



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

OFFICE OF THE  
GENERAL COUNSEL

Stop 9613

July 24, 2024

*Via electronic mail*

[REDACTED]

[REDACTED]

Re: Appeal, Freedom of Information Act Request [REDACTED] designated on appeal as [REDACTED]

Dear [REDACTED]

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer's decision regarding your May 29, 2024 FOIA request for records concerning "[a]ny investigation(s) or inquiries that directly pertain to the conduct, disclosures, and/or transactions of the registrant NuScale Power from January 1, 2023." By letter dated June 27, 2024, the FOIA Officer denied your request pursuant to FOIA Exemption 7(A).

On June 28, 2024, the FOIA Office received this appeal. You state that you "would like to know whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant." I have considered your appeal, and it is denied.

The question raised by a challenge to the adequacy of a search is "whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant."<sup>1</sup> "[T]he adequacy of a FOIA search is generally determined not by the

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<sup>1</sup> *SafeCard Services, Inc. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991); see also *In re: Clinton*, 973 F.3d 106, 116 (D.C. Cir. 2020) ("[A]n agency responding to a FOIA request is simply required to conduct a search *reasonably calculated* to uncover all *relevant documents*." (internal quotations omitted); *Amadis v. Dep't of State*, 971 F.3d 364, 368 (D.C. Cir. 2020) (a reasonable search is one that is calculated to locate responsive documents); *DiBacco v. Dep't of the Army*, 926 F.3d 827, 832-33 (D.C. Cir. 2019) (agency's "search efforts [must be] reasonable and logically organized to uncover relevant documents but [ ] need not knock down every search design advanced by every requester") (internal quotations omitted).

fruits of the search, but by the appropriateness of the methods used to carry out the search.”<sup>2</sup> Further, “there is no requirement that an agency search every record system.”<sup>3</sup>

In responding to your request, FOIA Office reviewed computer indices for investigations and contacted Division of Enforcement staff that perform enforcement functions relevant to the company for which you seek records. Enforcement staff confirmed the existence of responsive records concerning NuScale Power. You have not identified any other systems SEC divisions or offices FOIA Office staff should have searched, and I am not aware of any other systems or SEC divisions or offices that would have the investigative records you seek. Accordingly, the search conducted was reasonable and adequate.

I have also determined that the FOIA Officer correctly asserted Exemption 7(A) to withhold the requested records.<sup>4</sup> There is a two-step test to determine whether information is protected under Exemption 7(A), whether: (1) a law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm.<sup>5</sup> We have confirmed with Division of Enforcement staff that the investigation from which you seek records is still active and ongoing.<sup>6</sup>

Further, under Exemption 7(A), an agency may withhold records if they come within categories of records whose disclosure would generally interfere with enforcement proceedings.<sup>7</sup> We have confirmed with Division of Enforcement staff that the documents you seek come within categories whose disclosure could be reasonably expected to cause harm to the ongoing and active enforcement proceedings because, among other things, individuals and entities of interest

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<sup>2</sup> *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003).

<sup>3</sup> *Oglesby v. Dep’t of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

<sup>4</sup> Exemption 7(A) authorizes the withholding of “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information ... could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A).

<sup>5</sup> See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (holding that the government must show how records “would interfere with a pending enforcement proceeding”); *Juarez v. Dep’t of Justice*, 518 F.3d 54, 58-59 (D.C. Cir. 2008) (explaining that government must show that its ongoing law enforcement proceeding could be harmed by premature release of evidence or information).

<sup>6</sup> See *OKC Corp. v. Williams*, 489 F. Supp. 576 (N.D. Tex. 1980) (SEC is not required to disclose requested materials directly tied to a pending investigation); *Nat’l Pub. Radio v. Bell*, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (Congress intended that Exemption 7(A) would apply where disclosure may impede any necessary investigation prior to court proceedings); *Robbins Tire*, 437 U.S. at 232 (Congress intended that Exemption 7(A) would apply “whenever the Government’s case in court ... would be harmed by the premature release of evidence or information.”); *Accuracy in Media, Inc. v. U.S. Secret Service*, C.A. No. 97-2108, 1998 U.S. Dist. Lexis 5798 at 11 (D.D.C. April 16, 1998) (affirmation that there is an active and on-going investigation is enough); *Marzen v. HHS*, 632 F. Supp. 785, 805 (N.D. Ill. 1985) (concluding that Exemption 7(A) prohibits disclosure of law enforcement records when their release “would interfere with enforcement proceedings, pending, contemplated, or in the future”), *aff’d*, 825 F.2d 1148 (7th Cir. 1987).

<sup>7</sup> *Robbins Tire*, 437 U.S. at 236; see also *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1038 (7th Cir. 1998) (“the Government may justify its withholdings by reference to generic categories of documents”).

in the underlying investigation could fabricate evidence, influence witness testimony and/or destroy or alter certain documents.<sup>8</sup> Public release of the records sought could also hinder the ongoing investigation by revealing cooperating witnesses and exposing the scope of the underlying investigation.<sup>9</sup>

I have also considered whether partial disclosure of the withheld information is possible, but have determined that it is not because such a disclosure would not be consistent with the purposes of Exemption 7(A).<sup>10</sup>

Please be aware that my decision to affirm the FOIA Officer's assertion of Exemption 7(A) should not be construed as an indication by the Commission or its staff that any violations of law have occurred with respect to any person, entity, or security. As Exemption 7(A) precludes the release of the information at this time, no determination has been made concerning the applicability of any other FOIA exemptions. The Commission reserves the right to review the information to assert any other exemption when Exemption 7(A) is no longer applicable.<sup>11</sup>

You have the right to seek judicial review of my determination by filing a complaint in the United States District Court for the District of Columbia or in the district where you reside or have your principal place of business.<sup>12</sup> Voluntary mediation services as a non-exclusive

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<sup>8</sup> See *Robbins Tire*, at 232 (Congress intended that Exemption 7(A) would apply "whenever the Government's case in court ... would be harmed by the premature release of evidence or information.").

<sup>9</sup> See, e.g., *Shannahan v. IRS*, 672 F.3d 1142, 1150 (9th Cir. 2012) (the use of Exemption 7(A) was proper where agency explained harm to ongoing investigation by showing that release could reveal identity of confidential informants and thus hinder other individuals from cooperating, violate terms of an international agreement, and expose scope of investigation); *Citizens for Responsibility & Ethics in Wash. v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 52 (D.D.C. 2006) (release of records regarding alleged misuse of tribal gaming revenues during investigation could allow targets to ascertain direction of investigations, to identify potential charges to be brought, and to expose state and nature of current investigations, thereby undermining federal investigations); *Suzhou Yuanda Enter. Co. v. Customs and Border Prot.*, 404 F. Supp. 2d 9, 14 (D.D.C. 2005) (release of information "would interfere with an agency investigation [by] informing the public of the evidence sought and scrutinized by this type of investigation"); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 119 (D.D.C. 2005) ("release of this information could undermine the effectiveness" of agency's investigation); *Judicial Watch v. Dep't of Justice*, 306 F. Supp. 2d 58, 75-76 (D.D.C. 2004) (release of documents during course of investigation could damage agency's ability to obtain information); *Lynch v. Dep't of the Treasury*, 210 F.3d 384, at \*2 (9th Cir. 2000) (unpublished table decision) (agency declarations "made clear" that release of records could harm "efforts at corroborating witness statements . . . alert potential suspects . . . [and] interfere with surveillance"); *Solar Sources*, 142 F.3d at 1039 (disclosure could interfere by revealing "scope and nature" of investigation); *Amnesty Int'l v. CIA*, 728 F. Supp. 2d 479, 526-27 (S.D.N.Y. 2010) (disclosure of information in open investigations would reveal what individuals and activities were under investigation, what evidence had been collected, and compromise confidentiality of investigation; such disclosures were "precisely the kind of interference that Congress . . . want[ed] to protect against" (quoting *Robbins Tire*, at 247)).

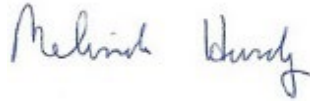
<sup>10</sup> I further find that it is reasonably foreseeable that disclosure of the withheld records would harm interests protected by Exemption 7(A) because such a disclosure could compromise ongoing enforcement proceedings.

<sup>11</sup> See *LeForce & McCombs, P.C. v. Dep't of Health and Human Services*, Case No. Civ-04-176-SH (E.D. Okla. Feb. 3, 2005) (an agency does not waive the right to invoke exemptions by not invoking such exemption during the administrative processing of a FOIA request).

<sup>12</sup> See 5 U.S.C. § 552(a)(4)(B).

alternative to litigation are also available through the National Archives and Records Administration's Office of Government Information Services (OGIS). For more information, please visit [www.archives.gov/ogis](http://www.archives.gov/ogis) or contact OGIS at [ogis@nara.gov](mailto:ogis@nara.gov) or 1-877-684-6448. If you have any questions concerning my determination, please contact Mark Tallarico, Senior Counsel, at 202-551-5132.

For the Commission  
by delegated authority,

A handwritten signature in blue ink that reads "Melinda Hardy". The signature is written in a cursive style.

Melinda Hardy  
Assistant General Counsel for  
Litigation and Administrative Practice