



two of the three documents might be released.\* Specifically, Dr. Burr questioned whether the redacted information, which was produced over 40 years ago, could cause harm to United States national security or foreign relations. He requested that, with respect to information regarding the United Kingdom, the DOE consult with the British Embassy, if it had not yet done so. Finally, he argued that the DOE and the State Department have declassified sensitive documents concerning similar meetings and the general topic of the request. Appeal at 1. Because, as explained below, the information withheld under Exemption 1 is classified information, we referred the Appeal that challenged those withholdings to the Office of Environment, Health, Safety and Security (EHSS), which reviewed the 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 1 of the FOIA provides that an agency may exempt from disclosure matters 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); *accord* 10 C.F.R. § 1004.10(b)(1). Executive Order 13526 is the current Executive Order that provides for the classification, declassification and safeguarding of national security information (NSI). When properly classified under this Executive Order, NSI is exempt from mandatory disclosure under Exemption 1. 5 U.S.C. § 552(b)(1); *see* 10 C.F.R. § 1004.10(b)(1).

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

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\* Dr. Burr did not indicate which two documents, of the three documents released in the March 3, 2016, determination letter, he wished to have reviewed on appeal. The Office of Classification informed this Office that, because the first document contained a single redaction—the title of an enclosure to a memorandum—they determined that Dr. Burr intended to direct his appeal to the remaining two documents, which each contained several extensive redactions. Memorandum of Telephone Conversation between Nicholas Prospero, Office of Environment, Health, Safety and Security, and William M. Schwartz, Staff Attorney, Office of Hearings and Appeals (December 12, 2016).

release of classified information. DOE Order 475.2B § 5(b)(8) (NSI per Executive Order 13526). Upon referral of this appeal from the Office of Hearings and Appeals, the Associate Under Secretary reviewed the second and third documents listed above, focusing on the applicability of Exemption 1 to their contents.

The Associate Under Secretary reported the results of his review in a memorandum dated November 9, 2016. In that review, he explained that the documents identified as responsive to the National Security Archive's request concern Foreign Government Information pertaining to the gaseous centrifuge separation process. He determined that, based on current DOE classification guidance and after coordination with the United Kingdom, most of the information previously withheld as NSI, classified as Confidential, is still properly classified as such pursuant to Executive Order 13526. The information that the Associate Under Secretary identified as NSI falls within section 1.4(b) of the Executive Order, which exempts from public disclosure information that reveals "foreign government information." Memorandum of Telephone Conversation between Nicholas Prospero, Office of Environment, Health, Safety and Security, and William M. Schwartz, Staff Attorney, Office of Hearings and Appeals (December 12, 2016). The Associate Under Secretary has, however, determined that a portion of the third document, Report on Foreign Travel, that was previously withheld as NSI may now be released. The remaining withheld portions of that document and all previously withheld portions of the second document, Tripartite Centrifuge Programme – Classification Guide, are still properly classified and must continue to be withheld from disclosure. 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 Executive Order 13526 requires the DOE to continue withholding portions of the two documents reviewed on appeal pursuant to Exemption 1 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 this exemption, the disclosure is prohibited by statute. *See, e.g., The National Security Archive*, OHA Case No. TFC-0002 (June 1, 2011). Therefore, those portions of the two documents that the Associate Under Secretary has now determined to be properly identified as NSI must continue to be withheld from disclosure. Nevertheless, the Associate Under Secretary has reduced the extent of the information previously redacted from the Report on Foreign Travel to permit releasing the maximum amount of information consistent with national security considerations. Accordingly, the National Security Archive's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on March 11, 2106, Case No. FIC-16-0003, is hereby granted to the extent set forth in paragraph (2) below and denied in all

other respects.

(2) Newly redacted versions of the responsive documents previously released in a determination issued on March 3, 2016, will be provided to the National Security Archive.

(3) 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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Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: December 16, 2016