

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH

Plaintiff,

v.

Civil Action No. 14-01611 (TSC)

DEPARTMENT OF DEFENSE

Defendant.

**PLAINTIFF'S RESPONSE TO DEFEDANTS' MOTION FOR MODIFICATION
OF SCHEDULING ORDER AND MOTION FOR IN CAMERA REVIEW AND
RELEASE**

COME NOW the Plaintiff hereby responds to Defendants Motion filed on December 19, 2014 for an Extension of Time to Respond to Complaint. We request the motion for more time be denied in favor of immediate *in camera* review. In opposition to further time extensions, and in support of *in camera* review, the Plaintiff submits the following:

1. The Court ordered the Defendant to respond to the Plaintiff's FOIA request by December 19, 2014. The Defendant has instead once again, on the deadline day at the last minute, requested more time. This pattern has been ongoing since the complaint was filed. In conference on November 21, 2014 the Court warned the Defendant to request no more extensions and even stated "the government filed for an extension of time previously, and that motion was granted, and I gave the government time to file an answer. There is a procedure for these matters. There is a complaint, then there is an answer, then there's scheduling and

motions, you know, dispositive motions. An answer has not been filed in this case...and the government on the very last day files a motion for an enlargement of time..." When viewed in the larger context, the Defendant's continual requests for more time and other similar maneuvers constitute DoD's bad faith response to this Freedom of Information Act request in that it perpetuates a corrupt system costing American taxpayers billions of dollars in violation of longstanding foreign aid laws and IRS regulations.

2. The cycle of bad faith began shortly after the FOIA was initially filed on January 5, 2012. The Plaintiff wished to spare the court these additional details in order to streamline our complaint filing, but they have now become relevant and their inclusion necessary. On January 30, 2012 DoD FOIA coordinator Sue Aldorfer contacted the plaintiff requesting the title of the requested report and its publication date. On January 31, the Plaintiff sent the IDA a letter asking it to deliver this information to Sue Aldorfer (Exhibit 1). However, despite the Plaintiff's best efforts by April 18, 2012 the Plaintiff could neither convince Sue Aldorfer to proactively solicit this information from IDA, nor the IDA to provide it to Sue Aldorfer with the Plaintiff acting as intermediary. Unable to emerge from bureaucratic limbo, the Plaintiff sent a descriptive FOIA request to thirty separate DoD components to see if any would identify the report. On May 16, 2012 the Plaintiff received an angry telephone call from DoD FOIA coordinator Aaron Graves who complained about the amount of DoD resources that had been mustered to respond to the multi-component request while finally confirming that the located report in his possession was "several hundred pages" long and was titled "Critical Technology Issues in Israel" by Edwin Townsley and Clarence Robinson. The plaintiff believes that DoD did not conduct a good faith effort to obtain the title and

publication date as required by FOIA upon receiving the original request.

3. At no time after proceeding to administratively process the FOIA with the report actually in hand did DoD contact the Plaintiff seeking to limit the scope of the request to the subject of interest, Israel. This is despite the fact that all Plaintiff descriptions of the report and attached news reports containing information from the report were about the Israeli nuclear weapons program and nonprofit organizations that fund it with U.S. tax-exempt donations. The plaintiff believes that DoD did not conduct a good faith effort to properly limit the scope through negotiations with the Plaintiff upon administratively processing the FOIA.

4. The Defendant during the administrative process refused to clarify even whether or not the report had—subsequent to 1987—been classified as confidential, secret or top-secret. This lack of clarification both limited the plaintiff's options and increased the time required to either proceed to outside review through the Inter Agency Security Classification Appeals panel through mandatory disclosure review or district court through FOIA. The plaintiff was thereby compelled to file an MDR. After a number of months, the Defendant closed the case, finally confirming "The 1987 IDA report is not classified." (Exhibit 2) The plaintiff believes that DoD did not conduct a good faith effort to clearly state the current classification status of the report as required by FOIA and unnecessarily wasted the Plaintiff's time and limited resources.

5. The Defendant has more recently in sworn affidavit to this court mischaracterized the Plaintiff's agreement to limit the scope to Israel in a way favorable to the Defendant. In response to the Defendant assertions, on November 20, 2014 the Plaintiff noted to the Court

that 10 U.S. C. § 130c does not provide a means for blanket FOIA denials since additional protocols are contained in that statute to consult with foreign governments before releasing sensitive information of such age and FOIA request dates. The Plaintiff was not suggesting that foreign government consultation procedures were applicable in this case. To the contrary, the Plaintiff believes strongly that they are not, and that there is a binding, superseding executive memorandum from DoD's commander-in-chief and public interests that the Court must first consider.

6. On December 5, 2014 the Defendant sent an email seeking the Plaintiff's written agreement to limit the scope to Israel rather than include the NATO nations. In the Plaintiff's view, this was an exchange that logically should have taken place at the initial administrative stage. Nevertheless on December 9, 2014, after reviewing a redacted report table of contents released by the Defendant, the Plaintiff responded to the limitation of scope request as follows: " With the caveat that the TOC is from the IDA report authored by Edwin Townsley and Clarence Robinson, and that this is a discussion which should have taken place administratively upon the initial filing of the FOIA, and that we reserve the right to request the rest of the report in the future if it becomes apparent that the subject of our interest is in fact mentioned in other country sections, I agree you should limit the scope to Section I and III of the report. I do not concede that your interpretation of our Nov. 20, 2014 response brief referencing 10 USC 130(c) is correct." (Exhibit 3)

7. Despite the Plaintiff's repeated attempts to clarify that the report in question is by Edwin Townsley and Clarence Robinson, the Defendant has never formally confirmed to the court that these are in fact the report authors. Such a clarification is important. Israel goes

to considerable lengths to conceal its nuclear weapons programs. During the Kennedy administration, it even walled-off sections of its Dimona plant to fool U.S. inspectors sent by the Kennedy administration to determine whether it was a nuclear weapons site.¹ This led the CIA and other intelligence gathering agencies to use "back channels" to determine Israel's progress without any formal intergovernmental contact. In 1968, a CIA report relied on U.S. physicist Edward Teller's informal conversations with friends in the Israeli scientific community for its confirmation and assessments of Israel's nuclear weapons capability.² That IDA researchers Robinson and Townsley conducted the study rather than DoD officials strongly suggests they too may not have solicited, received or relied on any "Israeli government" information but also based their assessments entirely on informal conversations with the Israeli academic community. Also, the three nuclear weapons R&D organizations of particular interest and mentioned in the Complaint have no apparent status as governmental or "international organizations" as strictly defined under 10 USC 130(c).

8. The Plaintiff does not know if any information that can be attributed to "the Israeli Government" is contained in the requested report. The history of the clandestine Israeli nuclear weapons program, the DoD's use of mid-level outside contractors, and DoD's recent attempts to locate the "right person" from the Israeli government to respond suggest there may be no "Israeli government" information in the report. The Plaintiff notes that in stark contrast to the email in Exhibit 3, the Defendant never unequivocally swears in his affidavit that the report contains information from the Israeli government. Therefore, the

¹ "The Sampson Option: Israel's Nuclear Arsenal and American Foreign Policy," by Seymour Hersh

² Nuclear Weapons. Federation of American Scientists <http://www.fas.org/nuke/guide/israel/nuke/>

Defendant's statement in point #8 "Plaintiff has indicated that his interest in the document rests solely with the information provided by the Israeli Government, and has graciously agreed to exclude the portions of the report that concern information from other nations" is a grave mischaracterization of what was plainly stated in the Plaintiff's email. (Exhibit 3) The Plaintiff wrote nothing about the Israeli government as an information source.

9. It must also be noted that 10 U.S. C. § 130c under which the Defendant is now soliciting Israeli input covers only three entities: foreign governments, international organizations as defined by the International Organizations Immunities Act (59 Stat. 669; 22 U.S.C. 288), and U.S. government agencies. It does not cover IRS tax-exempt 501(c)(3) organizations such as the Institute for Defense Analyses (the report author) or foreign universities and research institutions. It is also an optional—rather than mandatory—review for cases that meet its strict criteria, which the Plaintiff believes the present case does not.

10. The Plaintiff has described in considerable detail in previous filings how American taxpayers are being forced to pay billions of dollars in foreign aid while the Symington and Glenn Amendments are being violated. We have detailed that funding to foreign clandestine nuclear weapons programs are not considered by the IRS to be tax-exempt social welfare expenditures eligible for deductions and how this creates a "tax gap." The Plaintiff has argued that refusing to release even unclassified evidence verifying violations that the government has long possessed undermines governance and rule of law. It also contravenes executive guidance that DoD is obliged follow.

11. The DoD was ordered by its commander-in-chief in 2009 to administer FOIA in a proactive way. "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. All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA. "³ We believe since the very beginning the Defendant has in bad faith repeatedly sought bureaucratic avenues to avoid release of this report in direct contravention of nearly all clauses of the 2009 executive memo on FOIA. These circumstances make *in camera* review unavoidable.

12. The FOIA specifically authorizes *in camera* examination of documents (See 5 U.S.C. § 552(a)(4)(B)(2000); see also S. Conf. Rep. No. 93-1200, at 9 (1974), reprinted in 1974 U.S.C.C.A.N. 6267, 6287), although *in camera* review is entirely "discretionary." (Halpern v. FBI, 181 F.3d 279, 295, 2d Cir. 1999) It is circumstances like the present when there is actual evidence of bad faith on the part of the agency that *in camera* review is most likely to be ordered (Rugiero v. United States Dep't of Justice, 257 F.3d 534, 547, 6th Cir. 2001) It is in fact in just this circumstance that *in camera* review may most be "particularly appropriate." (Quiñon, 86 F.3d at 1228) Moreover, even with the submission of adequately detailed

³ http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/

government affidavits—and even in the absence of any bad faith in the agency's FOIA processing which is clearly not the case here—in *camera* inspection may be undertaken based upon "evidence of bad faith or illegality with regard to the underlying activities which generated the documents at issue." 4 In this case there is the slight twist in that the report's suppression enables the illegal continuance of foreign aid in disregard of clear evidence in possession of the government of a clandestine foreign nuclear weapons program, but the principal is the same. The Court of Appeals for the Sixth Circuit, in particular, has reasoned that *in camera* review is most appropriate in such a case in order to reassure the plaintiff and the public that justice has been served.⁵

13. Given the Defendant's overall bad faith approach to the Plaintiff's public interest FOIA, *in camera* review by this Court would now be the most efficient and fair way to determine their release status. According to the table of contents in Exhibit 3, this would only entail review of fifty-seven pages of unclassified content about Israel and another seven pages of introductory material.

⁴ Jones, 41 F.3d at 242-43; see Detroit Free Press v. United States Dep't of Justice, 174 F. Supp. 2d 597, 601 (E.D. Mich. 2001) (ordering *in camera* submissions because of questions about "the veracity of" the agency's justification for withholding documents, which "rais[e] questions of bad faith"); see also Summers v. Dep't of Justice, 140 F.3d 1077, 1085 (D.C. Cir. 1998) (Silberman, J., concurring) (urging *in camera* review of the "Official and Confidential" files of former FBI Director J. Edgar Hoover "to fully understand the enormous public interest in these materials").

⁵ See Jones, 41 F.3d at 242-43.

WHEREFORE, Plaintiff requests this Court:

- (1) Declare the Defendant has failed to meet the December 19 response deadline;
- (2) Deny the Defendant's request for schedule modification.
- (3) Obtain a copy of "Critical Technology Assessment For Israel and NATO Nations" for *in camera* review;
- (4) Release relevant sections of "Critical Technology Assessment For Israel and NATO Nations" to the Plaintiff to fulfill his pressing public interest research mandates.

Respectfully submitted,



Grant F. Smith, *Pro Se*

Dated: December 26, 2014

Exhibit 1

IRmep
Calvert Station
P.O. Box 32041
Washington, DC 20007

<http://www.irmep.org>
info@irmep.org
Phone: 202-342-7325
Fax: 202-318-8009



Tuesday, January 31, 2012

Dr. David Chu, Principal Officer
Institute for Defense Analyses
4850 Mark Center Drive
Alexandria, VA 22311-1882

Dear Dr. David Chu,

By your advice, we have filed a FOIA request with the Department of Defense to obtain clearance for the release of the IDA report that was denied public release by your office on December 14, 2011.

In order to enable the FOIA process, Sue Aldorfer, Chief of the FOIA team at DoD, requests that she be informed of the exact title and date of the report. She is holding our FOIA request and can be reached at 724-567-7236 or by mail at:

Sue Aldorfer, Chief of the FOIA Staff
Office of Freedom of Information
US Department of Defense
1155 Defense Pentagon
Washington, DC 20301-1155

When contacted by telephone, the IDA librarian claimed the report is not classified, but that he could not divulge the report's title. Presumably, an IDA official can make this disclosure directly to a security-cleared member of the report's chartering organization.

Thank you in advance for your cooperation in upholding the sanctity of the Freedom of Information Act.

Sincerely,



Grant F. Smith

Cc: Sue Aldorfer

Enclosure: relevant correspondence.

Exhibit 2



**DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155**

September 20, 2012
Ref: 12-FM-0022

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

Dear Mr. Smith,

This responds to your August 16, 2012, request for a Mandatory Declassification Review (MDR) of a 1987 IDA report. Your request was received in this office on August 22, 2012, and assigned case number 12-FM-0022.

The MDR process applies only to classified material. Since the 1987 IDA report is not classified, your MDR request is invalid as it does not apply. This action closes your request.

Sincerely,

Susan Aldorfer
for Paul J. Jacobsmeyer
Chief

Exhibit 3

Grant F. Smith

From: Grant F. Smith [gsmith@IRmep.org]
Sent: Tuesday, December 9, 2014 11:35 AM
To: 'Jennings, Laura (USADC)'
Subject: RE: Smith v. DoD, Civil Action No. 14-01611

Ms. Jennings,

With the caveat that the TOC is from the IDA report authored by Edwin Townsley and Clarence Robinson, and that this is a discussion which should have taken place administratively upon the initial filing of the FOIA, and that we reserve the right to request the rest of the report in the future if it becomes apparent that the subject of our interest is in fact mentioned in other country sections, I agree you should limit the scope to Section I and III of the report.

I do not concede that your interpretation of our Nov. 20, 2014 response brief referencing 10 USC 130(c) is correct.

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

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<http://irmep.org/irmep.xml>

To research and improve US-Middle East policy formulation.

● Research ● Awareness ● Accountability

From: Jennings, Laura (USADC) [mailto:Laura.Jennings2@usdoj.gov]
Sent: Tuesday, December 9, 2014 11:10 AM
To: gsmith@IRmep.org
Subject: RE: Smith v. DoD, Civil Action No. 14-01611

Mr. Smith,

The table of contents is attached, with redactions; however the countries are identified and you can also see that information is easily segregable.

From: Grant F. Smith [mailto:gsmith@IRmep.org]
Sent: Monday, December 08, 2014 6:16 PM
To: Jennings, Laura (USADC)
Subject: RE: Smith v. DoD, Civil Action No. 14-01611

Would it be possible to send the report table of contents so I can see how intertwined Israel/NATO issues might be?

From: Jennings, Laura (USADC) [mailto:Laura.Jennings2@usdoj.gov]
Sent: Monday, December 8, 2014 4:15 PM
To: gsmith@IRmep.org
Subject: RE: Smith v. DoD, Civil Action No. 14-01611

Mr. Smith:

In light of the Court's order filed on Friday (and copied below) requiring DoD to respond to your FOIA request by December 19, 2014, is it possible for you to inform me of your decision regarding the other countries by COB tomorrow?

Sincerely,
Laura Jennings

Notice of Electronic Filing

The following transaction was entered on 12/5/2014 at 3:28 PM EDT and filed on 12/5/2014

Case Name: SMITH v. DEPARTMENT OF DEFENSE

Case Number: [1:14-cv-01611-TSC](#)

Filer:

Document Number: No document attached

Docket Text:

MINUTE ORDER: Defendant shall respond to Plaintiff's FOIA request by December 19, 2014. Defendant must file any dispositive motion by January 9, 2015. Plaintiff must file its opposition by January 23, 2015. Defendant's reply must be filed by January 30, 2015. Should motions briefing not be necessary after Defendant responds to Plaintiff's FOIA request, the parties shall so notify the Court. Signed by Judge Tanya S. Chutkan on 12/5/2014. (lctsc2)

From: Grant F. Smith [<mailto:gsmith@IRmep.org>]

Sent: Friday, December 05, 2014 11:18 AM

To: Jennings, Laura (USADC)

Subject: RE: Smith v. DoD, Civil Action No. 14-01611

I have received this message and will respond within the time frame you suggest.

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>

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From: Jennings, Laura (USADC) [<mailto:Laura.Jennings2@usdoj.gov>]

Sent: Friday, December 5, 2014 10:59 AM

To: Grant F. Smith

Subject: Smith v. DoD, Civil Action No. 14-01611

Dear Mr. Smith:

I am writing to update you on DoD's efforts to process the 1987 report, "Critical Technology Assessment in Israel and NATO Nations."

As stated in your Response brief dated Nov. 20, 2014, 10 USC 130(c) requires that if the sensitive information from a foreign government was received prior to Oct 30, 2000, and is more the 25 years old when the request is received, then DoD must contact the foreign government and they must request in writing that the info not be disclosed for an additional period stated in that written request.

DoD is currently reaching out to Israel.

While the report covers Israel, it also describes in scientific terms the technological details of the basic research and development program thrusts in Israel and selected European allied nations with possible applications to US DoD programs.

The report is broken down by country. Are you only interested in the Israel portion? Would it be acceptable to remove the sections for the other European nations as non-responsive to your FOIA request (as Israel appears to be the thrust of your request)? Only having to get a review from Israel will expedite the process. Please let me know your response by next Friday, December 12, 2014.

Sincerely,
Laura Jennings

Laura Jennings
Special Assistant United States Attorney
555 Fourth Street, N.W. – Civil Division
Room E-4916
Washington, D.C. 20530
(202) 252-2569

Exhibit 4

CRITICAL TECHNOLOGY ASSESSMENT FOR ISRAEL AND NATO NATIONS

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