

**United States Department of Energy
Office of Hearings and Appeals**

In the Matter of Shawn Hughes)
)
Filing Date: April 13, 2015) Case No.: FIA-15-0017
)
_____)

Issued: May 4, 2015

Decision and Order

On April 13, 2015, Mr. Shawn Hughes (Appellant) filed an Appeal from a determination issued to him by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) (FOIA Request No. 14-00223-H). In its determination, the NNSA responded to a request filed by Mr. Hughes under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the NNSA to release those portions of the requested records it redacted pursuant to Exemption 3 of the FOIA, or 5 U.S.C. § 552(b)(3).

I. Background

On July 2, 2014, Mr. Hughes submitted a FOIA request to the DOE seeking “a drawing of the B83 ballistic (external) casing, giving dimensions with good detail, and locating all openings, connectors, ports, etc. on the body with some specificity.” Request from Shawn Hughes to DOE dated July 2, 2014. DOE headquarters transferred the request to the NNSA. Letter from Pamela Arias-Ortega, Denying Official, to Shawn Hughes dated April 9, 2015 (Determination Letter). On January 20, 2015, the NNSA sent the Appellant a determination letter stating that the NNSA had located nine responsive documents at Sandia National Laboratory. Letter from Pamela Arias-Ortega, Denying Official, to Shawn Hughes dated January 20, 2015. The NNSA attached all nine documents but redacted them in their entirety pursuant to 5 U.S.C. § 552(b)(3) and 5 U.S.C. § 552(b)(6), or Exemptions 3 and 6 of the FOIA. *See id.* With respect to Exemption 3, which permits agencies to withhold information that is exempted from disclosure by another statute, the NNSA cited to the International Traffic in Arms Regulations, 22 C.F.R. Parts 120-130, as well as to 10 U.S.C. § 140(c) and 32 C.F.R. Part 250. *Id.*

Mr. Hughes appealed the NNSA’s determination to this office on February 2, 2015. Letter from Shawn Hughes to the Office of Hearings and Appeals dated February 2, 2015. While the appeal was pending, the NNSA withdrew its determination letter, stating that it needed to revise its justification for withholding information under Exemption 3. Letter from Poli A. Marmolejos,

Director, Office of Hearings and Appeals, to Shawn Hughes dated February 27, 2015.¹ On April 9, 2015, the NNSA issued a new determination letter attaching the same nine documents, redacted in their entirety, and again citing Exemptions 3 and 6 as authority for the redactions. Determination Letter. However, the new determination letter revised the legal basis for withholding information under Exemption 3. The letter stated that sections 91 and 92 of the Atomic Energy Act, or 42 U.S.C. §§ 2121-22, as well as an NNSA policy statement on nuclear weapon-related import and export activities, provided the statutory authority necessary to apply Exemption 3. *Id.*; *see also* NNSA Policy Letter, NAP-23, “Atomic Energy Act Control of Import and Export Activities,” approved December 13, 2012 (NNSA Policy Letter).

Mr. Hughes filed this Appeal with the OHA on April 13, 2015. Letter from Shawn Hughes to the Office of Hearings and Appeals dated April 13, 2015 (Appeal Letter). In his Appeal, Mr. Hughes contends that neither the NNSA Policy Letter, nor sections 91 or 92 of the Atomic Energy Act, provides a legal basis for withholding the drawing under Exemption 3. *Id.*²

II. Analysis

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). We construe these exemptions narrowly to maintain the FOIA’s goal of broad disclosure.³ *See Dep’t of the Interior v. Klamath Water Users Prot. Ass’n.*, 532 U.S. 1, 8 (2001) (citation omitted). The DOE has the burden of showing that a FOIA exemption is applicable. *See* 5 U.S.C. § 552(a)(4)(B).

Exemption 3 of the FOIA provides that an agency may withhold information “specifically exempted from disclosure by statute.” 5 U.S.C. § 552(b)(3). Accordingly, the authority for an agency to invoke Exemption 3 must come from a statute, not some other rule or regulation. *See Founding Church of Scientology v. Bell*, 603 F.2d 945, 951-952 (D.C. Cir. 1979). Moreover, the statute must be one that “(A)(i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld” 5 U.S.C. § 552(b)(3); *see also* 10 C.F.R. § 1004.10(b)(3). The D.C. Circuit Court of Appeals has interpreted these provisions as requiring that the statute “explicitly deal with public disclosure.” *Reporters Comm. for Freedom of the Press v. U.S. Dep’t of Justice*, 816 F.2d 730, 736 (D.C. Cir. 1987) *rev’d on other grounds*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

Based on the foregoing, the NNSA Policy Letter cited in the determination letter does not provide authority for the withholding of the documents under Exemption 3. The question before

¹ The OHA received another appeal from Mr. Hughes on April 6, 2015, but dismissed that appeal because the NNSA had not yet issued a new determination. Letter from Poli A. Marmolejos, Director, Office of Hearings and Appeals, to Shawn Hughes dated April 7, 2015.

² Mr. Hughes does not appeal the NNSA’s decision to withhold portions of the documents under Exemption 6. Appeal Letter.

³ OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://energy.gov/oha/foia-cases>.

us is whether the statutory provisions referred to in the determination letter, 42 U.S.C. §§ 2121-22, offer a legal basis for withholding the documents. We have been unable to determine that they do. Section 91 of the Atomic Energy Act provides the Executive Branch with the authority to harness atomic energy for military purposes. *See* 42 U.S.C. § 2121. Section 92 prohibits individuals from engaging in various activities related to “any atomic weapon.” *See* 42 U.S.C. § 2122. The Act defines “atomic weapon” as “any device utilizing atomic energy. . . .” 42 U.S.C. § 2014(d).

We contacted the NNSA and asked them to clarify how Sections 91 and 92 of the Atomic Energy Act explicitly prevent the public disclosure of information, such as the drawing requested by Mr. Hughes. E-mail from Gregory Krauss, OHA, to Ida Hernandez, NNSA, et al. dated April 17, 2015. The NNSA did not specifically articulate how those two statutory provisions justify the withholding of the material requested. We must therefore remand this matter to the NNSA for a new determination. In that determination, the NNSA may either release those portions of the documents redacted pursuant to Exemption 3 or provide an adequate justification for withholding those portions.

It Is Therefore Ordered That:

(1) The Appeal filed by the Appellant, Case No. FIA-15-0017, is hereby remanded.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

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Poli. A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 4, 2015