

challenges of the Exemption 3 withholdings. *Environmental Defense Institute*, Case No. TFA-0465 (2011).^{*} In its Appeal, EDI contends that the information withheld pursuant to Exemption 3 was improperly withheld from disclosure, in light of the public's "overriding right to know what hazards the [Advanced Test Reactor] represents." Because, as explained below, the withheld information was determined to be Unclassified Controlled Nuclear Information (UCNI), we referred the portion of the Appeal that challenged the withholdings under Exemption 3 to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 3 withholdings to determine whether they were properly identified as UCNI under current guidance. We have now received HSS's report.

II. Analysis

Exemption 3 of the FOIA provides for withholding material

- (3) 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; and
 - (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

5 U.S.C. § 552(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-0060 (2004) (and cases cited therein). Section 148 of the Atomic Energy Act directs the Department of Energy to issue regulations or orders to protect from unauthorized dissemination information that has been determined to contain UCNI. 42 U.S.C. § 2168(a). These regulations appear at 10 C.F.R. Part 1017.

The Director of the Office of Security (the Director) has been designated as the official who shall make the final determination for the DOE regarding FOIA appeals involving the release of classified information and UCNI. 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 the Upgraded Final Safety Analysis Report, focusing on the applicability of Exemption 3 to its contents.

The Deputy Chief reported the results of his review in a memorandum dated November 6, 2012. In that review, he determined that, based on current DOE UCNI guidance, much of

^{*} Decisions issued by the Office of Hearings and Appeals after November 19, 1996, are available on the OHA website located at <http://energy.gov/oha/office-hearings-and-appeals>.

the information previously withheld as UCNI does not qualify as UCNI. Some of the information previously withheld as UCNI, however, is still properly UCNI as defined in Section 148 of the Atomic Energy Act, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as UCNI concerns design and design-related operational information pertaining to the Advanced Test Reactor site layout, pumps, piping, valves, power supplies, and similar equipment, which if sabotaged, could cause extensive downtime, defeat of emergency or back-up systems, or a significant hazardous process material or radiation release. The Deputy Chief has provided this Office with a copy of the Upgraded Final Safety Analysis Report from which the UCNI information has been deleted. Beside or within each deletion, "DOE (b)(3) UCNI" has been written in the margin of the document. 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 Executive Order 13526 requires the DOE to continue withholding portions of the Upgraded Final Safety Analysis Report 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 Upgraded Final Safety Analysis Report that the Deputy Chief has now determined to be properly identified as UCNI 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 Upgraded Final Safety Analysis Report to Idaho for a new review. In that review, Idaho must consider whether it should withhold, under any other authority provided in the FOIA, any portions of the document not determined to be UCNI that were previously withheld from EDI. After completing its review, Idaho should either release those portions or issue a new determination that provides adequate justification for the withholding of any additional information from the version of the Upgraded Final Safety Analysis Report that it provides to EDI. EDI will have the opportunity to appeal that determination, if it so desires. Accordingly, EDI's Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Environmental Defense Institute on March 14, 2011, Case No. TFC-0009, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) The Idaho Operations Office shall review the redacted version of the "Upgraded Final Safety Analysis Report for the Advanced Test Reactor, Revision 19, Effective Date

08/03/10” that bears markings indicating where all Unclassified Controlled Nuclear Information has been properly deleted. Upon completing its review, the Idaho Operations Office shall either release to Environmental Defense Institute the redacted version of the document described above, or issue a new determination that provides adequate justification for the withholding of any additional information from the version it provides to Environmental Defense Institute.

(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: December 20, 2012