

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GRANT F. SMITH,)
)
 Plaintiff,)
)
 v.) Civil Action No. 18-0777 (TSC)
)
 UNITED STATES OF AMERICA, *et al.*)
)
 Defendants.)
 _____)

**DEFENDANTS’ OPPOSITION TO PLAINTIFF’S STATEMENT OF MATERIAL
FACTS NOT IN GENUINE DISPUTE IN SUPPORT OF HIS
MOTION FOR SUMMARY JUDGMENT¹**

Defendants Department of Energy and Department of State (“DOE” and “DOS” respectively, or “Defendants” collectively) respectfully submit the following Opposition to Plaintiff’s Statement of Material Facts (“Plaintiff’s Statement”) (ECF No. 15-1):

1. The facts in Plaintiff’s Statement, Paragraph 1 concerning Defendants’ Statement, Paragraphs 1 to 4, are not in dispute.
2. Plaintiff’s Statement, Paragraph 2, disputes Defendants’ paragraph 5, *i.e.*, that DOS did not receive a FOIA request from Plaintiff for the document at issue in this litigation. Defendant acknowledges that Plaintiff submitted a FOIA request to DOS dated August 2, 2018, after the Defendants filed their dispositive motions. *See* Supplemental Declaration of Eric F. Stein (“Suppl. Stein Decl.”), ¶ 5, Exhibit A.
3. Paragraph 3 of Plaintiff’s Statement does not dispute facts in Defendants’ Paragraphs 6 to 7, thus they are conceded.

¹ Plaintiff has not actually filed a Motion for Summary Judgment; although he has docketed that title (ECF No. 16), the entry only refers to his Memorandum of Law (“Plaintiff’s Opp. Memo”) (ECF No. 15).

4. The facts disputed in Paragraph 4 of Plaintiff's Statement concerning Defendants' Paragraph 8 are not material.

5. The parties agree that the facts in Defendant's paragraph 10 are not in dispute.

6. The facts raised in Plaintiff's Statement, Paragraph 6 regarding Defendant's Paragraph 11 are not material.

7. Plaintiff's Statement, Paragraph 7 agrees that Defendants' Paragraph 12 is not in dispute. The second sentence of Plaintiff's Paragraph 7 regarding Defendants' Paragraph 12 consists of legal argument and conclusions, to which no response is required.

8. Plaintiff's Statement, Paragraph 8, concerning Defendants' Statements 13 to 21, does not create a genuine dispute of material facts.

a. Defendants' Statement, Paragraph 13 is undisputed.

b. Defendants' Statement, Paragraph 14 concerns the proper classification of information withheld under FOIA Exemption 1 and is undisputed. The declassified information cited by Plaintiff is not identical to the classified information withheld in response to Plaintiff's FOIA request in this case and "does not constitute an official acknowledgement of the information withheld under Exemption 1." Suppl. Stein Decl., ¶¶ 8-14. Among the reasons that the classification of the sentence in the DOE bulletin withheld under Exemption 1 remains proper is that "the subject matter . . . is sensitive, not routine, and not already in the public domain." *Id.*, ¶ 13.

c. Plaintiff does not raise a genuine dispute as to the potential harm to diplomatic relations of the United States in Defendants' Statement, Paragraphs 15 to 16.

d. Plaintiff's "dispute" regarding Defendants' Statement, Paragraphs 17 to 20, consists entirely of legal argument and speculation.

9. Defendants agree with paragraph 9 of Plaintiff's Statement.

10. DOE disputes Paragraph 10 of Plaintiff's Statement, which is entirely speculation, and therefore does not create a genuine issue of material fact. The purpose of WNP-136 is to protect classified information by informing agency personnel about classified information.

11. DOE disputes paragraph 11 of Plaintiff's Statement, which is entirely speculation and, therefore, does not create a genuine issue of material fact. The basis for WNP-136's classification appears on the front of the document.

12. DOE disputes paragraph 12 of Plaintiff's statement, which is entirely speculation and, therefore, does not create a genuine issue of material fact.

13. DOE disputes paragraph 13 of Plaintiff's statement, which is entirely speculation and, therefore, does not create a genuine issue of material fact.

14. Plaintiff's Paragraph 14 consists of legal conclusions to which a response is not required; to the extent a response is required, defendant DOE disputes it, however, Plaintiff's Paragraph 14 does not create a genuine issue of material fact. In comparing information cited by Plaintiff as evidence of official acknowledgement with the information withheld under Exemption 1, among the evident major differences are the time periods covered and the agencies making the assessment. *See* Suppl. Stein Decl. ¶¶ 10-11.

15. DOE agrees that the DOS classification guide from which the classification of WNP-136 is derived states that reporting on and analysis of the internal affairs or foreign relations of a country should be unclassified when the subject matter is routine, already in the public domain, or otherwise not sensitive. The remainder of Plaintiff's Paragraph 15 consists of legal conclusions to which a response is not required.

16. DOE disputes paragraph 16 of Plaintiff's statement, which is entirely speculation and, therefore, does not create a genuine issue of material fact.

Dated: September 6, 2018

Respectfully Submitted,

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