

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

GRANT F. SMITH,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 18-00777 (TSC)
)	
UNITED STATES OF AMERICA, <i>et al.</i>)	
)	
Defendants.)	
_____)	

DEFENDANTS’ STATEMENT OF MATERIAL FACTS NOT IN GENUINE DISPUTE

Pursuant to Local Civil Rule 7(h), Defendants respectfully submit this Statement of Material Facts Not in Genuine Dispute.

ADMINISTRATIVE BACKGROUND

1. Plaintiff submitted a FOIA request to the Department of Energy (“DOE”) on February 18, 2015, seeking “DOE Classification Bulletin WPN-136 [sic] on Foreign Nuclear Capabilities.”¹ (“Plaintiff’s FOIA Request”). Chalk Decl. ¶ 7 and Exhibit A.

2. Within DOE, the Office of Classification, among other responsibilities, responds to requests for information pursuant to FOIA and implements “a comprehensive program for the development and distribution of classification guides with DOE and to other government agencies.” Chalk Decl. ¶¶ 2, 4.

3. By letter dated February 23, 2015, Alexander Morris, FOIA Officer in DOE’s Office of Information Resources, sent Plaintiff an interim response providing the controlled number HQ-2015-0699 and assigning the request to the Office of the Associate Under Secretary

¹ Plaintiff erroneously identified the document as “WPN”; the correct acronym is “WNP”.

for the Office of Environment, Health, Safety and Security, waiving fees, and denying the request for expeditious processing. ECF No. 1, 23-24, Exhibit A; Chalk Decl. ¶ 8 and Exhibit B.

4. Within DOE, staff within the Office of the Associate Under Secretary for Environment, Health, Safety and Security processed Plaintiff's FOIA request and determined that portions of the one responsive document contained equities from the Department of State ("DOS"). Chalk Decl. ¶ 14.

5. DOS did not receive a FOIA request from Plaintiff for the document at issue in this litigation. Stein Decl. ¶ 5.

6. On March 20, 2015, DOE referred for consultation the sole document responsive to Plaintiff's FOIA request to DOS for review and response to the DOE, and DOS assigned this control Number P-2015-07312. Stein Decl. ¶ 6.

7. Within DOS, the Office of Information Programs and Services, among other responsibilities, responds to records access requests made by other government agencies when information is sought from it under FOIA and provides national security classification management and declassification review. Stein Decl. ¶ 2.

8. DOS reviewed the responsive document and requested certain withholdings under Exemption 1 and returned the pages to DOE on May 8, 2015. Stein Decl. ¶ 7.

9. On August 20, 2015, DOE completed the processing of Plaintiff's FOIA Request and released the two-page document to Plaintiff. ECF No. 1, 29-30, Exhibit B; Chalk Decl. Exhibit C.

10. Specifically, the two pages were released in part. ECF No. 1, 29-30, Exhibit B; Chalk Decl. ¶ 9 and Exhibit C.

11. By letter dated August 25, 2015, Plaintiff submitted an appeal of DOE's response to DOE's Office of Hearings and Appeals, challenging the redactions. ECF No. 1, ¶ 11; Chalk Decl. ¶ 10 and Exhibit D.

12. DOE denied Plaintiff's administrative appeal by letter dated February 12, 2016, and an attached Decision and Order, citing FOIA Exemptions 1 and 7(E). ECF No. 1, 31-37, Exhibit C; Chalk Decl. ¶ 11 and Exhibit E.

INFORMATION PARTIALLY WITHHELD UNDER EXEMPTION (b)(1)

13. DOE withheld classified information pursuant to 5 U.S.C. § 552(b)(1) after coordinating its review with DOS. Chalk Decl. ¶ 14; Stein Decl. ¶ 15.

14. The withheld information was properly classified pursuant to Executive Order 13526 and continues to warrant protection because DOS has not previously authorized or officially acknowledged the public release of this information and its release could reasonably be expected to damage national security. Stein Decl. ¶ 9, 14.

15. The information withheld pursuant to 5 U.S.C. § 552(b)(1) within the document identified as "Guidance on Release of Information Relating to the Potential for an Israeli Nuclear Capability" in DOS's *Vaughn* index is currently and properly classified at the SECRET classification level because disclosure of this information could reasonably be expected to cause serious damage to the national security. Stein Decl. ¶ 16-17; Chalk Decl. ¶ 15.

16. Disclosure of the classified information in the guidance document could "harm[] diplomatic relations between the United States and Israel through the release of information that has substantial implications for Israel's security, and by upsetting the geopolitical security situation in the Middle East region, which represents a longstanding security interest of the United States." Stein Decl. ¶ 17.

INFORMATION PARTIALLY WITHHELD UNDER EXEMPTION (b)(7)

17. DOE asserts exemption 5 U.S.C. § 552(b)(7)(E) to withhold information in the one responsive document on the basis that it “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.” Chalk Decl. ¶ 16.

18. The withheld information 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 National Security Information (NSI).” Chalk Decl. ¶ 17.

19. “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.

20. Release of this information “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. 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.*

CONCLUSION

21. The sole responsive document was carefully reviewed both prior to the initial production and again now in preparation of DOE's summary judgment motion papers for reasonable segregation of non-exempt information, and it has been determined that no segregation of meaningful information in the redacted document can be made without disclosing information warranting protection under FOIA. Chalk Decl. ¶¶ 14-15, 21; Stein Decl. ¶¶ 7, 14, and 18.

Dated: July 26, 2018

Respectfully Submitted,

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