UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-00777 (TSC)
	)	
UNITED STATES OF AMERICA,[1] *et al.*	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO DISMISS AND
MOTION FOR SUMMARY JUDGMENT

Defendant United States Department of State ("DOS"), through undersigned counsel, hereby moves for dismissal pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for lack of subject-matter jurisdiction and failure to state a claim upon which relief may be granted. DOS and Defendant United States Department of Energy ("DOE") also hereby move this Court for an order granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 7(h). These motions are supported by declarations from Edith A. Chalk, Director, Office of Technical Guidance, United States Department of Energy, Office of the Associate Under Secretary for Environment, Health, Safety and Security ("AU"), Office of Classification and Eric F. Stein, Director, Office of Information Programs and Services ("IPS"), United States Department of State. As discussed in the accompanying memorandum of points and authorities, Defendant DOE has complied with its obligations under the Freedom of Information Act ("FOIA"). There are no material facts in dispute and the Defendants are entitled to judgment

[1] A FOIA complaint is properly directed only to a federal agency. In addition to the United States of America, the Complaint names John J. Sullivan, [former] Acting Secretary, U.S. Department of State and Rick Perry, Secretary, U.S. Department of Energy, none of which are proper parties. In the interests of moving the case forward, undersigned counsel proposes to file dispositive motions today on behalf of DOE and DOS as the proper parties.

in their favor as a matter of law.

A proposed order and a statement of material facts not in dispute are attached to the Defendants' Memorandum.

Because consideration of Defendants' dispositive motions could dispose of this case, Plaintiff Grant F. Smith, proceeding *pro se*, is advised that the Court may treat the motion to dismiss and the facts set forth in support of the motion for summary judgment as conceded and the case may be dismissed if he fails to respond in a timely manner. *See Fox v. Strickland,* 837 F.2d 507, 509 (D.C. Cir. 1988); *see also* LCvR 7(b).

Dated: July 26, 2018

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

This motion concerns a single two-page document requested by Plaintiff from Defendant Department of Energy ("DOE"), which DOE released with redactions after coordinating its review with Defendant Department of State ("DOS"). The only function performed by DOS in this matter was to review the document sent by DOE, request certain withholdings, and return the document to DOE. Stein Decl. ¶ 5-6. Because Plaintiff did not submit a Freedom of Information Act ("FOIA") request to DOS, all claims against DOS should be dismissed for lack of subject-matter jurisdiction and because the Complaint fails to state a claim. Fed. R. Civ. P. 12(b)(1), 12(b)(6).

DOE, in good faith and with diligent effort, reasonably complied with the request for records submitted by *pro se* Plaintiff Grant F. Smith under FOIA, 5 U.S.C. § 552. Having completed its search for responsive records subject to FOIA, and released all nonexempt information after coordinating its review with DOS, DOE respectfully requests summary judgment on all of Plaintiff's claims.

FACTUAL BACKGROUND

The relevant facts are contained in the attached Statement of Material Facts Not in Genuine Dispute.

STANDARD OF REVIEW

I. Motion to Dismiss Under Rules 12(b)(1) and 12(b)(6)

Under Federal Rule of Civil Procedure ("Rule") 12(b)(1), a claim must be dismissed if subject-matter jurisdiction is lacking. Under Rule 12(b)(6), a claim should be dismissed if it fails as a matter of law or if the Complaint fails to plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007). For such a motion, the Court must resolve all factual doubts in Smith's favor. *See EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621, 624 (D.C. Cir. 1997). Where the action is brought by a *pro se* plaintiff, the court holds the complaint "to less stringent standards than formal pleadings drafted by lawyers," and considers the filings as a whole. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Schnitzler v. United States*, 761 F.3d 33, 38 (D.C. Cir. 2014). Nevertheless, the court need not accept inferences drawn by the plaintiff if those inferences are unsupported by facts alleged in the complaint, nor must the court accept the plaintiff's legal conclusions. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002). In ruling upon a motion to dismiss for failure to state a claim, a court may ordinarily consider only "the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002).

II. Summary Judgment

Summary judgment is appropriate when the pleadings and evidence "show[] that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Tao v. Freeh*, 27 F.3d 635, 638 (D.C. Cir. 1994). The party seeking summary judgment must demonstrate the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 248. A genuine issue of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Once the moving party has met its burden, the nonmoving party "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248.

The "vast majority" of FOIA cases are decided on motions for summary judgment. *See Brayton v. Office of U.S. Trade Rep.*, 641 F.3d 521, 527 (D.C. Cir. 2011); *Media Research Ctr. v. DOJ*, 818 F. Supp. 2d 131, 136 (D.D.C. 2011) ("FOIA cases typically and appropriately are decided on motions for summary judgment."); *Citizens for Responsibility & Ethics in Wash. ("CREW") v. U.S. Dep't of Labor*, 478 F. Supp. 2d 77, 80 (D.D.C. 2007). An agency may be entitled to summary judgment in a FOIA case if it demonstrates that no material facts are in dispute, it has conducted an adequate search for responsive records, and each responsive record that it has located either has been produced to the Plaintiff or is exempt from disclosure. *See Weisberg v. U.S. Dep't of Justice*, 627 F.2d 365, 368 (D.C. Cir. 1980).

To meet its burden, DOE may rely on reasonably detailed and non-conclusory declarations. *See McGehee v. CIA*, 697 F.2d 1095, 1102 (D.C. Cir. 1983); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); *Media Research Ctr.*, 818 F. Supp. 2d at 137.

"[T]he Court may award summary judgment solely on the basis of information provided by the department or agency in declarations when the declarations describe 'the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith.'" *CREW*, 478 F. Supp. 2d at 80 (quoting *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981)). "[A]n agency's justification for invoking a FOIA exemption is sufficient if it appears 'logical' or 'plausible.'" *Media Research Ctr.*, 818 F. Supp. 2d at 137 (quoting *Larson v. U.S. Dep't of State*, 565 F.3d 857, 862 (D.C. Cir. 2009)). Courts give agency declarations "a presumption of good faith, which cannot be rebutted by 'purely speculative claims about the existence and discoverability of other documents.'" *SafeCard Servs. Inc. v. SEC*, 926 F.2d 1197, 1201 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

Once the court determines that an agency has released all non-exempt material, it has no further judicial function to perform under the FOIA and the FOIA claim is moot. *Perry v. Block*, 684 F.2d 121, 125 (D.C. Cir. 1982); *Muhammad v. U.S. Customs & Border Prot.*, 559 F. Supp. 2d 5, 7-8 (D.D.C. 2008).

SUMMARY OF ARGUMENT

Plaintiff conceded that he has no basis to contest the adequacy of DOE's search for the one two-page document identified in his FOIA request and provided to Plaintiff by DOE in response to the request, and that he does not object to dispensing with that requirement in the parties' briefing. Because there is no case or controversy with respect to the adequacy of defendant's search, DOE will confine its motion for summary judgment to the propriety of the government's redactions and Plaintiff's request for *in camera* review. Thus, it will be necessary and appropriate

for the Court in this case to address only those matters. *See Shapiro v. U.S. Dep't of Justice*, 239 F. Supp. 3d 100, 106 n.1 (D.D.C. 2017), *appeal docketed*, No. 18-5123 (D.C. Cir. Apr. 30, 2018) (explaining that courts should address the dispute identified by the parties to a FOIA case through summary judgment because jurisdiction requires a live case or controversy).

Plaintiff did not direct a FOIA request to DOS, thus there is a lack of subject-matter jurisdiction for the FOIA claim against DOS, and so Plaintiff's claim against DOS should be dismissed under Rule 12(b)(1). In the alternative, Plaintiff's failure to direct a FOIA request to DOS means that Plaintiff cannot maintain a valid FOIA claim against DOS. Submitting a request for records to an agency is a prerequisite to filing a FOIA action for those records in court against that agency. *See, e.g.*, *MacLeod v. U.S. Dep't of Homeland Sec.*, Civ. A. No. 15-1792, 2017 WL 4220398, at *10 (D.D.C. Sept. 21, 2017). The failure to do so also constitutes failure to exhaust administrative remedies as required under FOIA. *Id.* Thus, because the Complaint fails to state a claim with respect to DOS, its potential claims against DOS should alternatively be dismissed under Rule 12(b)(6).

Portions of the document responsive to Plaintiff's FOIA request were withheld pursuant to Exemptions 1 and 7(E), but DOE produced all reasonably segregable information in the document containing such exempt material. Therefore, DOE has discharged its FOIA obligations and is entitled to summary judgment in its favor on all claims.

Finally, Plaintiff's request for *in camera* review should be denied, where, as here, DOE's withholdings implicate national security concerns and Smith has not demonstrated bad faith by the agencies in conducting their reviews and making their determinations.

ARGUMENT

I. All Claims Against Defendant Department of State Should be Dismissed.

To the extent that the Complaint may be construed as a claim against DOS under FOIA, it should be dismissed for lack of subject-matter jurisdiction because Plaintiff has not submitted a FOIA request to DOS for the document at issue. *See* Stein Decl. ¶ 5. Subject matter jurisdiction over FOIA claims requires that a request was directed at an agency. The jurisdictional grant of FOIA states that "the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld[.]" 5 U.S.C. § 552(a)(4)(B). Under FOIA, jurisdiction is dependent on a showing that an agency has improperly withheld agency records. *See* 5 U.S.C. § 552(a)(6)(A)(i) (requiring an agency to determine within 20 days after receipt of a FOIA request whether to comply with the request and to notify the requester accordingly); *Kissinger v. Reporters Committee for the Freedom of the Press*, 445 U.S. 136, 137-138, 150 (1980). Therefore, if a FOIA request is not directed at an agency as defined by FOIA, the jurisdictional conditions are not satisfied. *See, e.g., MacLeod*, 2017 WL 4220398, at *10.

Plaintiff has not alleged that he submitted a FOIA request to DOS; rather, he asserts that he submitted a request to DOE. *See* ECF No. 1 at ¶ 9. Where the plaintiff has not submitted a valid FOIA request to an agency, a claim under FOIA against that agency must be dismissed for lack of jurisdiction, because the agency did not improperly withhold agency records from the plaintiff. *See Banks v. Lappin*, 539 F. Supp. 2d 228, 235 (D.D.C. 2008) ("Federal jurisdiction over a FOIA claim is dependent upon a showing that an agency improperly withheld agency records. It cannot be said that an agency improperly withheld records if the agency did not receive a request for those records.") (citations omitted).

In the alternative, to the extent that the Complaint may be construed as a claim against DOS under FOIA, it should be dismissed for failure to state a claim because Plaintiff has not presented a FOIA request to DOS. Submitting a request for records to an agency is a prerequisite to filing a FOIA action for those records in court against that agency, and failure to do so constitutes failure to exhaust administrative remedies with respect to that agency. "Exhaustion of administrative remedies is generally required before filing suit in federal court so that the agency has an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision." *Hidalgo v. FBI*, 344 F.3d 1256, 1258, (D.C. Cir. 2003) (citing *Oglesby v. U.S. Dep't of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)); *Wilbur v. CIA*, 355 F.3d 675, 676 (D.C. Cir. 2004) (per curiam) (citing *Oglesby*, 920 F.2d at 61-64, 65 n.9).

Where, as here, there "is no factual allegation that [plaintiff] properly submitted an initial FOIA request for those documents…plaintiff has failed to exhaust his administrative remedies….and [his] claim with respect to the documents specifically listed in his request for relief must also be dismissed." *Abou-Hussein v. Gates*, 657 F. Supp. 2d 77, 81 (D.D.C. 2009) (citing *Pickering–George v. Registration Unit, DEA/DOJ*, 553 F. Supp. 2d 3, 5 (D.D.C. 2008); *see also Banks v. DOJ*, 538 F. Supp. 2d 228, 234 (D.D.C. 2008) ("It cannot be said that an agency improperly withheld records if the agency did not receive a request for those records.") (citing *West v. Jackson*, 448 F. Supp.2d 207, 211 (D.D.C. 2006), *aff'd*, No. 06-5281, 2007 WL 1723362 (D.C. Cir. Mar. 6, 2007) (per curiam); 5 U.S.C. § 552(a)(6)(A)(i)).

Under 5 U.S.C. § 552(a)(6)(A)(i) an agency's response is due within "within twenty days . . . after the receipt of [a FOIA] request." Thus, where, as in the instant Complaint, no request was presented to the agency and the Complaint does not allege that Plaintiff presented a request to the agency, Plaintiff has not initiated the triggering action and cannot claim administrative exhaustion.

Because the D.C. Circuit has held that exhaustion of administrative remedies in a FOIA case is "a jurisprudential doctrine" rather than a jurisdictional prerequisite, Rule 12(b)(6) may be the appropriate mechanism for dismissal here. *See Hines v. United States*, 736 F. Supp. 2d 51, 53 (D.D.C. 2010) (dismissing claim for failure to exhaust administrative remedies while noting that "the exhaustion requirement is a prudential consideration, not a jurisdictional prerequisite, and therefore a plaintiff's failure to exhaust does not deprive the court of subject-matter jurisdiction"); *Jones v. DOJ*, 576 F. Supp. 2d 64, 66 (D.D.C. 2008) ("It is settled in this circuit, however, that exhaustion of administrative remedies in a FOIA case is not a jurisdictional bar to judicial review . . . the matter is properly the subject of a motion brought under Rule 12(b)(6) for failure to state a claim upon which relief may be granted.").

Although DOS reviewed the one responsive document for applicable FOIA exemptions, it did so only at the behest of DOE, and DOE maintained responsibility for processing and responding to Plaintiff's request. Plaintiff failed to present or even allege that he presented a valid FOIA request to DOS and for that reason the Complaint fails to state a claim against DOS and should be dismissed.

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

II. The Department of Energy Properly Withheld Information Pursuant to FOIA Exemptions 1 and 7(E).

FOIA requires that an agency release all records responsive to a properly submitted request unless such records are protected from disclosure by one or more of the Act's nine exemptions. 5 U.S.C. § 552(b); *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 150-51 (1989). The agency bears the burden of demonstrating that the records it has withheld fall into one of those exemptions. 5 U.S.C. § 552(a)(4)(B); *see also Natural Res. Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1190 (D.C. Cir. 2000).

DOE properly applied Exemptions 1 and 7(E), pursuant to 5 U.S.C. § 552(b)(1) and (b)(7)(E), to withhold certain information from release in response to Plaintiff's request. Defendants describe the relevant exemptions and the basis for their application to Plaintiff's requests below.

A. Exemption 1: Precluded by Executive Order

Exemption 1 protects against the disclosure of records 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). An agency establishes that it has properly withheld information under Exemption 1 if it demonstrates that it has met the classification requirements of Executive Order 13526, the current Executive Order governing the classification of national security information ("NSI").

In the context of national security, the court gives "substantial weight" to detailed agency explanations in the national security context—its role is to ensure that the government's rational is logical or plausible. *Associated Press v. FBI*, 265 F. Supp .3d 82, 93 (D.D.C. 2017) (quoting *Judicial Watch, Inc. v. U.S. Dep't of Def.*, 715 F.3d 937, 941, 943 (D.C. Cir. 2013)); *see also Judicial Watch, Inc. v. Dep't of Commerce*, 337 F. Supp. 2d 146, 162 (D.D.C 2004) ("In light of

courts' presumed lack of expertise in the area of national security, a reviewing court is prohibited from conducting a detailed analysis of the agency's invocation of Exemption 1") (citing *Halperin v. CIA*, 629 F.3d 1108, 1124 (D.C. Cir. 2007)).

Additionally, "the text of Exemption 1 suggests that little proof or explanation is required beyond a plausible assertion that information is properly classified." *Morley v. CIA*, 508 F.3d 1108, 1124 (D.C. Cir. 2007). Thus, "[i]f an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise," the court "should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson*, 565 F.3d at 865; *Judicial Watch*, 715 F.3d at 940.

Section 1.1(a) of Executive Order 13526 sets forth four requirements for the classification of national security information:

> (1) An original classification authority classifies the information;
>
> (2) The U.S. Government owns, produces, or controls the information;
>
> (3) The information is within one of eight protected categories listed in section 1.4 of the Order; and
>
> (4) The original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in a specified level of damage to the national security, and the original classification authority is able to identify or describe the damages.

Defendants' Declarations demonstrate that DOE and DOS have adhered to both the substantive and procedural requirements set forth in Executive Order 13526 in determining that the information subject to Exemption 1 is classified. Chalk Decl. ¶¶ 3-4; Stein Decl. ¶¶ 14, 16-18.

After processing the search results for Plaintiff's FOIA request (FOIA H-2015-0699) and determining that portions of the one responsive document contained equities from DOS, DOE staff "coordinated its review with [DOS] and determined that a portion of the one (1) responsive document should be withheld under Exemption 1." Chalk Decl. ¶ 15.

First, Mr. Stein is a senior DOS official who holds original classification authority at the TOP SECRET level under written delegation of authority pursuant to section 1.3(c) of Executive Order 13526. *Id.* at ¶ 1. Mr. Stein ensured that DOS conducted a line-by-line review of the document at issue in Plaintiff's FOIA request and determined that no additional, meaningful part of the one sentence withheld under Exemption 1 can be reasonably segregated and released. *Id.* at ¶ 18.

The classified information withheld in this case also meets the substantive requirements of Executive Order 13526. The requested document is in the possession of the United States government. Stein Decl. at ¶ 14; Chalk Decl. at ¶ 9. It also falls under a protected category, Sections 1.4(d) of Executive Order 13526, because it pertains to "foreign relations or foreign activities of the United States, including confidential sources." Stein Decl. at ¶ 11. Accordingly, DOS requested that DOE withhold one sentence containing "information relating to the potential for an Israeli nuclear capability" under Exemption 1 because doing otherwise "could be expected to cause serious damage to the national security. *Id.* at ¶¶ 14, 17. DOS maintains that release of this information could cause serious damage to the national security of the United States, "both by harming diplomatic relations between the United States and Israel" and "by upsetting the geopolitical security situation in the Middle East region[.]" *Id.* at ¶ 17.

DOE staff confirmed that "The information withheld under Exemption 1 . . . is information that [DOS] has determined to be NSI" and that "[DOS] has indicated that the language remains

properly classified." Chalk Decl. at ¶ 15. In light of the government's national security interest in withholding critical DOS information, DOE properly withheld the redacted sentence from release to Plaintiff.

B. Exemption 7(E): Law Enforcement Information

Exemption 7(E) protects from disclosure information in law enforcement records that "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). "Exemption (b)(7)(E) sets a relatively low bar for the agency to justify withholding: rather than requiring a highly specific burden of showing how the law will be circumvented, exemption (b)(7)(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law." *Dillon v. Dep't of Justice*, 102 F. Supp. 3d 272, 296-97 (D.D.C. 2015) (quoting *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011) (alterations omitted)).

Plaintiff claims that the requested document, "'Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability' (WPN-136 [sic])," is not a valid classification guide, but rather is "a legislative rule in the form of a classification guide advanced by the Defendants to violate U.S. law…rather than enforce the law." (ECF No. 1 at ¶ 32). He further asserts that it is a "'technique and procedure' to violate the law." *Id.* at ¶ 35. Plaintiff also asserts that Defendants acted in bad faith in classifying and withholding WNP-136 because it is an "established fact that Israel has a nuclear weapons program" and 22 U.S.C. § 2799aa-1 prohibits foreign aid to nations with nuclear weapons programs that are not signatories of the Nuclear Non-Proliferation Treaty. *Id*. at ¶ 45. *See also, id.* at ¶ 35.

DOE uses Exemption 7(E) to protect from disclosure "techniques and procedures for law enforcement investigations or prosecutions or . . . guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." Chalk Decl. ¶ 16. Moreover, DOE asserted Exemption 7(E) to protect "DOE sensitive unclassified information related to guidance on the handling of certain information pertaining to the Israeli government, some of which the [DOS] has determined to be [NSI]." *Id.* at ¶ 17.

More specifically, in this case, DOE used the exemption to redact portions of WNP-136. *Id.* As DOE's declarant explains,

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

Id. at ¶ 18. Furthermore, "[A]ccess to classification guidance (classified or OUO) requires a need-to-know. Classification guides and bulletins are only issued to individuals whose duties are directly related to classification." *Id.* at ¶ 19.

Consequently, disclosure of the information DOE withheld under Exemption 7(E) "would provide insight in to the types of information the government considers to be classified . . . [and] materially assist efforts to discern classified or sensitive information through comparison with declassified information." *Id.* at ¶ 20.

DOE's declarant provides a logical explanation for why the released of the requested information might create a risk of circumvention of the law: that is, "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." *Id.* DOE has provided more than enough of a justification for its withholding under Exemption 7(E) and Plaintiff can make no serious argument to the contrary.

III. DOE has Released All Reasonably Segregable Information to Plaintiff.

Under FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it has withheld cannot be further segregated. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. U.S. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

DOE has provided all reasonably segregable, responsive records to Plaintiff. In order to ensure that it did so, DOE and DOS reviewed information withheld from the two-page document to identify non-exempt information that could be reasonably segregated. Chalk Decl. at ¶ 21; Stein Decl. at ¶ 18. Plaintiff cannot produce any evidence to substantiate a claim that the DOE has withheld reasonably segregable materials.

IV. The Court Should Exercise its Discretion to Decline to Review the Classification Guide *in Camera.*

Plaintiff has requested *in camera* review of WNP-136, and he argues that there is great public interest in the Court's review. ECF No. 1 at ¶¶ 43-44, 47-48. Unfortunately for Plaintiff, the numerous sources he cites support only the proposition that there may be some public interest in Israel's potential nuclear weapons capability and potentially the release of related information, not any particular interest in whether this Court conducts an *in camera* review of national security information or sensitive unclassified information contained in DOE's classification guide, WNP-136. By definition, *in camera* review is conducted in the privacy of judicial chambers, and the public will be excluded. While Plaintiff may have an interest in the Court's *in camera* review, it is unlikely that the public does.

Although FOIA permits district courts to conduct *in camera* review, it does not compel the Court to do so. *See, e.g., Larson v. Dep't of State*, 565 F.3d 857, 869-70 (D.C. Cir. 2009); *Juarez v. Dep't of Justice*, 518 F.3d 54, 59-60 (D.C. Cir. 2008) ("It is true that FOIA provides district courts the option to conduct *in camera* review . . . but it by no means compels the exercise of that option."). "Indeed, an *in camera* review is a last resort." *See, e.g., Bigwood v. United States Dep't of Defense*, 132 F. Supp. 3d 124, 153 (D.D.C. 2015). In circumstances such as this involving matters concerning national security, where "an agency's statements supporting exemption contain reasonable specificity of detail as to demonstrate that the withheld information logically falls within the claimed exemption and evidence in the record does not suggest otherwise," it is well-settled that "the court should not conduct a more detailed inquiry to test the agency's judgment and expertise or to evaluate whether the court agrees with the agency's opinions." *Larson*, 565 F.3d at 865, 870 (affirming grant of summary judgment notwithstanding denial of plaintiff's request for *in camera* review and explaining that in cases involving national security, *in camera*

review is "particularly a last resort"); *see also Looks Filmproduktionen*, 199 F. Supp. 3d at 177 ("[W]here an agency's withholdings implicate national security concerns [*in camera*] review is 'particularly a last resort[, and] a court should not resort to it routinely on the theory that 'it can't hurt.'") (quoting *American Civil Liberties Union v. U.S. Dep't of Justice*, 640 Fed. Appx. 9, 10 (D.C. Cir. 2016)).

The Court should exercise its discretion to decline to review the document *in camera*. *See Mobley v. CIA*, 806 F.3d 568, 588 (D.C. Cir. 2015) ("At its discretion, a district court 'may examine the contents of . . . agency records in camera[.]'") (quoting 5 U.S.C. § 552(a)(4)(B)); *see also Am. Civil Liberties Union v. U.S. Dep't of Defense*, 628 F.3d 612, 626 (D.C. Cir. 2011) ("This court reviews a district court's decision whether to conduct *in camera* review of FOIA documents for abuse of discretion."). "Another factor that plays into the calculus is the nature of the parties' dispute, because '*in camera* review is of little help when the dispute centers not on the information contained in the documents but on the parties' differing interpretations as to whether the exemption applies to such information.'" *Id.*

Plaintiff has neither identified anything improper about the DOE's redaction of this NSI and sensitive document, provided any evidence rebutting the Stein and Chalk Declarations demonstrating that the redacted information is subject to FOIA exemptions, nor established bad faith on the part of the government. Plaintiff's claims amount to nothing more than bare assertions and speculation about bad intent based on statements by public officials external to the Executive Branch about the general topic of Israel and nuclear proliferation (ECF No. 1, ¶¶ 22, 30) and instances when members of the Executive Branch declined to discuss it. *Id.* ¶¶ 23-29. The proper classification of executive agency information related to this topic does not depend on an isolated response to the binary question of whether such a weapons program does or does not exist; rather,

it involves evaluation of a wide range of information and consideration of multiple factors affecting whether disclosure of the information could be expected to harm the national security.

Here, Plaintiff is disputing whether Exemptions 1 and 7(E) apply to the classification guide and thus *in camera* review would be "of little help." Moreover, the agency's declarations, Stein Decl. ¶¶ 11, 14-17, and Chalk Decl. ¶¶ 15-20, provide specific information sufficient to place the document within the Exemption 1 and 7(E) categories, the record does not contradict this information, and there is no evidence in the record of the agency's bad faith. Far from demonstrating that *in camera* review is a matter of last resort in this case, Plaintiff proposes it as a matter of expedience. ECF No. 1 at ¶¶ 16-17. Under these circumstances, summary judgment is appropriate without *in camera* review of the document.

CONCLUSION

For the foregoing reasons the Court should grant DOS's motion to dismiss and DOE's motion for summary judgment. In addition, the Court should decline to review the classification guide *in camera*.

Dated: July 26, 2018

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 18-00777 (TSC)
	)	
UNITED STATES OF AMERICA, *et al.*	)	
	)	
Defendants.	)	
	)	

[PROPOSED] ORDER

Upon consideration of defendant Department of State's motion to dismiss and defendant Department of Energy's motion for summary judgment, and all memoranda and other materials submitted in support of and in opposition to the motions,

IT IS HEREBY ORDERED that defendant Department of State's motion to dismiss is GRANTED;

IT IS HEREBY ORDERED that defendant Department of Energy's motion for summary judgment is GRANTED;

IT IS HEREBY ORDERDED that the plaintiff's request for *in camera* review is DENIED; and it is further

ORDERED that JUDGMENT shall be entered for defendants.

This is a final appealable order. *See* Fed. R. App. P. 4(a).

SO ORDERED.

DATED: _____

_____
Tanya S. Chutkan
United States District Judge