

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

GRANT F. SMITH,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-0777 (TSC)
)	
UNITED STATES OF AMERICA, <i>et al.</i>)	
)	
Defendants.)	
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**DEFENDANTS’ REPLY IN SUPPORT OF MOTION TO DISMISS
AND MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO
PLAINTIFF’S CROSS-MOTION FOR SUMMARY JUDGMENT**

The sum of Plaintiff Grant F. Smith’s (“Smith” or “Plaintiff”) opposition to Defendants’ motion to dismiss is that the United States Department of Energy (“DOE”) was somehow obligated to provide him with details about its consultation with the United States Department of State (“DOS”) and that he has since submitted a Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, request to DOS for “its equity in WNP-136.” Plaintiff’s Memorandum of Law (“Plaintiff’s Opp. Memo”), ECF No. 15 at 36. Plaintiff’s opposition is insufficient to demonstrate that the Court has subject-matter jurisdiction over his claims against DOS or that he has stated a cognizable claim against that agency under FOIA. Thus, Plaintiff’s claims against DOS should be dismissed pursuant to Federal Rules of Civil Procedure (“Fed. R. Civ. P.”) 12(b)(1) and 12(b)(6).

Plaintiff’s opposition (ECF No. 15) to Defendants’ motion for summary judgment (ECF No. 14) fails to demonstrate that DOE did not appropriately respond to Plaintiff’s information request pursuant to FOIA. The crux of Plaintiff’s argument is that any acknowledgement by a government official from any agency of any aspect of an Israeli nuclear weapons capability at any time negates the classification of the withheld portions of DOE’s “Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability” or WNP-136. Plaintiff

offers speculation about Defendants' intent based on decades-old sources in the hope that this Court will somehow find merit in Plaintiff's case. Plaintiff's tactics, however, do not conceal the fact that there is no genuine issue of material fact, and Defendants are entitled to judgment as a matter of law.

DOE, after an adequate search and multiple reviews and consultation with DOS, has released all responsive documents and properly redacted information pursuant to FOIA Exemptions 1 and 7(E). Defendants have satisfied all of their obligations pursuant to FOIA and are entitled to judgment as a matter of law pursuant to Rule 56 of the Federal Rules of Civil Procedure on the grounds that no genuine issue of material fact exists.

I. Plaintiff's August 2018 FOIA Request to DOS is not at Issue.

Plaintiff blames Defendants for his failure to submit a FOIA request to DOS (*see* ECF No. 15 at 31-35) and argues that because he has now submitted a FOIA request to DOS his claims against DOS should not be dismissed. ECF No. 15 at 36. DOS received Plaintiff's FOIA request on August 7, 2018, and provided a determination in response dated August 28, 2018. *See* Defendants' Opposition to Plaintiff's Statement of Material Facts Not in Dispute ("Def's. Opp. Stmt. of Facts"), ¶ 2 and Supplemental Declaration of Eric F. Stein ("Suppl. Stein Decl."), ¶ 5-6, Exhibits A and B. Plaintiff has not averred facts sufficient to support a claim under FOIA concerning his latest request. DOS has responded in a timely manner to Plaintiff's 2018 request, and Plaintiff has not exhausted his administrative remedies, because DOS has not received an appeal of this decision from him.

Plaintiff's reliance on the DOJ Office of Information Policy's FOIA referral guidance (*see* ECF No. 15 at 30-35) is misplaced. In this case DOE consulted with DOS on the request, but it did not refer the request to DOS for direct reply; thus, the referral standards are inapplicable. Defendants did not prevent Plaintiff from filing an earlier FOIA request with DOS for the

information withheld under Exemption 1.¹ To the contrary, DOE's response of August 20, 2015, informed Plaintiff that "the U.S. Department of State (DOS) has also withheld information in the document pursuant to Exemption 1." ECF No. 1 at 25. Thus, Smith had years to file a request with DOS and exhaust his appeal rights and has no basis to claim he was "severely disadvantaged" by Defendants (ECF No. 15 at 35) – particularly as DOE produced to him the single document he sought in his FOIA request. He had a full opportunity in the DOE appeals procedure and in this action to contest the withholdings on that document.

Because Plaintiff has failed to exhaust administrative remedies as required under FOIA, the Court should dismiss his claims against DOS. Alternatively, because the Complaint fails to state a claim with respect to DOS, its claims against DOS should be dismissed under Rule 12(b)(6).

In the alternative, summary judgment is appropriate because the declarations submitted by the Defendants (including the Supplemental Stein Declaration) show that there is no issue of material fact as to the FOIA requests Plaintiff has submitted. Fed. R. Civ. P. 56.

II. Defendants' Properly Withheld Information Under Exemption 1.

The core of Plaintiff's opposition is his claim that Defendants improperly withheld information because it was improperly classified and that it was improperly classified because it had already been disclosed to the public. *See* ECF No. 15 at 16-22; 40-41. The initial showing a plaintiff must make to support such an official acknowledgment argument is strict and high: the plaintiff must "show that an agency's previous disclosure appears to duplicate the material sought, *i.e.*, that the disclosure is as specific as and matches the sought material." *Assassination Archives & Research Ctr. v. CIA*, 334 F.3d 55, 60 (D.C. Cir. 2003) (citations and quotations omitted). The

¹ Plaintiff's citation of reports about DOS's past FOIA processing (ECF No. 15 at 35) provides no support for his allegations that Defendants violated FOIA referral procedures in this case.

D.C. Circuit has recognized that this “high hurdle for a FOIA plaintiff to clear” is necessary to protect the government’s “vital interest in information relating to the national security and foreign affairs.” *Public Citizen v. Dep’t of State*, 11 F.3d 198, 203 (D.C. Cir. 1993). While Plaintiff recognizes that the bar for a waiver of the government’s ability to withhold classified information is high, *see* ECF No. 15 at 17,² his proffered information clearly fails to meet it.

As an initial matter, Plaintiff’s official acknowledgment argument fails because Plaintiff does not argue that either Defendant has officially acknowledged anything. *See* ECF No. 15 at 17-22. Rather, Plaintiff argues that disclosures by other U.S. Government agencies and third-party reporters waive Defendants’ ability to withhold information based on Exemption 1. *See id.* This argument is squarely foreclosed in the D.C. Circuit, where “a disclosure made by someone other than the agency from which the information is being sought” does not constitute a disclosure by that agency. *Frugone v. CIA*, 169 F.3d 772, 775 (D.C. Cir. 1999) (citing cases); *see also Afshar v. Dep’t of State*, 702 F.2d 1125, 1130-31 (D.C. Cir. 1983) (“[E]ven if a fact . . . is the subject of widespread media and public speculation, its official acknowledgment by an authoritative source might well be new information that could cause damage to the national security. Unofficial leaks and public surmise can often be ignored by foreign governments that might perceive themselves to be harmed by disclosure of their cooperation with the CIA, but official acknowledgment may force a government to retaliate.”).

Even if the information provided by Plaintiff constituted disclosures by Defendants, which it does not, Plaintiff has failed to meet his burden of showing that the information appears to duplicate the material sought. The information Plaintiff provides does not purport to match the

² Plaintiff quotes DOJ’s 2017 FOIA Guide, “refusing to consider classification information to be in the public domain unless it has been officially disclosed” and *New York Times Co. v. DOJ*, “general comments from an Executive Branch official do not meet the exacting standard[.]”

information sought. Upon review of the three documents in Plaintiff's opposition that provided the most plausible support for his contentions,³ DOS's declarant, Eric F. Stein cites three significant differences between the allegedly officially acknowledged information cited in each of Plaintiff's sources and the information withheld from Plaintiff under FOIA Exemption 1:

- 1) The time periods involved (1968, 1974, 1978 versus 2012);
- 2) The agencies making the assessments (CIA versus DOE and DOS); and
- 3) The content of the information withheld is not identical.

Suppl. Stein Decl., ¶¶ 10-11. Following this review, Stein "concluded that the information contained in those documents is not identical to the information withheld under Exemption 1 and does not constitute an official acknowledgement of the information withheld." Suppl. Stein Decl., ¶¶ 8-11; Def's. Opp. Stmt. of Facts, ¶ 8b. This is more than sufficient to show that Plaintiff has failed to meet his burden of showing that the information appears to duplicate the material sought. *See, e.g., Public Citizen*, 11 F.3d at 201 ("[FOIA] bars the courts from prying loose from the government even the smallest bit of information that is properly classified.... In many cases, the very fact that a known datum appears in a certain context or with a certain frequency may itself be information that the government is entitled to withhold.").

Further, DOS reviewed its January 2005 classification guide pertaining to foreign relations and the analogous section of its current guide and determined that the "classification of the sentence in the DOE bulletin withheld under Exemption 1 was proper" under both of its classification guides. Suppl. Stein Decl. ¶ 13. "Among the reasons for this is that the subject matter withheld under Exemption 1 is sensitive, not routine, and not already in the public domain."

³ DOS reviewed two versions of a 1974 Central Intelligence Agency ("CIA") Special National Intelligence Estimate ("SNIE") and as well as one document cited and described by Plaintiff as "testimony given by [CIA Director of Science and Technology Carl] Duckett to the U.S. Nuclear Regulatory Commission and released under FOIA." Suppl. Stein Decl., ¶ 9.

Id.; Def's. Stmt. of Facts, ¶ 8.

III. DOE Properly Withheld Information under Exemption 7(E).

Plaintiff's opposition relies on hyperbole and conjecture to contest DOE's asserted law enforcement basis for withholding portions of WNP-136. He suggests that the law enforcement "techniques and procedures" DOE seeks to protect consist of "home raids, dismissal, threatened prosecutions" and because these methods are not secret they are not properly withheld. ECF No. 15 at 23-24. He further speculates that the law enforcement information withheld in WNP-136 is "likely merely a list of penalties federal agency employees and contractors will suffer[.]" *Id.*

Further, Plaintiff's Opposition Statement of Facts concerning the purpose and operation of WNP-136 consists wholly of overgeneralization and speculation. *See* ECF No. 15-1, ¶¶ 10-11 ("The purpose . . . is to prevent employees . . . from making statements . . ." and "WNP-136" is "self-classifying."). DOE is clear that "[t]he purpose of WNP-136 is to protect classified information by informing agency personnel about classified information" and that the "basis for WNP-136's classification appears on the front of the document." Def's. Opp. Stmt. of Facts, ¶¶ 10-11; *see also* Chalk Decl. ¶ 18 (ECF No. 14-2); Def's. Stmt. of Facts, ¶ 19 (ECF No. 14-1).

Plaintiff's opposition devotes more than five pages to wide-ranging discussions about Iraq and Iran (*see* ECF No. 15 at 25), a former DOS spokesperson's lack of comment on intelligence information (*id.* at 26), a long-term visa granted to an Israeli moviemaker (*id.* at 27), and a 1978 journal of a former Atomic Energy Commissioner concerning enriched uranium in Ohio (*id.* at 29-30). Taken together, these fragments cannot be fashioned into a meaningful whole that is sufficient to raise any genuine issue of material fact concerning WNP-136 in response to Defendants' declarations.

IV. Plaintiff has not Demonstrated Public Interest in the Court's *In Camera* Review.

Plaintiff cites a Google poll in support of public interest in enforcement of the Arms Export Control Act ("AECA"). ECF No. 15 at 42-43. However revealing the survey results may be, Plaintiff has not demonstrated that the public interest in the outcome of the Court's decision in this FOIA litigation, if any, depends on the Court's *in camera* review of WNP-136.

As demonstrated by Defendants' declarations, evaluation of the propriety of the agency's withholdings requires not only a careful review of the withheld information in WNP-136 but also the past and current classifications guides from which it is drawn and an expert analysis of the purpose and effect of the relevant classification schemes. It is precisely in this type of situation where the Court should exercise its discretion to decline to review the document *in camera* and avoid substituting its review for that of subject matter experts entrusted with those responsibilities on a daily basis absent any credible indication of the agencies' abuse of discretion, which is not present here.

CONCLUSION

For the foregoing reasons the Court should grant Defendants’ motion to dismiss with respect to DOS and Defendants’ motion for summary judgment with respect to DOE and deny the relief sought in Plaintiff’s opposition.

September 6, 2018

Respectfully submitted,

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