Israel had over 200 nuclear weapons pointed at Tehran. Asked whether, under U.S. law, U.S. foreign aid to Israel should be cut off since it is not a signatory to the Nuclear Non-proliferation Treaty, Kirby dodged and weaved, claiming facts already in the public domain were an "intelligence matter." See John Kirby, Spokesperson, "Daily Press Briefing" U.S. DOS, September 16, 2016 <http://www.state.gov/r/pa/prs/dpb/2016/09/262000.htm>

QUESTION: Okay. So an email has recently come to light, an exchange between Jeffrey Leeds and former Secretary of State Colin Powell, in which he [Powell] acknowledges that Israel has, quote – has – he says 200 nuclear weapons. And the Nuclear Nonproliferation Treaty has not been signed by Israel. Under U.S. law, the United States should cut off support to Israel because it's a nuclear power that has not signed the Nuclear Nonproliferation Treaty according to Colin Powell. Correct?

MR KIRBY: Shouldn't you ask Colin Powell that? I'm not going to speak to this particular traffic and I'm certainly not going to discuss --

QUESTION: So you're saying Israel doesn't have nuclear weapons?

MR KIRBY: I'm certainly not going to discuss matters of intelligence from the podium and I'm not – I have no comment on that.

QUESTION: Okay. Well, the email says, “The boys in Tehran know Israel has 200, all targeted on Tehran, and we have thousands.” I mean, that seems to indicate that there’s a knowledge of an Israeli nuclear program, which would make U.S. aid to Israel illegal.

MR KIRBY: I think I’ve answered your question.

QUESTION: Okay. Well, let me ask: Is that – am I – do I have the correct understanding of U.S. law, that we are not allowed to support a nuclear power that has not signed the Nuclear Nonproliferation Treaty?

MR KIRBY: Look, we obviously support the Nuclear Nonproliferation Treaty. I’m not a legal expert on all the tenets of it and I am certainly not going to speak about the details that you’ve revealed here in this email traffic. That would be inappropriate for me to discuss one way or the other. I’m not going to do it.

QUESTION: Follow-up on North Korea? So there are sanctions imposed on North Korea in response to their nuclear proliferation. There were sanctions put on Iran in response to allegations of nuclear proliferation. And now we have this email from Colin Powell saying that Israel has 200 nuclear weapons. Why is Israel not facing any consequence for this?

MR KIRBY: That’s a very colorful way of getting back to the same question you just asked me, but I’m going to refer you back to the transcript when you see it this afternoon to what I said before to your question.

QUESTION: Can I just ask: You are familiar with this email, right?

MR KIRBY: I'm not.

QUESTION: Oh.

MR KIRBY: I have not seen it. I'm not – I can't speak to it, the email, and frankly, even if I had seen it, sir, I wouldn't engage in that kind of a discussion from the podium.

39. A FOIA complaint in this court in 2015 compelled release of the Department of Defense report "Critical Technology Assessment in Israel and NATO Nations." The report detailed Israel's nuclear weapons production infrastructure and work on hydrogen bombs. (See "U.S. Confirmed Existence of Israeli H-Bomb Program in 1987, Report Raises Questions over U.S. Refusal to Enforce Own Foreign Aid Laws," Antiwar.com February 14, 2015)

40. The Central Intelligence Agency, responding administratively to a Plaintiff FOIA request on December 7, 2017 released its Special National Intelligence Estimate, "Prospects for Further Proliferation of Nuclear Weapons" otherwise known as the 1974 SNIE. The report detailed the range of Israel's Jericho nuclear missiles, accurately predicted Israel's attempted sale of nuclear weapons to apartheid South Africa and provided new insights into Israel's theft of U.S. government owned weapons-grade uranium from a Pennsylvania facility, the Nuclear Materials and Equipment Corporation. (See "In 1974 CIA Claimed Israeli Nuclear Missiles Could Hit Neighbors, Newly released details link Israel's highly enriched uranium to Pennsylvania plant," Antiwar.com, March 19, 2018.)

41. This court in particular holds in high esteem the Freedom of Information Act as

the sole means of challenging the grave misapplication of EO 13526 and as an avenue for government accountability. This court ruled in a related case ([Smith v USA, 16-cv-1610](#)) on [February 2, 2017](#)) that “Plaintiff’s claims regarding Executive Order 13526 appear to bear slightly more of a relationship to his ‘financial injuries,’ because he intends to challenge information classification that could impact his success in seeking government records. But the availability of an adequate remedy under FOIA itself precludes any relief under the APA. See, e.g., *Feinman v. FBI*, 713 F. Supp. 2d 70, 76 (D.D.C. 2010). Plaintiff may seek compensation for his FOIA fees in the lawsuits he brought pursuant to FOIA. To the extent that Plaintiff alleges informational injury—harm resulting from his inability to access the information he seeks—based on Executive Order 13526, he must seek redress under FOIA and not the APA. *Citizens for Responsibility & Ethics in Washington v. United States Dep’t of Justice*, No. 16-5110, 2017 WL 412626 at *7–8 (D.C. Cir. Jan. 31, 2017) (explaining that ‘APA section 704 limits review under that statute to agency actions ‘for which there is no other adequate remedy in a court’ and finding no APA review of FOIA reading room’ violations).”

42. The Plaintiff therefore submits this much narrower FOIA request for judicial review of two-pages of information.

43. It is timely under the judicial review provisions of the FOIA 5 U.S.C. § 552(a)(4)(B).

44. Plaintiff suggests that since Defendants have already submitted their affidavit, which though entirely conclusory, presents their best legal argument for secrecy in their Decision and Order (Exhibit C) that immediate *in camera* review would be the most expedient means for this court to make its own independent determination whether FOIA

Exemptions 1 and 2 were applied in good faith, or whether WPN-136 should be released in full to the plaintiff, and thereby to the American public. Defendant DOE considers their response final enough to have published it on the DOE website in January of 2017 as “The Matter of Grant F. Smith.” See

<https://www.energy.gov/sites/prod/files/2017/01/f34/FIC-15-0003.pdf>

45. There are many other strong indications of Defendant bad faith in classifying and withholding WPN-136, beyond the established fact that Israel has a nuclear weapons program. Conditions applying to U.S. foreign aid disbursement to non-Nuclear Non-Proliferation Treaty signatories with nuclear weapons programs are very clear under 22 USC §2799aa-1: *Nuclear reprocessing transfers, illegal exports for nuclear explosive devices, transfers of nuclear explosive devices, and nuclear detonations*. Rather than comply with this law, Defendants seek to misuse their classification authority to restrict release of such official information and sever public access to expertise encased within U.S. government agencies. “Where the record contains a showing of bad faith, the district court would likely require In camera inspection.” *Ray v Turner*, 587 F.2d 1187, 1195 (D.C. Cir 1978); see also *Allen v CIA*, 636 F.2d 1287, 1298 (D.C. Cir. 1980).

46. However, “[in] camera inspection does not depend on a finding or even tentative finding of bad faith. A judge has discretion to order “[i]n camera inspection on the basis of an uneasiness, on a doubt he wants satisfied before he takes responsibility for a de novo determination. Government officials who would not stoop to misrepresentation may reflect an inherent tendency to resist disclosure, and judges may take this natural indication into account” *Ray*, 587 F.2d at 1195.

47. There is a strong current public interest in *in camera* inspection of WPN-136. On March 23 the President signed a \$1.3 trillion spending bill into law, after Congress passed the Consolidated Appropriations Act, 2018 mandating that \$3.1 billion in foreign aid be given to Israel. (See Page 1259, <http://docs.house.gov/billsthisweek/20180319/BILLS-115SAHR1625-RCP115-66.pdf>) The authority cited for this \$3.1 transfer (out of a total of \$5.7 billion) in taxpayer funds is section 23 of the Arms Export Control Act.

48. The American public in general, especially taxpayers, therefore have an immediate and overriding interest in knowing whether 54% of funds enabled under one section of the Arms Export Control Act (section 23) are being spent only because Defendants are proactively undermining enforcement of another section of the very same act (section 22) via the secret WPN-136. *In camera* review under such circumstances is proper. “In cases that involve a strong public interest in disclosure there is...a greater call for *in camera* inspection.” *Allen v CIA*, 636 F.2d 1287, 1294 (DC. Cir 1980).

WHEREFORE, Plaintiff requests this Court:

- (1) Declare the Defendants failure to comply with FOIA to be unlawful;
- (2) Disclose the complete, unredacted copy of WPN-136 to him;
- (3) Grant such other and further relief as may deem just and proper.

Respectfully submitted,



Grant F. Smith
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P.O. Box 32041
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202-342-7325

info@IRmep.org

For process service:

Grant F. Smith c/o IRmep
1100 H St. NW Suite 840
Washington, D.C. 20005

Dated: April 5, 2018

Exhibit List

Exhibit A	Department of Energy, FOIA interim response, HQ-2015-00699-F, February 23, 2015
Exhibit B	Department of Energy, FOIA final response, HQ-2015-00699-F, August 20, 2013
Exhibit C	Department of Energy, FOIA appeal denial, HQ-2015-00699-F, FIC-15-0003, February 12, 2016
Exhibit D	Eleanor Holmes Norton, letter to Plaintiff about the Arms Export Control Act and Israel, March 27, 2018

Exhibit A

Department of Energy, FOIA interim response, HQ-2015-00699-F, February 23, 2015



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 B

Department of Energy, FOIA final response, HQ-2015-00699-F, August 20, 2015



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.



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) DOE (b)(7)(E)

DOE (b)(7)(E)

(OUO) DOE (b)(7)(E)
DOE (b)(7)(E)

~~(OUO)~~ DOE (b)(7)(E)

DOS (b)(1)

DOE (b)(7)(E)

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: 2/24/16	1. Classification Retained
Authority: [] DC [] O []	2. Classification Changed To: _____
Derived From: _____	3. Contains DOE Classified Info
Declassify On: _____	4. Associate With: _____
2 nd Review Date: 2/24/16	5. _____
AU-80	6. 1 line bracketed
Priority: DD	7. Write in plain text. Info OUB
	DCS L.S. SNSI

~~NOFORN~~

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

DOE (b)(7)(E)

DOE (b)(7)(E)

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

(OUO) **DOE (b)(7)(E)**

DOE (b)(7)(E)

(OUO) **DOE (b)(7)(E)**

DOE (b)(7)(E)

(OUO) **DOE (b)(7)(E)**

DOE (b)(7)(E)

(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

Exhibit C

Department of Energy, FOIA appeal denial, HQ-2015-00699-F, FIC-15-0003,
February 12, 2016



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

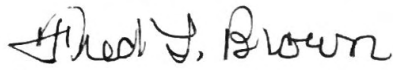
Re: OHA Case No. FIC-15-0003
FOIA Case No. HQ-2015-00699-F

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.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740
Web: ogis.archives.gov
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

Exhibit D

Eleanor Holmes Norton, letter to Plaintiff about the Arms Export Control Act and Israel,
March 27, 2018

MAR 30 2018



COMMITTEE ON
TRANSPORTATION AND
INFRASTRUCTURE

RANKING MEMBER

Congress of the United States
House of Representatives
Washington, DC 20515-1501

March 27, 2018

Mr. Grant F. Smith



Washington, DC 20007-1248

Dear Grant,

Thank you for contacting me regarding the Arms Export Control Act and Israel. I very much appreciate hearing from you. No president has exercised his authority to waive the nuclear enrichment transfer prohibition for Israel.

Please continue to keep me informed of your views on legislation and other congressional issues. I also invite you to contact me whenever you have a personal federal issue or a problem for which you think I can be helpful. I hope you visit my website at www.norton.house.gov and sign up for my weekly newsletter, where I report the earliest information on what I am doing in Congress, and view my seasonal newsletter. I also invite you to follow me on Facebook, Twitter and Instagram. Please note that our constituent services office has moved to the front entrance of a new building at 90 K Street NE. Please visit or call us at (202) 408-9041 if you are in need of constituent services.

Sincerely,

Eleanor Holmes Norton
Member of Congress

Initials/IB