United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Martin Pfeiffer	)		
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Filing Date: July 8, 2019	)	Case No.:	FIA-19-0024
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Issued: July 17, 2019

Decision and Order

On July 8, 2019, Martin Pfeiffer (Appellant) appealed a Determination Letter issued to him from the Department of Energy's (DOE) National Nuclear Security Administration (NNSA) regarding Request No. FOIA 19-00125-EW. In that determination, NNSA responded to a request filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. NNSA refused to acknowledge whether responsive records existed, citing DOE's "No Comment Policy" and the Atomic Energy Act of 1954. In this Decision, we deny the appeal.

I. BACKGROUND

On March 3, 2019, DOE received the Appellant's request for the following records:

> Reports, technical assessments, analyses, presentations, and similar records related to the use or usability of non-metallic plutonium in nuclear explosives. Please be sure to include as a target of your search records examining or discussing the use or usability of plutonium oxide(s) (e.g., PuO2) for nuclear explosive purposes.

FOIA Request at 1 (March 3, 2019). On April 30, 2019, NNSA responded to the request by neither confirming nor denying the existence of responsive records pursuant to DOE's "No Comment Policy" (DOE Classification Bulletin GEN-16).[1] This response is commonly referred to as a "Glomar" response.[2] Mr. Pfeiffer timely appealed this response, alleging that the application of the Glomar doctrine was overbroad, that the language of his request was read narrowly and prejudicially in order to justify application of the Glomar doctrine, and that the DOE has waived

[1] The "No Comment Policy" prohibits the confirmation of classified status information. The policy can be found at https://www.energy.gov/sites/prod/files/2016/05/f31/GEN-16-Rev2-09-23-2014-with-memo.pdf.

[2] The Glomar doctrine derives its name from the Hughes Glomar Explorer, a submarine-retrieval ship that was the subject of the FOIA request at issue in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976).

its ability to use a Glomar response because "the potential nuclear explosive usability and characteristics of non-metallic forms of plutonium, including PuO_2, has been admitted and discussed implicitly and explicitly by the Department of Energy in the past as well as being obvious from data released by the Department of Energy about the nuclear characteristics of various non-metallic forms of plutonium." Appeal at 2 (July 8, 2019). In support of his allegations, the Appellant cited three papers, two discussing whether PuO_2 could be used in weapons and one that included open-source DOE information about the basic nuclear characteristics of PuO_2 from which the Appellant concluded that the nuclear explosive usability of some non-metallic forms of plutonium is "obvious." *Id.*

II. ANALYSIS

Agencies use Glomar responses in a variety of instances, including where, as here, the existence or non-existence of requested records is itself a classified fact exempt from disclosure under Exemption 3 of the FOIA. *See Poulsen v. DOD*, 373 F. Supp. 3d 1249, 1267 (N.D. Cal. 2019); *Gardels v. Cent. Intelligence Agency*, 689 F.2d 1100, 1103 (D.C. Cir. 1982); *Arlie B. Siebert*, OHA Case No. TFA-0146 (Sept. 21, 2006). FOIA Exemption 3 allows nondisclosure for matters that are specifically exempted from disclosure by a statute so long as the statute (a) unequivocally requires the matter to be withheld from the public or (b) establishes particular criteria or types of matters for withholding. 5 U.S.C. § 552(b)(3); 10 C.F.R. § 1004.10(b)(3).

A. Glomar Response Pursuant to the Atomic Energy Act of 1954

The Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq*., *amended by* Pub. L. No. 115-439 (2019), defines "Restricted Data" as "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy," not including "data declassified or removed from the Restricted Data category pursuant to section 2162 of this title." 42 U.S.C. § 2014(y); Pub. L. No. 115-439 § 11(y). It defines "Atomic Weapon" as "any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device." 42 U.S.C. § 2014(d); Pub. L. No. 115-439 § 11(d). The AEA allows for disclosure of Restricted Data to an individual only if (1) the Office of Personnel Management has "made an investigation and report to the [Atomic Energy] Commission on the character, associations, and loyalty of such individual, and the Commission shall have determined that permitting such person to have access to Restricted Data will not endanger the common defense and security;" or (2) the Commission has "accept[ed] an investigation and report on the character, associations, and loyalty of an individual made by another Government agency which conducts personnel security investigations, provided that a security clearance has been granted to such individual by another Government agency based on such investigation and report." Pub. L. No. 115-439 § 145(a), (c). The AEA thus establishes particular criteria that must be withheld from the public. *See also Smith v. CIA*, 246 F. Supp. 3d 117, 127 (D.D.C. 2017) (applying Exemption 3 pursuant to the AEA).

The Appellant requested detailed records related to the use or usability of non-metallic plutonium in nuclear explosives. "Nuclear explosives" may be reasonably interpreted as a weapon whose

destructive power derives from nuclear—*i.e.* atomic—energy. This interpretation is supported by the Appellant's citations to papers discussing the use of non-metallic plutonium in nuclear weapons. Accordingly, I find that the Appellant's use of the term "nuclear explosives" is reasonably interpreted to fall within the definition of "Atomic Weapon" as set forth by the AEA.

The records requested by the Appellant included "reports, technical assessments, analyses, presentations, and similar records" related to the use of non-metallic plutonium, especially PuO_2 in atomic weapons. Whether this substance can be used in an atomic weapon is an essential element of the design and manufacture of such weapon. Accordingly, I find that the records requested by the Appellant fall within the definition of "Restricted Data" as set forth by the AEA.

Though the Appellant characterizes DOE's interpretation of his request as "narrow," I find that it was a reasonable interpretation. Indeed, it is difficult to divine a different interpretation that would not merit the same response by DOE. DOE's response to its reasonable interpretation of the requests was not overbroad, but, in fact, statutorily required.

For the foregoing reasons, I find that DOE, through its "No Comment Policy," properly applied a Glomar response pursuant to the AEA.

B. Waiver

An agency waives its ability to use a Glomar response when it officially acknowledges the existence or nonexistence of records responsive to the specific information in the FOIA request. *Poulsen*, 373 F. Supp. 3d at 1267–68. An agency is considered to have officially acknowledged this when (a) the requested information is as specific as the previously released information; (b) the requested information matches the previously released information; and (c) the requested information has already been made public through an official and documented disclosure. *James Madison Project v. DOJ*, 302 F. Supp. 3d 12, 20 (D.D.C. 2018) (citing *Fitzgibbon v. CIA*, 911 F.2d 755, 765 (D.C. Cir. 1990)).

In *Wolf v. CIA*, a historian requested all records the CIA had on a certain foreign national. 473 F.3d 370, 373 (D.C. Cir. 2007). The CIA responded by neither confirming nor denying the existence of any records regarding that foreign national. *Id.* The historian argued that the CIA had already officially acknowledged such records' existence when its director read dispatches related to the foreign national during his testimony before a congressional subcommittee, and therefore could not assert a Glomar response. *Id.* at 379. The court sided narrowly with the historian, holding that the CIA's official acknowledgement waiver related only to the existence or nonexistence of the responsive records disclosed in the congressional testimony. *Id.* Consequently, the court found that the historian was entitled to the disclosure of information as to whether those records existed, but not as to whether any other records existed. *Id.*

The lesson from *Wolf* is that waiver applies to specific documents, not to categories of documents. Though the Appellant can point to documents that he believes constitute waiver, the release of those documents do not constitute official acknowledgement waiver for any other documents. Furthermore, the Appellant already has access to the documents he cited, rendering moot any effort to compel the DOE to produce them in response to a FOIA request. *United States DOJ v. Tax*

Analysts, 109 S. Ct. 2841, 2852 (1989) (stating that "an agency need not disclose materials that it has previously released.").

For the foregoing reason, I find no official acknowledgement waiver of DOE's ability to use a Glomar response in responding to Appellant's request.

III. ORDER

It is hereby ordered that the Appeal filed on July 8, 2019, by Martin Pfeiffer, No. FIA-19-0024, is denied.

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 one's right to pursue litigation. OGIS may be contacted in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS, College Park, MD 20740
Web: https://www.archives.gov/ogis Email: ogis@nara.gov
Telephone: 202-741-5770 Fax: 202-741-5769 Toll-free: 1-877-684-6448

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