

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

In the Matter of Greg Marlowe)
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Filing Date: June 21, 2013)
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Case No. FIC-13-0001

Issued: December 9, 2013

Decision and Order

Greg Marlowe filed an Appeal from a determination that the National Archives and Records Administration (NARA) issued on April 25, 2013. In that determination, NARA denied in part a request for information that Mr. Marlowe had submitted on August 12, 2009, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. After reviewing the documents that NARA identified as responsive to Mr. Marlowe’s request, the Department of Energy (DOE) withheld portions of those documents after it determined that the withheld information was protected from mandatory disclosure under the FOIA. This Appeal, if granted, would require the DOE to release those portions of the documents that were initially withheld from disclosure.

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

Mr. Marlowe requested information from NARA about a patent awarded to W.F. Libby for his work involving uranium enrichment. After identifying documents responsive to Mr. Marlowe’s request, NARA forwarded those documents to the DOE for a review regarding their releasability under the FOIA. On April 25, 2013, NARA issued a determination in which it released one responsive document in its entirety and seven documents with portions withheld pursuant to Exemption 3 of the FOIA, which was invoked to protect from public disclosure information classified as Restricted Data under the Atomic Energy Act of 1954. Mr. Marlowe challenged the withholdings taken pursuant to Exemption 3 in an Appeal filed

on June 21, 2013.¹ In his Appeal, Mr. Marlowe contends that information withheld pursuant to Exemption 3 should now be declassified and released to him. 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 information withheld under Exemption 3 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 . . . 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 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).²

The Chief Health, Safety, and Security Officer, HSS, has been delegated the authority to make the final determination for the DOE regarding FOIA appeals involving the release of classified information. DOE Delegation Order No. 00-024.00B, Section 1.11 (June 9, 2009). This authority has been redelegated to the Principal Deputy Chief for Mission Support Operations, HSS (Deputy Chief). Redelegation Order No. 00-024-02A, Section 1.9. Upon referral of this Appeal from the Office of Hearings and Appeals, the HSS's Office of Classification reviewed the information withheld from disclosure to Mr. Marlowe.

The Deputy Chief reported the results of his review in a memorandum dated November 27, 2013. In that review, he determined that, based on current DOE classification guidance, some of the information previously withheld as classified information may be released. He also determined that 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 concerns early research design-related information pertaining to the United States barrier technology used in uranium enrichment by gaseous diffusion. This information continues to be classified as Confidential Restricted Data (RD). RD is a form of classified information the withholding of which is required under the Atomic Energy Act, and is therefore exempt from disclosure

¹ We received Mr. Marlowe's initial submission on June 7, 2013. That submission lacked a copy of NARA's April 25, 2013, determination letter, which is required by the DOE's regulations governing FOIA appeals, at 10 C.F.R. § 1004.8(b). We obtained a copy of that letter from NARA on June 21, 2013, at which time we deemed the appeal to be perfected.

² Decisions issued by the Office of Hearings and Appeals (OHA) after November 19, 1996, are available on the OHA website located at <http://www.energy.gov/oha>.

under Exemption 3.

The Deputy Chief has provided this Office with copies of the seven documents from which the RD has 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 documents responsive to Mr. Marlowe's request, 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 documents that the Deputy Chief has now determined to be properly identified as RD 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. Accordingly, Mr. Marlowe's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Greg Marlowe on June 21, 2013, Case No. FIC-13-0001, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of the seven documents from which information was initially withheld from Mr. Marlowe pursuant to Exemption 3 of the Freedom of Information Act will be provided to Mr. Marlowe.

(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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Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, MD 20740

Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5759
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

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