

“Memorandum and Options Paper” originating with the National Security Council. *Id.* NNSA identified the second document as a March 17, 1978, letter from Mr. Harold M. Agnew to Dr. Frank Press (the Agnew Letter). *Id.* NNSA transferred the first document to the National Security Council for processing. *Id.* With respect to the Agnew Letter, NNSA found that almost all the material in the document was exempt from disclosure under Exemption 1 of the FOIA as well as the deliberative process privilege of Exemption 5. *Id.* NNSA further determined that those portions of the Agnew Letter not falling under any exemption were “so inextricably intertwined with the exempted information” that there was no meaningful information left to release. *Id.* NNSA therefore withheld the document in its entirety. *Id.*

In its Appeal, the Appellant challenges the withholding of information in the Agnew Letter under both Exemptions 1 and 5. Appeal from William Burr, National Security Archive, to Poli Marmolejos, Office of Hearings and Appeals, dated February 17, 2016 (Appeal). We issued a decision regarding the information withheld from the Agnew Letter pursuant to Exemption 5 on March 9, 2016 (Case No. FIA-16-0020). With respect to NNSA’s application of Exemption 1, the Appellant contends that the information withheld pursuant to that exemption should be reviewed for possible disclosure because “previously declassified information” published by the State Department “should enable the Department of Energy to declassify some of the information from the Agnew letter.” Appeal at 1. Because NNSA determined that the information withheld under Exemption 1 was classified, 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 1 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 exempts 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 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 Agnew Letter, focusing on the applicability of Exemption 1 to its contents.

The Associate Under Secretary reported the results of his review in a memorandum dated March 23, 2016. In that review, he determined that, based on current DOE classification guidance, much of the information previously withheld as NSI is still properly classified as NSI pursuant to Executive Order 13526. The information that the Associate Under Secretary identified as NSI concerns nuclear explosion monitoring and falls within section 1.4(g) of the Executive Order, which exempts from public disclosure information that reveals “vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans or protection services relating to the national security.” The Associate Under Secretary has provided this Office with a copy of the Agnew Letter from which the NSI has been deleted. Beside each deletion, “DOE (b)(1)” has been written in the margin of the document. 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 Agnew Letter. 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 1, the disclosure is prohibited by executive order. Therefore, those portions of the Agnew Letter that the Associate Under Secretary has now determined to be properly identified as NSI must be withheld from disclosure. Nevertheless, the Associate Under Secretary 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 Associate Under Secretary’s findings, we are remanding the Agnew Letter to NNSA for a new review. In that review, NNSA must consider whether it should withhold any portions of the Agnew Letter no longer determined to be NSI that were previously withheld from the Appellant. After completing its review, NNSA should either release those portions of the letter no longer identified as NSI or issue a new determination that provides adequate justification for withholding any of that information. Accordingly, the National Security Archive’s Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The portion of the Appeal filed by the National Security Archive on February 18, 2016, that concerns the application of Exemption 1, Case No. FIC-16-0002, 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 review the redacted version of the March 17, 1978, letter from Mr. Harold M. Agnew to Dr. Frank Press, which bears markings indicating where all national security information has been properly deleted. Upon completing its review, NNSA shall either release to the National Security Archive those portions of the letter no longer identified as National Security Information or issue a new determination that provides adequate justification for withholding any of that information.

(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.

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 the right to pursue litigation. FOIA requesters may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
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Web: ogis.archives.gov
E-mail: ogis@nara.gov
Telephone: 202-741-5770
Fax: 202-741-5769
Toll-free: 1-877-684-6448

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: April 7, 2016