

November 6, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Michael Ravnitzky

Date of Filing: October 18, 2007

Case Number: TFA-0227

Michael Ravnitzky filed an Appeal from a determination issued by the Office of the Inspector General (IG) of the Department of Energy on September 26, 2007. In that determination, the IG denied in part a request for information that the Appellant had submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Mr. Ravnitzky is appealing the determination with respect to one of the documents the IG withheld in part. With respect to that document, the IG determined that the portions that were not released to Mr. Ravnitzky contained classified information. This Appeal, if granted, would require the DOE to release that document in its entirety.

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 March 14, 2006, Mr. Ravnitzky requested several IG audit reports. The IG released a number of the requested documents to Mr. Ravnitzky, but referred the remainder to the Office of Classification, Office of Health, Safety and Security, to determine whether the remaining documents, or any portions of them, needed to be withheld from disclosure due to their classified nature. After receiving the results of the Office of Classification's review, the IG issued a determination letter on September 26, 2007, in which it explained that it was withholding portions of seven of the requested documents pursuant to Exemptions 1, 2, and 3 of the FOIA. The IG explained in its determination letter that it invoked Exemption 1 to withhold information from public disclosure that is properly classified as National Security Information pursuant to Executive Order 12958, as amended.

On October 17, 2007, Mr. Ravnitzky filed an Appeal of the IG's determination letter with

this office, which was deemed perfected on October 18, 2007, when we obtained a copy of the determination letter. Mr. Ravnitzky limited the scope of his Appeal to those portions of a document entitled Audit Report: Control of Classified Matter at Paducah, dated July 2001 (DOE/IG-0515), that the IG had withheld under Exemption 1 of the FOIA.

In his Appeal, Mr. Ravnitzky contends that many of the portions redacted from the version provided to him concerned past events and their disclosure “would not cause serious harm to the national security”; moreover, “their release would inform the public of the activities of government.” He concludes, therefore, that “[c]ontinued classification, redaction and withholding on this report is not only wrong but legally improper.” Appeal Letter.

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 12958, as amended by Executive Order 13292, is the current Executive Order that provides for the classification, declassification and safeguarding of national security information. When properly classified under this Executive Order, national security information 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. DOE Delegation Order No. 00-030.00, Section 1.8 (December 6, 2001). As the result of reorganization within the Department, this function is now the responsibility of the Deputy Chief for 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 DOE/IG-0515, the subject of this Appeal.

According to the Deputy Chief, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE originally withheld from the document may now be released. The Deputy Chief has informed this Office that the information the DOE continues to withhold concerns programs for safeguarding nuclear facilities or materials, and vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security, which includes defense against transnational terrorism, which is currently classified as National Security Information (NSI) under sections 1.4(f) and (g) of Executive Order 12958, as amended by Executive Order 13292. That information is identified as “DOE b(1)” in the margin of a redacted version of this document, which will be provided to the Appellant under separate cover. Because NSI is defined as classified information in Executive Order 12958, it is exempt from mandatory disclosure under Exemption 1 of the FOIA.

The denying official for the DOE's withholdings is Mr. Michael A. Kilpatrick, Deputy Chief for Operations, Office of Health, Safety and Security, Department of Energy.

Based on the Deputy Chief's review, we have determined that Executive Order 12958 requires DOE to continue withholding portions of the document under consideration in this Appeal. 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 document that the Deputy Chief has now determined to be properly classified must be withheld from disclosure. Accordingly, the Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Michael Ravnitzky on October 18, 2007, Case No. TFA-0227, 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 Audit Report: Control of Classified Matter at Paducah, dated July 2001 (DOE/IG-0515), will be provided to Mr. Ravnitzky.

(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: November 6, 2008