

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

In the Matter of Eric Schlosser )  
 )  
Filing Date: August 10, 2010 )  
 ) Case No. TFC-0005  
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Issued: March 15, 2012

**Decision and Order**

Eric Schlosser filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on July 7, 2010. In that determination, NNSA denied in part a request for information that Mr. Schlosser had submitted on September 24, 2008, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. NNSA withheld information that was responsive to the request after it determined that the information was protected from mandatory disclosure under two provisions of the FOIA. This Appeal, if granted, would require the DOE to release identified portions of those documents responsive to Mr. Schlosser’s request that were withheld from disclosure due to their classified nature.

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).

**I. Background**

On September 24, 2008, Mr. Schlosser requested 12 documents from the Sandia National Laboratories archives. On July 7, 2010, NNSA issued a determination in which it released one of the requested documents in its entirety, released eight documents with portions withheld pursuant to either Exemption 3 or Exemption 6 of the FOIA, or both exemptions, and forwarded the remaining three documents to the Department of Defense for its review. Mr. Schlosser challenged certain withholdings taken pursuant to Exemption 3 in an Appeal

filed on August 10, 2010.<sup>1</sup> In his Appeal, Mr. Schlosser contends that specified portions of six of the documents contain information withheld pursuant to Exemption 3 that should be released to him, because they relate to nuclear weapons no longer contained in our arsenal and safety issues that no longer exist, having been corrected through advances in design and technology. Because, as explained below, Exemption 3 concerns classified information, we referred the Appeal to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 3 withholdings to determine whether they were properly classified under current guidance. We have now received HSS's report.

## II. Analysis

Exemption 3 of the FOIA provides that an agency may withhold from disclosure information "specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matter to be withheld." 5 U.S.C. § 552(b)(3); *see* 10 C.F.R. § 1004.10(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., National Security Archive*, Case No. TFA-0115 (2006).<sup>2</sup>

The Director of the Office of Security has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). This authority has now been delegated to the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security (Deputy Chief). Upon referral of this Appeal from the Office of Hearings and Appeals, the Deputy Chief reviewed those pages of six documents that Mr. Schlosser identified as containing information the withholding of which he was challenging in his Appeal.

The Deputy Chief reported the results of his review in a memorandum dated March 7, 2012. In that review, he determined that, based on current DOE classification guidance, some of the information previously withheld as classified information may be released. Much of the information previously withheld as classified information, however, is still properly classified, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as properly classified relates to design and design-related information concerning nuclear weapons that is classified as Restricted Data (RD) and Formerly Restricted Data (FRD). RD and FRD are forms of classified information the

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<sup>1</sup> Mr. Schlosser clarified that he does not challenge the withholdings taken pursuant to Exemption 6. Memorandum of Telephone Conversation between Mr. Schlosser and William M. Schwartz, Attorney-Examiner, Office of Hearings and Appeals (OHA), August 10, 2010.

<sup>2</sup> Decisions issued by the Office of Hearings and Appeals are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine at <http://www.oha.doe.gov/search.htm>.

withholding of which is required under the Atomic Energy Act, and are therefore exempt from disclosure under Exemption 3.

The Deputy Chief has provided this Office with copies of the pages that were reviewed, from which the RD and FRD have been deleted. Beside each deletion, "DOE (b)(3)" has been written in the margin of the page. The denying official for these withholdings is William A. Eckroade, Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that the Atomic Energy Act requires the DOE to continue withholding portions of the six documents 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 Exemption 3, the disclosure is prohibited by statute. Therefore, those portions of the six documents that the Deputy Chief has now determined to be properly identified as RD or FRD must be withheld from disclosure. Nevertheless, the Deputy Chief has reduced the extent of the information previously deleted to permit releasing the maximum amount of information consistent with national security considerations.

In view of the Deputy Chief's findings, we will remand the reviewed portions of the six documents to NNSA. After deleting from those portions any information that it initially withheld from Mr. Schlosser pursuant to Exemption 6 of the FOIA, NNSA should release appropriately redacted versions of those portions to Mr. Schlosser. Accordingly, Mr. Schlosser's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Eric Schlosser on August 10, 2010, Case No. TFC-0005, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The National Nuclear Security Administration shall release to Mr. Schlosser the newly redacted portions of six documents that were attached to a memorandum issued by the Principal Deputy Chief for Mission Support Operations, Office of Health, Safety and Security, dated March 7, 2012, after further redacting any information initially deleted from those portions pursuant to Exemption 6 of the Freedom of Information Act.

(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.

Poli A. Marmolejos  
Director  
Office of Hearings and Appeals

Date: March 15, 2012