



DEPARTMENT OF THE NAVY
OFFICE OF THE JUDGE ADVOCATE GENERAL
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WASHINGTON NAVY YARD DC 20374

IN REPLY REFER TO:

5720

Ser 14/288

May 31, 2023

SENT VIA EMAIL AND FOIA ONLINE

Mr. John Greenewald
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**SUBJECT: FREEDOM OF INFORMATION ACT (FOIA) REQUEST DON-NAVY
2022-004903; FOIA APPEAL DON-NAVY-2023-009979**

This letter serves as a response to your May 3, 2023 FOIA appeal, which was submitted to the Secretary of the Navy/Chief of Naval Operations FOIA Office (DNS-36) and assigned tracking number DON-NAVY-2023-009979. DNS-36 forwarded your appeal on the same day, which was received by my office on May 4, 2023. Your underlying request was submitted to DNS-36, the initial denial authority (IDA), on February 23, 2022 and assigned tracking number DON-NAVY-2022-004903. In your request, you sought, in addition to a fee waiver and expedited processing, “a review and a copy of the releasable portions of the classified briefing video” created by Mr. Jay Stratton. (You subsequently modified your request, but there is no discernable difference from your initial submission.)

On May 3, 2023, the IDA issued its final disposition of your request, denying your request. The IDA informed you that, while a record responsive to your request was located, that record would be withheld pursuant to FOIA exemption (b)(1).

You now appeal the IDA’s final disposition of your request, contending that the IDA inappropriately applied FOIA exemption (b)(1) to the responsive record.

Your appeal is a request for a final agency determination under the FOIA. For the reasons stated below, your appeal is denied.

Under FOIA exemption (b)(1), federal agencies must withhold information that is “properly and currently classified in the interest of national defense or foreign policy, as specifically authorized under the criteria established by Executive Order and implemented by regulations.” *See* 5 U.S.C. § 552(b)(1); 32 C.F.R. § 701.59(a). Pursuant to Executive Order 13,526, information regarding military plans, weapons systems, or operations are properly classified. 3 C.F.R. § 13526. If potentially responsive

information qualifies as exemption (b)(1) information, there is “no discretion” regarding its release. 32 C.F.R. § 701.59 (a)(2). When an agency relies on exemption (b)(1), the agency is afforded wide deference by the courts. *Students Against Genocide v. Dep’t of State*, 257 F.3d 828, 837 (D.C. Cir. 2001); *Doherty v. DOJ*, 775 F.2d 49, 52 (2d Cir. 1985). As such, to support citing this exemption, “little proof or explanation is required beyond a plausible assertion that information is properly classified.” *James Madison Project v. CIA*, 605 F. Supp. 2d 99, 110 (D.D.C. 2009). However, when invoking exemption b(1), denial authorities must comply with the FOIA's general requirement that agencies segregate and release nonexempt information.

Pursuant to the FOIA, “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Agencies shall “consider whether partial disclosure of information is possible whenever the agency determines that a full disclosure of the record is not possible.” 5 U.S.C. § 552(a)(8)(A)(ii). Under this provision, “agencies and courts [must] differentiate among the contents of a document rather than . . . treat it as an indivisible ‘record’ for FOIA purposes.” *Fed. Bureau of Investigation v. Abramson*, 456 U.S. 615, 626, 102 S. Ct. 2054, 72 L. Ed. 2d 376 (1982). District courts “must make specific findings of segregability regarding the documents to be withheld.” *N.Y. Times Co. v. United States FDA*, 529 F. Supp. 3d 260, 289 (S.D.N.Y. 2021) (citing *Color of Change v. U.S. ‘Dep’t of Homeland Sec.*, 325 F. Supp. 3d 447, 455 (S.D.N.Y. 2018) (quoting *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1116, 377 U.S. App. D.C. 460 (D.C. Cir. 2007))).

Agencies need not, however, disclose non-exempt information that is “inextricably intertwined” with exempt information. See *Hopkins v. U.S. Dep’t of Hous. & Urban Dev.*, 929 F.2d 81, 85 (2d Cir. 1991). Information is deemed inextricably intertwined where “disclosure would compromise the confidentiality of [exempt] information that is entitled to protection.” *Id.* However, a requester is not entitled to disclosure if disclosure would produce only a “few nuggets of non-intertwined, ‘reasonably segregable’” information. *Gonzalez v. United States Citizenship & Immigration Servs.*, 475 F. Supp. 3d 334, 353 (S.D.N.Y. 2020); *Lead Indus. Ass’n, Inc. v. Occupational & Health Safety Admin.*, 610 F.2d 70, 88 (2d Cir. 1970); see also *Am. Civil Liberties Union v. Dep’t of Justice*, 252 F. Supp. 3d 217, 227-28 (S.D.N.Y. 2017) (collecting cases). To the extent that there may be bits of non-exempt information in the responsive documents, the IDA should provide information to illustrate that such information is either inextricably intertwined with the exempt information or are the kinds of “nuggets” that are not required to be provided to requestors under the FOIA. *Gonzalez*, 475 F. Supp. at 354. Courts recognize, however, that reasonable segregation is not possible when nonexempt information is inextricably intertwined with exempt information. *Mead Data Center v. Dep’t of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

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After receiving your appeal, my office contacted the IDA to seek additional information about the processing of your request. My office was informed that the IDA consulted with the original classification authority (OCA) in this case. The OCA informed my office that the responsive record was reviewed by a subject matter expert, who determined that the responsive record was properly classified and that no segregation was possible. As the Department of the Navy's (DON) appellate authority for FOIA appeals, I must defer to the classification authority's expertise regarding the classification of the information in question related to national security. I am satisfied that the IDA's classification of the records responsive to your request satisfies the requirements under FOIA exemption (b)(1), as the responsive records at issue were reviewed for classification by the appropriate official and no information can be segregated and potentially released. Accordingly, your appeal is denied.

As the Department of the Navy's designated adjudication official for this FOIA appeal, I am responsible for its denial. You may seek judicial review of this decision by filing a complaint in an appropriate U.S. District Court. My office represents the U.S. Government and is therefore unable to assist you in this process.

You have the right to seek dispute resolution services by contacting the Department of the Navy's FOIA public liaison, Mr. Christopher Julka, at christopher.a.julka@navy.mil or at (703) 697-0031. You may also seek dispute resolution services from the Office of Government Information Services (OGIS), the Federal FOIA Ombudsman's office, at (202) 741-5770 or ogis@nara.gov.

If you have further questions or concerns for my office, my point of contact is LT Nate Bosiak, JAGC, USN, who may be reached at (202) 685-5450 or by email at nathaniel.a.bosiak.mil@us.navy.mil.

Sincerely,




S. D. SCHROCK
Director
General Litigation Division

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OPNAV N2/N6
DNS-36
DON CIO

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and research of John Greenewald, Jr., creator of:

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