

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

In the Matter of the National Security Archive	)	
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Filing Date: May 12, 2011	)	
	)	Case No. TFC-0010
	)	

Issued: July 31, 2012

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**Decision and Order**

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The National Security Archive filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) issued on April 21, 2011. In that determination, NNSA denied in part a request for information that the National Security Archive had submitted on November 29, 2006, 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 the portions of the document responsive to the National Security Archive’s request that were withheld from disclosure under Exemption 1 of the FOIA.

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 November 29, 2006, the National Security Archive requested a number of documents concerning an interagency training exercise entitled “Mighty Derringer” that took place in December 1986. On April 21, 2011, NNSA issued a determination in which it released one document responsive to the request, with portions of that document withheld from disclosure pursuant to Exemptions 1 and 3 of the FOIA. The National Security Archive challenged NNSA’s determination to withhold information under Exemption 1 in an Appeal filed on May 12, 2011. In its Appeal, the National Security Archive contends that because “the scenario [underlying the exercise] was entirely hypothetical, declassification of more details may be possible without harm to national security.” Appeal at 1. Because, as explained below, Exemption 1 concerns classified information, we referred the portion of the Appeal

that challenged the withholdings under Exemption 1 to the Office of Health, Safety and Security (HSS), which reviewed the Exemption 1 withholdings to determine whether they were properly classified under current guidance. We have now received HSS's report.

## **II. Analysis**

Exemption 1 of the FOIA provides that an agency may exempt 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); 10 C.F.R. § 1004.10(b)(1).

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 "Mighty Derringer" document, focusing on the applicability of Exemption 1 to its contents.

The Deputy Chief reported the results of his review in a memorandum dated July 24, 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 as NSI by Executive Order 13526, and must continue to be withheld from disclosure. The information that the Deputy Chief identified as NSI 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 Deputy Chief has provided this Office with a copy of the "Mighty Derringer" document from which the NSI has been deleted. Beside or within each deletion, "DOE (b)(1)" 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 "Mighty Derringer" document pursuant to Exemption 1 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 1, the disclosure is prohibited by executive order. Therefore, those portions of the “Mighty Derringer” document that the Deputy Chief has now determined to be properly identified as NSI 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, the National Security Archive’s Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by the National Security Archive on May 12, 2011, Case No. TFC-0010, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) A newly redacted version of the document entitled “Exercise Mighty Derringer” will be provided to the National Security Archive.

(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: July 31, 2012