

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

In the Matter of Yogi Shan)
)
Filing Date: February 17, 2016)
)
) Case No. FIC-16-0001
_____)

Issued: September 29, 2016

Decision and Order

Yogi Shan filed an appeal from a determination that the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) issued on January 29, 2016 (Request No. 13-00258-H). In that determination, NNSA released a document responsive to a request that Mr. Shan filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld portions of that document under Exemptions 3 and 6 of the FOIA. This appeal, if granted, would require the DOE to release the portions of that document that were withheld from disclosure under Exemption 3.

I. Background

On September 9, 2013, Mr. Shan filed a FOIA request seeking copies of five specified documents. On January 29, 2016, NNSA responded to that request, releasing one of those documents, “LRL Warheads for Advanced Spartan,” dated October 31, 1968, with redactions, which it justified pursuant to FOIA Exemptions 3 and 6. Determination Letter from Jane Summerson, Authorizing and Denying Official, NNSA, to Yogi Shan (Jan. 29, 2016).

Mr. Shan challenged NNSA’s determination to withhold information in an Appeal that he filed on February 17, 2016. We issued a decision regarding the information withheld from the document pursuant to Exemption 6 on February 29, 2016 (Case No. FIA-16-0019). In his appeal, Mr. Shan contends that the information withheld pursuant to Exemption 3 should be reviewed for possible disclosure because the document is over 45 years old and concerns a project that was ultimately cancelled. He also contends that “the X-ray output of the warheads has been covered in openly published papers.” Because, as explained below, the information withheld under Exemption 3 is classified information, we referred the portion of the appeal that challenged those withholdings to the Office of Environment, Health, Safety and Security (EHSS), which reviewed the Exemption 3 withholdings to determine whether they were properly classified under current guidance. We have now received EHSS’s

report.

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). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b). We must construe the FOIA exemptions narrowly to maintain the FOIA's goal of broad disclosure. *Dep't of the Interior v. Klamath Water Users Prot. Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). The agency has the burden to show that information is exempt from disclosure. *See* 5 U.S.C. § 552(a)(4)(B). To the extent permitted by law, the DOE will release documents exempt from mandatory disclosure under the FOIA whenever it determines that disclosure is in the public interest. 10 C.F.R. § 1004.1.

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . if that statute – (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* 10 C.F.R. § 1004(b)(3). We have previously determined that the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-2296, is a statute to which Exemption 3 is applicable. *See, e.g., Greg Marlowe*, Case No. FIC-13-0001 (2013).

The Associate Under Secretary for Environment, Health, Safety and Security is the official who makes the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Order 475.2B, § 5(b)(7) (Restricted Data and Formerly Restricted Data per the Atomic Energy Act). Upon referral of this appeal from the Office of Hearings and Appeals, the Associate Under Secretary reviewed the document titled "LRL Warheads for Advanced Spartan," focusing on the applicability of Exemption 3 to its contents.

The Associate Under Secretary reported the results of his review in a memorandum dated July 29, 2016. In that review, he explained that the requested document pertains to the "LRL Warheads for Advanced Spartan" project and contains sensitive classified information related to nuclear weapons design. He determined that, based on current DOE classification guidance, the information previously withheld as Restricted Data, classified as Secret, is still properly classified as such pursuant to the Atomic Energy Act. The denying official for these withholdings is Matthew B. Moury, Associate Under Secretary for Environment, Health, Safety and Security, Department of Energy.

Based on the Associate Under Secretary's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the document titled "LRL

Warheads for Advanced Spartan” pursuant to Exemption 3 of the FOIA. Although a finding of exemption from mandatory disclosure generally requires our subsequent consideration of the public interest in releasing the information, such consideration is not permitted where, as in the application of these exemptions, the disclosure is prohibited by statute. *See, e.g., The National Security Archive*, OHA Case No. TFC-0002 (June 1, 2011). Therefore, the previously withheld portions of the document titled “LRL Warheads for Advanced Spartan,” must continue to be withheld from disclosure. Accordingly, Mr. Shan’s Appeal will be denied.

It Is Therefore Ordered That:

(1) The Appeal filed by Yogi Shan on February 17, 2016, Case No. FIC-16-0001, is hereby denied.

(2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 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.

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