

October 24, 2006

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Beveridge & Diamond, P.C.

Date of Filing: June 22, 2006

Case Number: TFA-0167

Beveridge & Diamond, P.C. filed an Appeal from a determination that the Headquarters FOIA/Privacy Act Group (FOIA/PA) of the Department of Energy issued on May 22, 2006. In that determination, FOIA/PA denied in part a request for information that the Appellant submitted to the DOE pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. FOIA/PA identified and released five documents that were responsive to the Appellant's request, two in their entirety and three with portions withheld. FOIA/PA determined that the withheld portions contained classified information that should be protected from disclosure under the FOIA. This Appeal, if granted, would require the DOE to release the withheld portions of the documents.

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 September 3, 2004, the Appellant requested seven documents: Atomic Energy Commission (AEC) 384/23 through AEC 384/27 and AEC 384/29, regarding the Uranium 233 Program, and AEC 384/28, regarding production reactors and operation of production reactors for non-weapons purposes. The History and Archives Group of the Office of the Executive Secretariat conducted a review and located six of the seven requested documents.¹ On May 22, 2006, FOIA/PA responded to the request by providing the Appellant with copies of AEC 384/26 and AEC 384/28 in their entirety, and copies of AEC 384/24, AEC

¹ AEC 384/23 had been transferred to the National Archives and Records Administration (NARA). On October 6, 2004, FOIA/PA advised the Appellant to request that document directly from NARA.

384/25 and AEC 384/27 from which portions had been redacted.² In its determination letter, FOIA/PA explained that the withheld portions of AEC 384/24, AEC 384/25 and AEC 384/27 contained information properly classified as Restricted Data pursuant to the Atomic Energy Act, 42 U.S.C. §§ 2161-2166, therefore warranting protection from disclosure under Exemption 3 of the FOIA.

The present Appeal seeks the disclosure of the withheld portions of the documents entitled AEC 384/24, AEC 384/25 and AEC 384/27. In its Appeal, the Appellant contends that the information it seeks is “approximately 50 years old and related to a defunct program. In all likelihood, the information is long outdated and is of more historical than scientific significance.” The Appellant also contends that much of this information is likely already in the public domain and therefore its disclosure is unlikely to jeopardize the common defense and security of the nation.

II. Analysis

Exemption 3 of the FOIA provides for withholding material “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) 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, 29 DOE ¶ 80,267 (2006).*

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 the responsive documents from which the DOE had withheld information.

According to the Deputy Chief, the DOE determined on review that, based on current DOE classification guidance, some of the material the DOE withheld from the documents may now be released. The information that the DOE continues to withhold concerns total inventories of special nuclear material, which is currently classified as Restricted Data (RD) and is identified as “DOE b(3)” in the margin of the documents. RD is a form of classified information the withholding of which is required under Atomic Energy Act of 1954, and is therefore exempt from mandatory disclosure under Exemption 3.

² FOIA/PA notified the Appellant that AEC 384/29 fell under the jurisdiction of the Office of Naval Reactors within the DOE’s National Nuclear Security Administration, and that that office would be responding directly to the Appellant concerning that document.

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 the Atomic Energy Act requires DOE to continue withholding portions of the documents 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 3, the disclosure is prohibited by statute. Therefore, those portions of the documents that the Deputy Chief has now determined to be properly classified 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 Appeal will be granted in part and denied in part.

It Is Therefore Ordered That:

(1) The Appeal filed by Beveridge & Diamond, P.C., on June 22, 2006, Case No. TFA-0167, is hereby granted to the extent set forth in paragraph (2) below and denied in all other respects.

(2) Newly redacted versions of Atomic Energy Commission documents AEC 384/24, AEC 384/25 and AEC 384/27, regarding the Uranium 233 Program, will be provided to Beveridge & Diamond, P.C.

(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.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 24, 2006