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Description of document: Each Federal Energy Regulatory Commission (FERC) Freedom of Information Act (FOIA) Appeal letter received and each FOIA Appeal response processed, FY2014 - FY2016

Requested date: 01-November-2016

Released date: 15-December-2016

Posted date: 16-January-2017

Source of document: Freedom of Information Act Request
Office of External Affairs
888 First Street, NE
Washington, DC 20426
Fax: 202-208-2106
Email: foia-ceii@ferc.gov
[FERC Electronic FOIA Request Form](#)

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Federal Energy Regulatory Commission
Washington, D.C. 20426

DEC 15 2016

Re: Initial Response Letter
FOIA No. FY17-5

VIA ELECTRONIC & REGULAR MAIL

On November 1, 2016 you filed a request for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016), and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2016). Specifically, you seek "a copy of each FOIA Appeal letter received and each FOIA Appeal response processed during FY2014, FY2015 and FY2016."

A search of the Commission's non-public files identified approximately eighty (80) documents that may be responsive to your request. Given the considerable number of responsive documents, we are providing an initial response covering all FOIA Appeal responses processed during FY2014, FY2015, and FY2016. These documents are enclosed with personal information redacted in accordance with FOIA Exemption 6.¹

FOIA Exemption 6 provides that an agency should not disclose "personnel . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." *See, e.g., Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997); *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989). Accordingly, the personal information of private individuals who submitted FOIA appeals has been redacted from the appropriate documents.

The Commission will continue to review the additional responsive documents and additional determinations concerning those documents (all FOIA Appeal letters received during FY2014, FY2015 and FY2016) will follow on a rolling basis.² Commission staff

¹ 5 U.S.C. 552(b)(6).

² *See S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. S-06-2845, 2008 U.S. Dist. LEXIS 107177, 47 (E.D. Cal. June 20, 2008) (supporting the practice of releasing documents on a rolling basis); *Hinton v. Fed Bureau of Investigations*, 527 F. Supp. 223, 225 (E.D. Penn. 1981) (noting that rolling responses

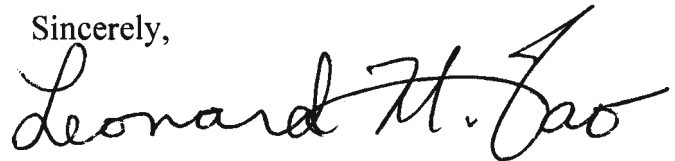
will endeavor to provide you with another determination within twenty (20) business days of the date of this letter. If you have any questions regarding this matter, please contact the undersigned by facsimile at (202) 208-2106 or contact Toyia Johnson of my staff at (202) 502-8004.

Ordinarily, any appeal from a FOIA determination must be filed within 90 days of the date of issuance as provided by the Freedom of Information Act and 18 C.F.R. § 388.110(a)(1) of the Commission's regulations. However, because your request is being processed on a rolling basis, the Commission will hold your appeal rights in abeyance pending a final determination. This will allow you to file a single appeal at the conclusion of our processing of your request.

If you decide to appeal, this appeal must be in writing, addressed to Max Minzner, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and clearly marked "Freedom of Information Act Appeal." Please include a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

You also have the right to seek dispute resolution services from the FOIA Public Liaison of the agency or the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue your appeal. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,



Leonard M. Tao
Director
Office of External Affairs

Enclosures (40)

preserve the government's right to carefully review material while promoting FOIA's disclosure goals); *see also* U.S. Dept. of Justice, *FOIA Post*, "OIP Guidance: The importance of Good Communication with FOIA requesters," (posted 2010) (stating agencies should provide rolling responses for requests involving a voluminous material.)

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

JAN 3 1 2014

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-21

VIA CERTIFIED MAIL

Mr. Roy Mendelsohn



Dear Mr. Mendelsohn:

This letter responds to your December 24, 2013, appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2013). You have appealed the decision issued on December 17, 2013 by Leonard M. Tao, Director of the Office of External Affairs (Director), which withheld the two internal memos you seek, filed under Accession Nos. 20131031-0181 and 20131031-0182, in Docket No. P-1267.

On appeal, you contend that the Commission erred in withholding the above-described information, which I note was withheld under FOIA Exemption 5.¹ As a side issue, you also criticized the Commission's Critical Energy Infrastructure Information process (CEII)² process, which the Director presented to you as a potential alternative source of information.

¹ See 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency").

² CEII is specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that: (i) Relates details about the production, generation, transmission, or distribution of energy; (ii) Could be useful to a person planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the Freedom of Information Act; and (iv) Gives strategic information beyond the location of the critical infrastructure. See 18 C.F.R. § 388.113.

DISCUSSION

The Director correctly invoked FOIA Exemption 5 to withhold Accession Nos. 2013031-0181 and 20131031-0182 in their entirety. Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny"). Agency staff must have the leeway to express their personal and internal opinions on official matters without fear that such opinions would be publicly released. The withheld materials are internal engineering memos summarizing consultations and studies related to the Buzzards Roost Hydroelectric Project in Docket No. P-1267. The staff opinions reflected in the withheld memos are preliminary in that they did not necessarily represent the official views of the agency. The withheld materials also include internal staff analysis submitted to superiors for review.

In addition, any factual portions of these documents are so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process). Given the deliberative nature of the information contained in the two internal memoranda, they are exempt from disclosure in their entirety under FOIA Exemption 5. For these reasons, the memos you seek were correctly withheld in their entirety under FOIA Exemption 5.³

Finally, while I understand your disappointment with the Director's determination, his determination was appropriate, and his suggestion that you consider the CEII process as a possible alternative source of information was intended solely for your benefit.

³ I also want to clarify that two separate documents, Accession Nos. 20131018-0211 and 20131018-0212 are publicly available on the Commission's e-Library system. The March 27, 2013 Board of Consultants Report and the February 2013 Site-Specific Probable Maximum Precipitation reports referenced in these documents may be of interest to you and may be available upon request through the Commission's CEII process.

FOIA Appeal No. FY14-21

- 3 -

Accordingly, I disagree with your assertion that the CEII process is a "device to keep FERC machinations out of the public eye." To the contrary, the CEII process was designed to make information available to members of the public like you, who may have a legitimate need for information, while keeping it out of the hands of potential terrorists. See 98 FERC ¶ 61,017 pp. 1-2 (Jan. 16, 2002). Indeed, you have successfully obtained information through the CEII process on several occasions.⁴

CONCLUSION

For the reasons stated above, your December 24, 2013 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
Acting General Counsel

Certified Mail Receipt No. 7002 0860 0001 4092 9620

⁴ Our records indicate that in the past two years, you filed five requests for CEII and received the requested information. The five requests for CEII are: CE12-82, CE12-16, CE12-169, CE13-34, and CE13-70.

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

DEC 20 2013

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-1

VIA CERTIFIED MAIL

Christopher C. Horner, Esq.
Free Market Environmental Law Clinic
9033 Brook Ford Road
Burke, VA 22015
CHornerLaw@aol.com

Dear Mr. Horner:

This letter responds to your correspondence received November 21, 2013, which appeals the October 31, 2013 response of Leonard M. Tao, Director of the Office of External Affairs (Director), to the request you filed on October 2, 2013, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2013). Specifically, you requested the following documents, for a one-year period dating back to October 2, 2012:

- 1) all emails, text messages, or instant messages (and any attachments thereto);
- 2) and any other records;
- 3) which were sent to or from any employee (including also as cc: or bcc:) in FERC's a) Office of Enforcement, or b) Office of the Executive Director (which for this purpose does include the four divisions reporting to the Office of the Director);
- 4) discussing or referencing FERC filling the position of Director, Office of Enforcement as advertised in the job posting found at http://jobs.govloop.com/37308/director-office-of-enforcement/?post_to=govloop;
- 5) including but not limited to representing or referencing a complaint, objection, dispute or challenge to the manner in which FERC filled the position or resolution or discussion of same.

You appeal the determination of the Director, which withheld thirty-six (36)¹ documents in their entirety under FOIA Exemptions 5 and 6.² Specifically, you raise the following issues: (A) the Director failed to justify withholding documents in whole or in part under FOIA Exemption 5 deliberative process privilege and failed to disclose factual portions of pertinent documents; and (B) the Director failed to justify why the individual's privacy interest in personnel information is greater than the public interest in disclosure of that information. After a careful review of your appeal, and the withheld information, I am upholding the Director's response. I address your arguments in turn below.

DISCUSSION

A. The Director Correctly Applied FOIA Exemption 5 to protect deliberative material.

Contrary to your assertions, the Director correctly invoked FOIA Exemption 5 to withhold responsive documents in their entirety. The withheld material includes emails and communications between FERC staff and the Office of Personnel Management (OPM) concerning evaluation for a career Senior Executive Service position. The withheld material also includes internal staff opinions subject to supervisory review and internal staff communications and opinions, as well as corresponding draft documents.

Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny"). Agency staff must have the

¹ On appeal, staff determined the documents responsive to your request only number twenty-seven (27), not thirty-six (36).

² *See* 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. § 552(b)(6) (protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.")

leeway to express their personal and internal opinions on official matters without fear that such opinions would be publicly released. The staff opinions reflected in the withheld documents were preliminary in that they did not necessarily represent the official views of the agency. In addition, these staff opinions were communicated internally in preparation for submissions to OPM.³ Staff reasonably may exchange views concerning such matters. A disclosure of this information would chill future internal communication among staff, and may cause public confusion as to the agency's official position.

I agree with your assertion that the agency is required to produce purely factual portions of documents. However, in this instance, to the extent factual portions exist, they are so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. U. S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process). The withheld material does not contain any information that is reasonably segregable.

B. The Director correctly applied FOIA Exemption 6 to protect personnel information.

I also disagree with your assertions that the Director failed to properly invoke FOIA Exemption 6. FOIA Exemption 6 protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). Your reliance on *Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 690 F.2d 252 (D.C. Cir. 1982), is misplaced. While, in *Washington Post Co.*, the public interest in disclosure supported release of hired consultants' non-federal employment information, the information you seek consists of personnel-related information concerning an application and evaluation for a career Senior Executive Service position that was not ultimately filled. This is precisely the type of information FOIA Exemption 6 is designed to protect. *See Core v. U.S. Postal Serv.*, 730 F.2d 946, 948 (4th Cir. 1984) (recognizing that the privacy interest in unsuccessful applicants' personnel information for positions in the federal government that are not filled outweighs the public interest in such information).

³ Such communications between Executive Branch agencies also may be covered by FOIA Exemption 5. *See Dep't of Interior v. Klamath Water Users Protective Ass'n*, 121 S. Ct. 1060, 1066 (2001) (recognizing FOIA Exemption 5 extends to communications between Government agencies).

C. Responsive documents are also protected in whole or in part under FOIA Exemption 2.

In addition to FOIA Exemptions 5 and 6, upon further review, I have determined that some or all of the responsive documents are also protected from disclosure under FOIA Exemption 2, which protects internal agency documents that relate solely to the agency's personnel rules and practices. *See Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1271 (2011) (holding that Exemption 2, consistent with the plain meaning of the term "personnel rules and practices," encompasses records relating to issues of employee relations and human resources).

CONCLUSION

For the reasons stated above, your November 21, 2013 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
Acting General Counsel

Certified Mail Receipt No. 7002 0860 0001 4093 6291

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

JAN 27 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-08

VIA CERTIFIED MAIL

Mr. Steven G. Soles
STS Energy Partners LP
26 Buttonwood Drive
Exton, PA 19341
stevenstsenergy@gmail.com

Dear Mr. Soles:

This letter responds to your December 12, 2013 appeal of the denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2013).

BACKGROUND

On October 31, 2013, you filed a FOIA request seeking documents related to the Commission's March 6, 2008 "Order Denying Complaint" in *Black Oak Energy LLC, et. al. v. PJM Interconnection LLC (Black Oak Order I)*¹ and the Commission's September 17, 2009 "Order Accepting Compliance Filing" in *Black Oak Energy LLC, et. al. v. PJM Interconnection LLC (Black Oak Order II)*² in Docket Nos. EL08-14-000 and EL08-14-002. In particular, you requested:

1. Internal agency documents prepared by Commission staff analyzing the issues addressed by the Commission in the *Black Oak Order I* and the *Black Oak Order II*;
2. Documents prepared by the Office of Energy Market Regulation (OEMR) or other Commission departments or staff, analyzing or discussing the concept found in paragraph 51 of *Black Oak Order I* that paying excess loss charges to arbitrageurs may result in arbitrageurs making "trades that would not be profitable based solely on price differentials" alone;

¹ 122 FERC ¶ 61,208 (2008).

² 128 FERC ¶ 61,262 (2009).

3. Documents prepared by Commission staff in OEMR or other Commission departments that analyze or discuss the Commission's decision to reverse *Black Oak Order I* and hold that PJM is required to pay arbitrageurs a proportionate share of line loss surpluses related to virtual trading; and
4. Documents prepared by Commission staff in preparation of issuing *Black Oak Order II* that analyze or discuss the Commission's conclusion in paragraph 51 of *Black Oak Order I* that paying excess loss charges may influence arbitrageurs virtual trades, and the ultimate effect of the Commission's decision in *Black Oak II* on that concept.

On November 26, 2013, the Director issued a determination withholding (294) documents in their entirety pursuant to FOIA Exemption 5.³ The Director determined the documents were deliberative process materials and contained notes and comments primarily between Commission staff in the Office of Energy Market Regulation and the Office of the General Counsel. Specifically, he indicated that the withheld materials consisted of pre-decisional emails, draft orders, draft briefs, draft deficiency letters, a draft motion to stay including comments from senior staff, and internal memoranda to senior staff seeking deliberative commentary on prospective Commission agenda items.

On December 12, 2013, you appealed the Director's determination. In your appeal you raise the following issues: (A) the Director failed to adequately justify use of FOIA Exemption 5 to withhold all (294) documents in their entirety; and (B) any document containing "working law" must be disclosed to you, despite the applicability of FOIA Exemption 5.

DISCUSSION

A. The Director Correctly Applied FOIA Exemption 5 to Protect Deliberative Material.

FOIA Exemption 5 authorizes the Commission to withhold documents when release of the information could interfere with internal agency deliberations. Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not

³ See 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.")

in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny").

In the instant case, the withheld material consisted of pre-decisional emails, draft orders, draft briefs, draft deficiency letters, a draft motion to stay including comments from senior staff, and internal memoranda to senior staff seeking deliberative commentary on prospective Commission agenda items. Agency staff must have the leeway to express their personal and internal opinions without fear that such opinions would be publicly released. Staff opinions reflected in the withheld documents were preliminary in that they were subject to supervisory review or approval and did not necessarily represent the official views of the agency. A disclosure of this information would chill future internal communication among staff, and may cause public confusion as to the agency's official position.

Furthermore, there are no segregable portions of the documents that may be released to you. While the agency is generally required to produce non-exempt portions of documents including purely factual information, facts that are inextricably intertwined with the deliberative material should not be disclosed. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. U. S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process). Thus, the Director correctly withheld the documents in their entirety.

B. None of the Withheld Information Consists of Working Law.

Under the working law exception to FOIA Exemption 5, agencies are required to release all established working law. Agencies are not, however, required to produce the pre-decisional deliberative processes that result in final decisions and working law. Indeed, the Supreme Court has determined that working law is tantamount to final opinions, not draft opinions, draft memoranda or pre-decisional notes and drafts. *See N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 152 (1975) (noting that the working law exception requires "disclosure of all [final] opinions and interpretations which embody the agency's effective law and policy, and the withholding of all papers which reflect the agency's group thinking *in the process of working out its policy* and determining what its law shall be.") (emphasis added). Other courts have also concluded that "documents created by an agency as part of the deliberative process which precede its final decision are exempt from disclosure under FOIA." *See Haggstad v. Dep't of Justice*, 182 F.

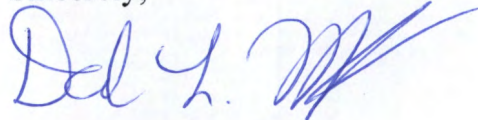
Supp.2d 1 (D.D.C. 2000) (citing *N.L.R.B.* at 132, 151 (clarifying the scope of the working law exception to FOIA Exemption 5)).

In the instant case, the Commission's working law is available to you and all members of the public through the Commission's publicly issued orders. These orders represent the official position of the Commission, not the pre-decisional deliberative material sought in your request. Thus, the Director correctly determined that none of the (294) deliberative documents in this case were appropriate for release.

CONCLUSION

For the reasons stated above, your December 12, 2013 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
Acting General Counsel

Certified Mail Receipt No. 7002 0860 0001 4093 9834

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

JAN 27 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-10

OFFICE OF THE GENERAL COUNSEL

VIA CERTIFIED MAIL

Mr. Christopher Horner, Esq.
1899 L Street NW, Suite 1200
Washington, DC 20036
chorner@cei.org
CHornerLaw@aol.com

Dear Mr. Horner:

This letter responds to your December 11, 2013 appeal of the denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2013).

BACKGROUND

On November 1, 2013, you specifically requested all emails, text messages, or instant messages (and any attachments thereto) which were held or were sent to or from Jon Wellinghoff, James Pederson, Debbie-Anne Reese, Christina Hayes, Jeff Wright, Ann Miles, Sandra Waldstein, Lauren O'Donnell, and/or David Morenoff which:

1. Include, anywhere, the word "Dow," and one or more of the terms "LNG," "export" and/or "terminal" and;
2. Any records which mention, or are to or from (including carbon copies and blind carbon copies) any one or more of the following individuals: Andrew Liveris, Keith Belton, Peter Molinaro, Kevin Kolevar, Paul Cicio, Jennifer Diggins.

You indicated that you requested documents from August 1, 2012, through the date your FOIA request was completely processed. You also clarified that you did not seek records related to any filings in any Commission proceedings under the Natural Gas Act or Federal Power Act. Finally, you clarified that you did not seek media reports, news clippings or any emails that were forwarded without other commentary.

On December 4, 2013, the Director issued a determination releasing one (1) letter from the Industrial Energy Consumers of America, releasing one (1) partially redacted

email,¹ releasing one (1) email in its entirety, withholding forty-one (41)² emails in their entirety under FOIA Exemption 5³ and withholding one (1) memorandum, attached to an email, in its entirety under FOIA Exemption 5. The withheld documents consist of internal emails and discussions among staff.⁴

On December 11, 2013, you appealed the Director's determination. In your appeal you specifically raise the following issues: (A) the Director failed to justify withholding documents in whole or in part under FOIA Exemption 5 deliberative process privilege; (B) the Director failed to rationalize withholding documents in accordance with the policy contemplated by FOIA Exemption 5; and (C) the Director failed to take into account whether segregable, redacted records were appropriate for discretionary release and failed to disclose factual non-exempt portions of pertinent documents under FOIA Exemption 5. I address your arguments in turn below.

DISCUSSION

A. The Director Correctly Applied FOIA Exemption 5 to Protect Deliberative Material.

FOIA Exemption 5 authorizes the Commission to withhold documents when release of the information could interfere with internal agency deliberations. Courts have

¹ Staff omitted non-responsive portions of this document.

² Upon further review and re-calculation, staff determined that thirty-two (32), not forty-one (41) documents were withheld in their entirety during the initial processing of your FOIA request. Duplicative materials have been excluded from your request.

³ See 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.")

⁴ Upon additional evaluation, staff has determined that that thirty (30) of the thirty-two (32) withheld documents are non-responsive: fourteen (14) documents are Communication Chronicle "media reports" which you expressly excluded from the scope of your FOIA request; nine (9) documents consist of internal emails generated for the purpose of processing your request or coordinating a response among staff; and seven (7) documents were either completely non-responsive to your request or they were related to filings under the Federal Power Act. Accounting for the removal of duplicative and non-responsive material, only two (2) documents are being withheld from you in their entirety.

consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny").

In the instant case, the withheld material consists of internal staff emails and internal notes, opinions and comments between Commission staff. The staff opinions also relate to the official role of an employee in the Office of External Affairs, who reasonably may exchange views with supervisors. Agency staff must have the leeway to express their personal and internal opinions on official matters without fear that such opinions would be publicly released. The staff opinions and concerns reflected in the withheld documents were preliminary in that they concerned a possible course of future action. Thus, disclosure of this information would chill future internal communication among staff, and may cause public confusion as to the basis of agency action.

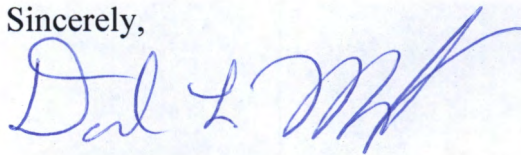
B. The Director Correctly Determined that None of the Withheld Documents Were Segregable or Appropriate for Discretionary Release.

I agree with your assertion that the agency is required to produce purely factual portions of documents. However, in this instance, factual portions of the two (2) remaining documents were so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations, or result in the production of meaningless phrases. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process); *see also Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F.Supp.2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists, because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated meaningless words"). The withheld material does not contain any information that is reasonably segregable, and all non-exempt material has been released to you. Therefore, no additional factual information can be released.

CONCLUSION

For the reasons stated above, your December 11, 2013 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
Acting General Counsel

Certified Mail Receipt No. 7002 0860 0001 4093 9841

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

APR 09 2014

OFFICE OF THE GENERAL COUNSEL

Re: FOIA Appeal No. FY14-17

VIA CERTIFIED MAIL

Susan Jane M. Brown
Western Environmental Law Center
4107 NE Couch Street
Portland, OR. 97232
brown@westernlaw.org

Dear Ms. Brown:

This letter responds to your appeal received February 27, 2014 of the determination denying in part your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2013).¹ As discussed below, I agree with the determination to withhold the information in part and am denying your appeal.

Background

On November 15, 2013, you requested the updated stakeholder list filed by Pacific Connector Gas Pipeline, LP (Pacific Connector) in FERC Docket No. CP13-492 under Accession No. 20130930-5138 (landowner list). A search of the Commission's nonpublic files identified the document responsive to your request, which was submitted with a request for privileged and confidential treatment. After notifying Pacific Connector in accordance with the Commission's regulations, the Director of the Office of External Affairs (Director) on January 7, 2014, released the document to you with the names and addresses of individual landowners redacted pursuant to FOIA Exemption 6. See 5 U.S.C. § 552(b)(6).²

In your appeal of the Director's determination, you present four arguments. First, you argue that the Director failed to make a threshold determination that the names and personal addresses are "personnel and medical files and similar files." (Appeal 3-5.) Second, you contend that the privacy interest here is minimal. (Appeal 5-8.) Third, you assert that there is a public interest in disclosure to verify compliance with transparency

¹ You submitted the request on behalf of Klamath Siskiyou Wildlands Center, Rogue Riverkeeper, Landowners United, Oregon Coast Alliance, Cascadia Wildlands, Sierra Club, and Mr. Bob Barker.

² Contrary to statements in your appeal, both the December 24, 2013 and January 7, 2014 determination letters summarized Pacific Connector's objections.

and notification laws. (Appeal 8-9.) Fourth, you argue that a balancing of the interests weighs in favor of a full release. (Appeal 9.)

Discussion

FOIA Exemption 6 provides that an agency should not disclose “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” See 5 U.S.C. § 552(b)(6). As the Director explained, it is well established that the names and personal home addresses of private landowners are protected from release under FOIA Exemption 6. See, e.g., *Bibles v. Oregon Natural Desert Ass’n*, 519 U.S. 355 (1997); *U.S. Dep’t of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) [hereinafter *FLRA*]; *Carter, Fullerton & Hayes LLC v. FTC*, 520 F. Supp. 2d 134, 144-45 (D.D.C. 2007); *National Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989). To overcome this exemption, it must be demonstrated that the public interest in disclosure outweighs the substantial privacy interest.³

As a threshold matter, the names and personal addresses of private individuals are considered “personnel and medical files and similar files” under FOIA Exemption 6. This threshold requirement is interpreted very broadly and protects any information that “applies to a particular individual.” See *Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982); *Odland v. FERC*, Civil Action No. 13-141, 2014 WL 1244773, *10 (D.D.C. 2014) (stating that the term “similar files” is not intended to apply only to intimate information). None of the authority on which you rely states that the names and address of private citizens are not protectable under FOIA Exemption 6.

Moreover, the Supreme Court’s decisions in *FLRA* and *Bibles* determined that, contrary to your assertions, there is a privacy interest in protecting the names and personal addresses of individual citizens. Consistent with these decisions, FERC precedent recognizes the privacy interest of individual citizens in their names and addresses. See, e.g., *Columbia Gas Transmission Corp.*, 128 FERC ¶ 61,050 at P 32 (2009) (determining that releasing the names and addresses of private citizens on a landowner list “implicate[s] a privacy interest, and their mandatory release would constitute an unwarranted invasion of individual privacy.”) In light of unwarranted

³ See *NARA v. Favish*, 541 U.S. 157, 172; see also *Martin v. Dep’t of Justice*, 488 F.3d 446, 458 (D.C. Cir. 2007) (“In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.” (quoting *Boyd v. Dept. of Justice*, 475 F.3d 381, 387 (D.C. Cir. 2007))); *Carpenter v. Dep’t of Justice*, 470 F.3d 434, 440 (1st Cir. 2006).

invasions of privacy from disclosure of landowner lists, FERC practice is to protect landowner names and addresses unless the landowner has consented to or otherwise voluntarily submitted that information in the proceeding. *See, e.g.*, FERC Submission Guidelines, at pg. 6-7 (January 14, 2014) available at <http://www.ferc.gov/help/submission-guide/user-guide.pdf>.

Nonetheless, your appeal argues that the privacy interest of the landowners has been diminished because Pacific Connector used the landowner list for mailings and because the information can be obtained from other public sources.⁴ The privacy interest of the landowners concerning their names and personal home addresses, however, is not waived merely because other sources have that information or because there are other means for obtaining the information. *See Odland*, 2014 WL 1244773 at *11 (citing *ACLU v. Dep't of Justice*, 655 F.3d 1, 12 (D.C. Cir. 2011); *Lazaridis v. U.S. Dep't of State*, No. 10-1280 (RMC), 2013 WL 1226607 (D.D.C. Mar. 27, 2013) (finding that although plaintiff obtained withheld information by other means, the need to protect the material was not waived nor was the agency's ability to invoke the FOIA exemption). Therefore, I agree with established precedent that the landowners have a significant privacy interest in their names and addresses.

Even though public release of the names and addresses inherently exposes the landowners to an unwanted invasion of privacy, you contend that disclosure is in the public interest in order to shed light on FERC and Pacific Connector's compliance with notification and public participation laws. Specifically, you assert that disclosure is necessary for public oversight. You rely, in large part, on *Columbia Riverkeeper v. FERC*, 650 F. Supp. 2d 1121 (D. Or. 2009) [hereinafter *Riverkeeper*].

The magistrate judge's decision in *Riverkeeper* is not applicable here. In *Riverkeeper*, the magistrate observed that: FERC had previously disclosed comparable information on its eLibrary database;⁵ there were possibly multiple examples of lack of notice to landowners; and FERC had not conducted an adequate search for responsive documents in view of apparent inconsistencies and omissions identified through discovery. *Riverkeeper*, 650 F. Supp. 2d at 1126-31. With these considerations in mind,

⁴ Your argument that Pacific Connector used the material for mailings conflicts with your assertion that disclosure is needed to verify notice was sent because: (1) such mailings suggest that Pacific Connector has been fulfilling its notice requirements; and (2) that you have a means to verify compliance without disclosure.

⁵ When alerted to this fact, FERC took immediate corrective action to remove the information from public view and to ensure that such disclosure would not occur in the future.

the magistrate ruled that Exemption 6 could not be invoked. These facts are not present in the instant matter.⁶

Rather, the facts here are more akin to the District of Columbia District Court's decision in *Odland*, in which that court affirmed FERC's protection of landowner lists under Exemption 6. See 2014 WL 1244773 at *10-11. In *Odland*, the court plainly stated that *Riverkeeper* was not applicable because there was ample evidence of notice in the record. *Id.* The Plaintiffs, like in *Riverkeeper* and here in your appeal, argued that they needed the entire lists to verify that notice was received. *Id.* The court, however, stated that FERC's duty is to *send notice* and that "whether notice *was received* is irrelevant to FERC's conduct and thus is not a matter of public interest." *Id.* at *11. The court concluded that revealing the names and addresses of landowners would not "reveal anything about the workings of FERC" and therefore concluded there was no public interest in disclosure. *Id.*

Like in *Odland*, there is ample evidence in the public record of notice for this project. See 2014 WL 1244773 at *11. In that regard, FERC's efforts with regard to transparency and public participation are demonstrated by the vast public record in FERC Docket Nos. PF12-17 and CP13-492.⁷ In describing FERC's notification, the record indicates that the "the mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental groups and non-governmental organizations; interested Indian tribes; other interested parties; and local libraries and newspapers.... all affected landowners (as defined in the Commission's regulations)⁸ and anyone who submits comments on the projects."⁹ In addition to the

⁶ Furthermore, *Riverkeeper* narrowly interprets *Bibles* and *FLRA*. In doing so, *Riverkeeper* de-emphasizes significant aspects of *Bibles* and *FLRA* that place a very high premium on protecting individual privacy. In light of the factual differences here, these court decisions could support a different outcome in this instance. See *FLRA*, 510 U.S. at 502 (finding that the disclosure of the personal home addresses of individuals would violate their privacy rights).

⁷ At this time, there are over five hundred (500) documents collectively in FERC Docket Nos. PF12-17 and CP13-492.

⁸ See 18 C.F.R. 157.21(f)(3) and 157.6(d)(2) (defining affected landowners).

⁹ See *Notice of intent to prepare an Environmental Impact Statement for the planned Jordan Cove Liquefaction and Pacific Connector Pipeline Projects, request for comments on environmental issues, etc re Jordan Cove Energy Project LP et al under PF12-7 et al.*, (August 2, 2012) [Accession No. 20802-3020]; *Notice of Pacific Connector Gas Pipeline, LP's 6/6/13 filing of an application seeking a certificate of*

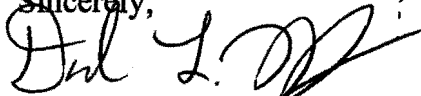
considerable public record, there were seven public meetings in Southern Oregon to inform the public of the project.¹⁰ Furthermore, the landowner lists, even as redacted, show that FERC has gone to great lengths to obtain a list of affected landowners and send notice. Full disclosure of the list would not be dispositive as to whether FERC has met its notice obligation to *send* notice. *See Odland*, 2014 WL 1244773 at *11. As the court stated in *Odland*, “[w]hether notice was received is irrelevant to FERC’s conduct and thus is not a matter of public interest.”

As discussed above, to overcome FOIA Exemption 6, it must be demonstrated that the public interest in disclosure of the information outweighs the substantial privacy interest of the landowners. *See Horner*, 879 F.2d at 879 (observing that “even a modest privacy interest outweighs nothing every time.”). In this instance, I find that this balance favors protecting the significant privacy interest of the landowners. *See Id.*

Conclusion

For the reasons stated above, the Director’s determination is hereby affirmed. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,



David L. Morenoff
Acting General Counsel

7002 0860 0001 4093 4853

public convenience and necessity authorizing the construction and operation of the Pacific Connector Gas Pipeline, etc. under CP13-492 et al., (June 19, 2013) [Accession No. 20130619-3035]

¹⁰ *See Project update for the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects under CP13-483 et al* (November 26, 2013) [Accession No. 20131126-4001]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

JAN 16 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-28

VIA EMAIL AND REGULAR MAIL

Beth Gordon, Esq.
The Gordon Law Firm
113 East Nobel Avenue
P. O. Box 734
Williston, FL 32696
thegordonlawfirm@aol.com

Dear Ms. Gordon:

This letter is a response to your correspondence dated January 12, 2014, received by the Federal Energy Regulatory Commission (Commission) on January 13, 2014, regarding your Freedom of Information Act (FOIA) request, filed in accordance with 5 U.S.C. § 552 (2012) and the Commission's FOIA regulations, 18 C.F.R. § 388.108 (2013). Your appeal was filed prior to a Commission determination on your FOIA request. Consequently, it is not ripe for review by the General Counsel. The Director of the Office of External Affairs will provide you with a determination letter regarding your request within the statutory timeframe. That letter will explain your appeal rights. If you are still interested in pursuing an appeal, please follow the instructions in that letter.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Beamon", with a stylized flourish at the end.

Charles A. Beamon
Associate General Counsel
General and Administrative Law

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

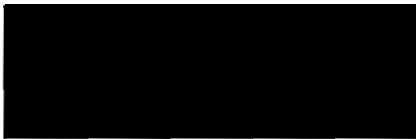
JUN 03 2014

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-36

VIA CERTIFIED MAIL

Mr. Jason Smathers



Dear Mr. Smathers:

This letter responds to your correspondence received April 16, 2014, which appeals the determinations made by the Director of the Office of External Affairs (Director) of the Federal Energy Regulatory Commission (Commission) on March 13 and April 10, 2014, in response to the request you filed on January 23, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014).

Procedural History and Background

On January 23, 2014, pursuant to the FOIA, you sought copies of "any emails in the [FERC] FOIA Office that contain the word Smathers," primarily from January 1, 2009 to the present.

The Commission processed your request on a rolling basis in two separate responses. First, on March 13, 2014, the Director issued an initial partial response letter releasing nineteen (19) documents in their entirety. Second, on April 10, 2014, the Director issued a second and final response letter releasing twenty (20) documents in redacted form. Pursuant to FOIA Exemption 5, the redactions consisted of deliberative information including the names of lower level FERC staff who handled such matters.¹

¹ See 5 U.S.C. 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency."). This exemption incorporates various privileges, including the deliberative process privilege which is at issue here.

On appeal, you assert that “each of these emails ostensibly discusses a request I have filed, which the agency presumably has acted on, thereby adopting at least some of the reacted information as the official agency position for that request.”² You contend that “the context in which the redactions appear seem [sic] to indicate that much of the redacted content is indeed official agency position and not deliberative material.”³ You state that FOIA Exemption 5 exempts from disclosure “only those documents that are normally privileged in the civil discovery context.”⁴ Specifically, you argue that the public disclosure of the redacted portions of the requested documents would not be “likely in the future to stifle honest and frank communication within the agency.”⁵

Discussion

After a careful review of the requested documents, the Director’s determination, relevant case law, and your appeal, I am upholding the Director’s response in part and reversing in part. While I agree with the Director’s finding that a substantial portion of these emails is protected by FOIA Exemption 5, I have determined to release additional parts of nine (9) of the twenty (20) redacted documents.

The additional information which is hereby released consists of routine factual information which is not covered by a FOIA Exemption. *See Ctr. For Int’l Env’t Law v. Office of the U.S. Trade Representative*, 505 F Supp. 2d 150, 158 (D.D.C. 2007) (segregable nonexempt information should be released).

However, I disagree with your overall contention that the redactions reflect Agency determinations which should otherwise be released. In most instances, as noted, the redactions consisted of predecisional internal discussions among lower level staff who typically assisted the Director with the processing of FOIA requests. Lower level staff in particular should have the leeway to engage in routine communications without fear that their every word will be publicly disclosed, possibly widely disseminated, and perhaps taken out of context. Disclosure could also result in a misleading public perception because the views of staff might not necessarily reflect official agency

² Appeal at 1.

³ *Id.*

⁴ *Id.*, citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975).

⁵ *Id.*, citing *Morley v. Central Intelligence Agency*, 508 F.3d 1108, 1126 (D.C. Cir. 2007).

FOIA Appeal No. FY14-36

- 3 -

direction. See *Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that “[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny.”).

Moreover, in conjunction with withholding lower staff’s internal comments, an agency may also withhold their identities. In fact, the U.S. District Court for the District of Columbia has stated that “if a document is deliberative in nature, the identity of the author is also privileged, because of the potential chilling effect and harm to the deliberative process.” *Cofield v. City of LaGrange, GA*, 913 F. Supp. 608, 616 (D.D.C. 1996), citing *Brinton v. Dep’t of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), cert denied, 452 U.S. 905 (1981) (protecting identities of attorneys who provided legal advice to Secretary of State); *Tax Reform Research Group v. IRS*, 419 F. Supp. 415 (D.D.C. 1976) (protecting identities of participants in internal IRS communications). See also *Oldland v. FERC*, 2014 WL 1244773 (D.D.C. March 27, 2014), slip op. at 7 (denying Plaintiffs’ complaint that Vaughn Index was too vague because it omitted names of lower level FERC staff).

Conclusion

For the reasons explained above, I am upholding the Director’s decision in part and reversing in part.

Judicial review of my decision of your appeal is available to you in the United States District court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimilie at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,



David L. Morenoff
Acting General Counsel

Certified Mail Receipt No. 7002 0860 0001 4094 0830

Enclosures (9)

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

MAY 23 2014

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-42

CERTIFIED MAIL

Mr. Craig Linder
Assistant General Counsel
Dow Jones
Avenue of the Americas
New York, NY 10036
Craig.linder@dowjones.com

Dear Mr. Linder:

This letter responds to your correspondence received April 14, 2014,¹ in which you appeal the March 4, 2014 response of Leonard M. Tao, Director of the Office of External Affairs (Director), to the request filed by *The Wall Street Journal* reporter Rebecca Smith on January 31, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014).²

Procedural History and Background

On January 31, 2014, pursuant to the FOIA, Ms. Smith specifically requested a copy of the following information:

- (1) A report on electric-grid vulnerabilities, which may have been prepared in May 2013, by Richard Waggel of FERC's Office of Energy Infrastructure Security;
- (2) A list of the largest electrical transmission substations in the U.S.;
- (3) A list of security measures that utilities should consider implementing to make their systems better protected against physical attacks. [Ms.

¹ *Dow Jones* is the parent company of *The Wall Street Journal*.

² This response was initially due on May 12, 2014. On May 12, 2014, the Commission's Secretary extended the deadline to May 27, 2014.

Smith] believe[s] the list was dated May 13, 2013 and was prepared at the request of former Chairman Jon Wellinghoff;

(4) Emails between former Chairman Wellinghoff and others at the Commission concerning grid security and protections, beginning in January 2013 and continuing to the present day; and

(5) Any FERC reports or analyses on grid attacks, especially concerning the April 16, 2013 attack on PG&E Corp's Metcalf substation in San Jose, California.

On March 4, 2014, the Director issued a determination withholding thirty-five (35) internal staff emails in their entirety under FOIA Exemption 5.³ In this appeal, you raise the following issues: (A) the Director failed to satisfy the burden of demonstrating that the emails are exempt from disclosure under FOIA Exemption 5; and (B) the Director must produce any "reasonably segregable" portions of the withheld emails.

DISCUSSION

A. The Director Correctly Applied FOIA Exemption 5 to protect deliberative material.

After a careful review of the requested documents, the Director's determination, relevant case law, and your appeal, I am upholding the Director's response. I agree with the Director's finding that the thirty-five (35) internal emails are protected by FOIA Exemption 5. The documents consist of internal communications and deliberations between Office of Energy Infrastructure Security (OEIS) staff and then FERC Chairman Jon Wellinghoff. They reflect internal staff opinions, analysis, comments on drafts, and proposed initiatives regarding cyber security. In addition, the emails include summaries of meetings regarding cyber and physical threats to energy infrastructure and contemplate future actions responsive to these threats.

FOIA Exemption 5 incorporates the deliberative process privilege, which is at issue here, to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; to protect against premature disclosure of proposed policies before they are finally adopted; and to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir.

³ See 5 U.S.C. § 552(b)(5).

1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that “[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny”).

Agency staff must have the leeway to express their personal and internal opinions on official matters without fear that such opinions would be publicly released. The staff opinions reflected in the withheld emails reflect potential OEIS initiatives and deliberations regarding cyber security issues, and do not necessarily represent the official views of the agency. These staff opinions were communicated internally prior to any official agency action. Not only would release risk chilling future staff discussion, release here could cause public confusion by disclosing analysis that ultimately did not form part of any final analysis released to the public.

B. The Director correctly determined that none of the emails contained information that was reasonably segregable.

I agree with your assertion that the agency is required to produce purely factual portions of documents. However, in this instance, to the extent factual portions exist, they are so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. U. S. Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency’s decision-making process). The withheld material does not contain any information that is reasonably segregable. Therefore, no additional factual information can be released.

C. Many of the Emails Are Also Protected Under FOIA Exemption 7(F).

Though not invoked by the Director, a further review of the responsive material reveals that at least eighteen (18) of the thirty-five (35) emails are also exempt from disclosure under FOIA Exemption 7(F). FOIA Exemption 7(F) exempts “records or information compiled for law enforcement purposes” to the extent that release of such information “could reasonably be expected to endanger the life or physical safety of any individual.” *See* 5 U.S.C. § 552(b)(7)(F).

In particular, so long as the information at issue was compiled for law enforcement purposes, this FOIA exemption may be used to prevent the release of information that could endanger the life or physical safety of people. *See Pub. Employees for Envtl. Responsibility v. U.S. Section, Int’l Boundary & Water Comm’n*, 740 F.3d 195 (D.C. Cir. 2014) (recognizing that law enforcement purposes include proactive steps designed to prevent criminal activity and to maintain security, not just investigating and prosecuting

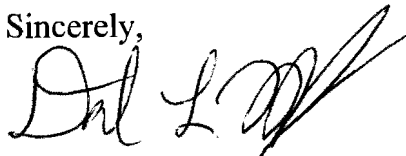
individuals after a violation of the law; and holding that critical infrastructure emergency action plans and inundation maps were created for law enforcement purposes and protected under FOIA Exemptions 7(E) and 7(F)).

Accordingly, at least eighteen (18) emails are also withheld from disclosure in their entirety under FOIA Exemption 7(F). The Exemption applies because the emails contain analysis of cyber and physical attacks, and discuss preventive security measures pertaining to electric utility infrastructure which, if released, could endanger the life or physical safety of an individual.

CONCLUSION

For the reasons stated above, your April 14, 2014 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
Acting General Counsel

Certified Mail Receipt No. 7002 0860 0001 4092 9668

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

July 3, 2014

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-44

VIA CERTIFIED MAIL

Susan Jane M. Brown, Esq.
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401
brown@westernlaw.org

Dear Ms. Brown:

This letter responds to your appeal received June 9, 2014 of the determination denying in part your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2014).¹ As discussed below, I uphold the Director's determination in part and reverse in part as to one document.

Background

On February 7, 2014, you submitted a FOIA request seeking records related to the Williams Pacific Connector Gas Operator, LLC (Pacific Connector) pipeline construction application, Docket No. CP13-492. Specifically, you requested:

1. An unredacted copy of the "updated stakeholder list" referenced in Williams Pacific Connector Gas Operator, LLC's ("Pacific Connector") filing with the Federal Energy Regulatory Commission ("FERC") for Docket No. CP13-492 dated January 17, 2014.
2. Unredacted copies of all previous versions of the stakeholder/landowner lists dating to the original submitted to FERC for Docket No. CP13-492 as referenced in Pacific Connector's letter dated January 17, 2014. NOTE: excluded from this request is the "updated stakeholder list"

¹ You submitted the request on behalf of Klamath-Siskiyou Wildlands Center, Rogue Riverkeeper, Landowners United, Oregon Coast Alliance, Cascadia Wildlands, and Mr. Bob Barker.

referenced in Pacific Connector's filing with FERC dated September 30, 2013 which is the subject of a separate FOIA request (FERC tracking number FOIA-2014-0017).

3. Unredacted copies of all communications between the FERC and Pacific Connector regarding Requesters' November 12, 2013 FOIA request (FERC tracking number FOIA-2014-0017).
4. Unredacted copies of all requests to receive notice of siting, permitting, or planning actions regarding the proposed Jordan Cove/Pacific Connector project (for Docket No. CP13-492) that is the subject of Pacific Connectors' correspondence described in request categories 1 and 2 above. *See, e.g.*, 40 C.F.R. § 1506.6(b)(1) ("In all cases the agency shall mail notice to those who have requested it on an individual action."); 18 U.S.C. § 380.9 (incorporating and implementing NEPA's public participation regulations established at 40 C.F.R. § 1506.6).
5. Unredacted copies of all requests from stakeholders/landowners for confidential treatment of their names, addresses or other information regarding the proposed Jordan Cove/Pacific Connector project (for Docket No. CP13-492) that is the subject of Pacific Connector's correspondence described in request categories 1 and 2 above.
6. All documents providing or describing a legal basis or authority for FERC to communicate with Pacific Connector regarding Requesters' November 12, 2013 FOIA request.

A search of the Commission's nonpublic files identified three (3) documents responsive to your request. The documents are landowner lists, which were submitted by Pacific Connector with a request for privileged and confidential treatment. After notifying Pacific Connector in accordance with the Commission's regulations,² the Director of the Office of External Affairs (Director), on April 21, 2014, released the documents to you with the names and addresses of individual landowners redacted pursuant to FOIA Exemption 6. *See* 5 U.S.C. § 552(b)(6).

You appeal the Director's determination on the grounds that FOIA Exemption 6 is not applicable and that the Director failed to respond to Request Items 2 through 6.

² 18 C.F.R. § 388.112(d).

Discussion

The Director correctly withheld material under FOIA Exemption 6.

FOIA Exemption 6 provides that an agency should not disclose “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” See 5 U.S.C. § 552(b)(6). To overcome this exemption, it must be demonstrated that the public interest in disclosure outweighs the substantial privacy interest.³

1. Landowners have a strong privacy interest in protecting names and personal home addresses.

The names and personal addresses of private individuals are considered “personnel and medical files and similar files” under FOIA Exemption 6. See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006); *Minnis v. USDA*, 737 F.2d 784, 786 (9th Cir. 1984) (names and addresses are within “similar files” definition). Moreover, it is well established that the names and personal home addresses of private landowners implicate a strong personal privacy interest that is routinely protected under FOIA Exemption 6. See, e.g., *Bibles v. Oregon Natural Desert Ass’n*, 519 U.S. 355 (1997); *U.S. Dep’t of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) [*FLRA*]; *National Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 877-78 (D.C. Cir. 1989) (recognizing privacy interest of an individual avoiding unlimited disclosure of his name and address to deter unwanted contact); *Odland v. FERC*, Civil Action No. 13-141, 2014 WL 1244773 at *10 (D.D.C. 2014).

Despite your contention, the privacy interest of the landowners concerning their names and personal home addresses is not waived merely because other sources have that information or because there are other means for obtaining the information. See *Odland*, 2014 WL 1244773 at *11 (citing *ACLU v. Dep’t of Justice*, 655 F.3d 1, 12 (D.C. Cir. 2011)); *Lazaridis v. U.S. Dep’t of State*, No. 10-1280 (RMC), 2013 WL 1226607 (D.D.C. Mar. 27, 2013) (finding that although plaintiff obtained withheld information by other means, the need to protect the material was not waived nor was the agency’s ability to invoke the FOIA exemption).

³ See *NARA v. Favish*, 541 U.S. 157, 172 (2004); see also *Martin v. Dep’t of Justice*, 488 F.3d 446, 458 (D.C. Cir. 2007) (“In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.” (internal quotations omitted)).

In addition, your reliance on *Columbia Riverkeeper v. FERC*, 650 F. Supp. 2d 1121 (D. Or. 2009) [*Riverkeeper*] is misplaced. In *Riverkeeper*, the magistrate judge narrowly found that there was not a strong personal privacy interest because FERC had previously disclosed comparable information in its eLibrary database⁴ and that there was possible evidence that multiple landowners did not receive notice. *Riverkeeper*, 650 F.Supp.2d at 1126-31. Here, there is no evidence in the extensive docket in CP13-492 that notice was not properly given or that stakeholders are not otherwise properly engaged in the application process. Moreover, *Riverkeeper* narrowly interprets *Bibles* and *FLRA*, de-emphasizing the very high premium these leading Supreme Court decisions place on protecting individual home addresses. In light of the factual differences here, these cases support a different outcome from *Riverkeeper*.

2. On balance, the public interest in disclosure, if any, does not outweigh the landowners' significant privacy interest in their names and personal home addresses.

The public interest at issue in the FOIA Exemption 6 balancing test is “the extent to which disclosure of the information sought would shed light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to.” *Bibles*, 519 U.S. at 355-56. Under this standard, you have not articulated a cognizable public interest in disclosing the information.

For example, in *Odland*, in which that court affirmed FERC’s protection of landowner lists under Exemption 6, the plaintiffs argued that they needed the entire list to determine whether “FERC’s notification procedures were effective.”⁵ 2014 WL 1244773 at *10-11. The court, however, stated that FERC’s obligation is to send notice and “whether notice *was received* is irrelevant to FERC’s conduct and thus is not a matter of public interest.” *Id.* at *11. The court distinguished *Riverkeeper*, finding that there was “ample public documentation” showing that FERC provided notice. *Id.*

Like in *Odland*, FERC’s efforts with regard to transparency and public participation are demonstrated by the vast public record in FERC Docket Nos. PF12-17

⁴ When alerted to this fact, FERC took immediate action to remove the information from public view and to ensure that such disclosure would not occur again.

⁵ You allege that you are not seeking the information to shed light on whether FERC’s notification procedures are effective. (Appeal at 12). Yet, among other things, you intend to compare the various iterations of the stakeholder list in order to evaluate the accuracy of the information used by FERC (Appeal at 9), which is essentially evaluating effectiveness of FERC’s notification procedures.

and CP13-492.⁶ The record describes FERC's notification procedures.⁷ In addition to the notice documented in the record, there were seven public meetings in Southern Oregon to inform the public of the project.⁸ Furthermore, the landowner lists, even as redacted, show that FERC has gone to great lengths to obtain a list of affected landowners and send notice. Full disclosure of the list would not be dispositive as to whether FERC has met its obligation regarding notice. *See Odland*, 2014 WL 1244773 at *11. The public record shows that FERC has indeed met its legal obligations.

Likewise, disclosing names and personal home addresses will not reveal whether the landowners have received accurate information or are unfairly treated. Rather, the accuracy of the information provided may be evaluated by reviewing the record, which includes the information sent to the public. Moreover, using the full list to engage private citizens does not meet the public interest standard because such an endeavor will not reveal FERC activities. *See, e.g., Bibles*, 519 U.S. at 355 (rejecting asserted public interest in "providing persons on the BLM's mailing list with additional information" because it does not reveal agency activities); *Horner*, 879 F.2d at 879 (rejecting public interest claim in disclosure of names and addresses where disclosure would aid in lobbying activities because it would not reveal agency activities).

Furthermore, *Gilman v. U.S. Dep't of Homeland Security*, to which you refer, is not applicable. No. 09-0468 (BAH), 2014 WL 984309 (D.D.C. Mar. 14, 2014). In *Gilman*, the court held that the balance tipped in favor of disclosing landowner names and addresses to shed light on Customs and Border Protection's building of a wall along the Texas-Mexico border. The court found that because the location and dimensions of the wall were unknown, disclosing the names and addresses would show the impact on

⁶ At this time, there are over five hundred and fifty (550) documents collectively in FERC Docket Nos. PF12-17 and CP13-492.

⁷ *See Notice of intent to prepare an Environmental Impact Statement for the planned Jordan Cove Liquefaction and Pacific Connector Pipeline Projects, request for comments on environmental issues, etc re Jordan Cove Energy Project LP et al under PF12-7 et al.*, (August 2, 2012) [Accession No. 20120802-3020]; *Notice of Pacific Connector Gas Pipeline, LP's 6/6/13 filing of an application seeking a certificate of public convenience and necessity authorizing the construction and operation of the Pacific Connector Gas Pipeline, etc. under CP13-492 et al.*, (June 19, 2013) [Accession No. 20130619-3035].

⁸ *See Project update for the Jordan Cove Liquefaction and Pacific Connector Pipeline Projects under CP13-483 et al* (November 26, 2013) [Accession No. 20131126-4001].

indigenous communities and whether landowners were being treated fairly. 2014 WL 984309 at *7. Here, the location, route, and other significant details about the project are known and part of the extensive public record. Additionally, unlike *Gilman*, there is an established regulatory process with environmental review and public participation in which communications are part of the public record.⁹

To overcome FOIA Exemption 6, it must be demonstrated that the public interest in disclosure of the information outweighs the substantial privacy interest of the landowners. *See Horner*, 879 F.2d at 879 (observing that “even a modest privacy interest outweighs nothing every time.”). Here, I find that the balance weighs in favor of protecting the significant privacy interest of private landowners. *See Id.*

Documents responsive to Request Items 2 through 6.

With the exception of the enclosed comment letter from Pacific Connector, you have been provided with all documents responsive to your request, including through the Director’s response to this FOIA request and during the processing of your November 15, 2013 FOIA request (FY14-17). I am also providing you another copy of the November 26, 2013 opportunity to comment letter to Pacific Connector. Lastly, the Director’s January 7, 2014 response letter stated the legal basis under which FERC communicates with interested parties concerning assertions of confidentiality. *See* 18 C.F.R. § 388.112(d).

Conclusion

For the reasons stated above, the Director’s determination is hereby affirmed in part and reversed in part. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park,

⁹ To the extent you seek communications from Pacific Connector with stakeholders, that information will not shed light on government activities, but rather the activities of a private party. *Dep’t of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 774 (1989) (finding that a “rap sheet” of someone who allegedly had “improper dealings with a corrupt Congressman” was not in the public interest because it did not reveal anything about the Congressman’s behavior).

MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at 301-837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "D.L. Morenoff", with a long, sweeping horizontal line extending to the right.

David L. Morenoff
Acting General Counsel

Enclosures (2)

Federal Energy Regulatory Commission
Washington, DC 20426

APR 21 2014

Re: FOIA No. FY14-44
Release Letter

VIA ELECTRONIC AND REGULAR MAIL

Susan Jane M. Brown
Western Environmental Law Center
1216 Lincoln Street
Eugene, OR 97401
brown@westernlaw.org

Dear Ms. Brown:

On February 7, 2104, you filed a request¹ for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2013).² Specifically, you requested:

1. An unredacted copy of the "updated stakeholder list" referenced in Williams Pacific Connector Gas Operator, LLC's ("Pacific Connector") filing with the Federal Energy Regulatory Commission ("FERC") for Docket No. CP13-492 dated January 17, 2014.
2. Unredacted copies of all previous versions of stakeholder/landowner lists dating to the original submitted to FERC for Docket No. CP13-492 as referenced in Pacific Connector's letter dated January 17, 2014. NOTE: excluded from this request is the "updated stakeholder list" referenced in Pacific Connector's filing with FERC dated September 30, 2013[2] which is the subject of a separate FOIA request (FERC tracking number FOIA-2014-0017).

¹ You submitted the request on behalf of Klamath Siskiyou Wildlands Center, Rogue Riverkeeper, Landowners United, Oregon Coast Alliance, Cascadia Wildlands, Sierra Club, and Mr. Bob Barker. You also requested a fee waiver; however, no fees were associated with the processing of this request. *See* 18 C.F.R. § 388.109(b)(2)(iii).

² On March 4, 2014, the Commission issued a letter extending the timeframe to respond in accordance with 18 C.F.R. § 388.110(b)(1) and (b)(4)(iii). By email on March 20, 2014, staff confirmed that you agreed to extend the timeframe to respond to coincide with the deadline in your FOIA Appeal No. FY14-17. The Commission issued its initial response to your request on April 10, 2014 notifying the submitter and you of the Commission's intent to release a redacted version of the document.

3. Unredacted copies of all communications between the FERC and Pacific Connector, regarding Requesters' November 12, 2013 FOIA request (FERC tracking number FOIA-2014-0017).
4. Unredacted copies of all requests to receive notice of siting, permitting, or planning actions regarding the proposed Jordan Cove/Pacific Connector project (for Docket No. CP13-492) that is the subject of Pacific Connector's correspondence described in request categories 1 and 2 above. See, e.g., 40 C.F.R. § 1506.6(b)(1) ("In all cases the agency shall mail notice to those who have requested it on an individual action."); 18 U.S.C. § 380.9 (incorporating and implementing NEPA's public participation regulations established by 40 C.F.R. § 1506.6).
5. Unredacted copies of all requests from stakeholders/landowners for confidential treatment of their names, addresses or other information regarding the proposed Jordan Cove/Pacific Connector project (for Docket No. CP13-492) that is the subject of Pacific Connector's correspondence described in request categories 1 and 2 above.
6. All documents providing or describing a legal basis or authority for FERC to communicate with Pacific Connector regarding Requesters' November 12, 2013 FOIA request.

Commission staff identified three landowners lists filed under Accession Nos. 20140117-5162; 20130709-5056 and 20130606-5002 as responsive to this request. On March 10, 2014, in response to notice sent by the Commission pursuant to 18 C.F.R. § 388.112(d), Pam Barnes, Project Manager for Williams Pacific Connector Gas Operator, LLC (Williams), objected to the release of privileged and confidential information submitted to the Commission. Williams raised specific objections to release of the names and addresses of private citizens under FOIA Exemption 6, which protects files the disclosure of which would constitute a clearly unwarranted invasion of privacy. Williams also stated that the facts here are distinguishable from those related to the landowner list in *Columbia Riverkeeper, et al. v. FERC*, 650 F. Supp. 2d 1121(D. Or. 2009). As explained below, partially redacted versions of the landowner lists at issue will be released to you and portions will be withheld under FOIA Exemption 6.

FOIA Exemption 6 provides that an agency should not disclose "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." See 5 U.S.C. § 552(b)(6). It is well established that the names and personal home addresses of private landowners are protected from release under FOIA Exemption 6. See, e.g., *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997); *U.S. Dep't of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994); *Carter, Fullerton & Hayes LLC v. FTC*, 520 F. Supp. 2d

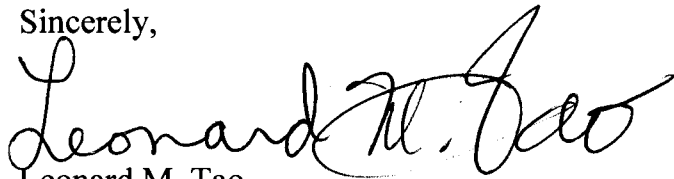
134, 144-45 (D.D.C 2007); *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989). To overcome the presumption in favor of protecting individual privacy, it must be demonstrated that the public interest in disclosure of the information outweighs the substantial privacy interest of the landowners. See *NARA v. Favish*, 541 U.S. 157, 172; see also *Martin v. Dep't of Justice*, 488 F.3d 446, 458 (D.C. Cir. 2007). That burden has not been met here.

Relying on *Columbia Riverkeeper, et al. v. FERC*, 650 F. Supp. 2d 1121(D. Or. 2009), you argue that disclosure of the requested information would contribute to the public's understanding of the operations of FERC. Your reliance on *Riverkeeper* is misplaced. As noted in a recent decision in *Odland v. FERC*, Civil Action No. 13-141, 2014 WL 1244773, *10 (D.D.C. 2014), *Riverkeeper* was not applicable because there was ample evidence of notice in the record. *Id.* The Plaintiffs, like in *Riverkeeper* and here in your request, argued that they needed the entire lists to verify that notice was received. *Id.* The court, however, stated that FERC's duty is to send notice and that "whether notice was received is irrelevant to FERC's conduct and thus is not a matter of public interest." *Id.* at *11. The court concluded that revealing the names and addresses of landowners would not "reveal anything about the workings of FERC" and therefore concluded there was no public interest in disclosure. *Id.*

Thus, the redacted portions of the document consist of landowners' home addresses, home phone numbers, or other personal information. On the other hand, the names, addresses, and other data of commercial entities do not implicate a privacy interest that is protected by FOIA Exemption 6 and are being released to you.

Please find enclosed redacted portions of Accession Nos. 20140117-5162; 20130709-5056 and 20130606-5002. As provided by FOIA and 18 C.F.R. § 388.110 of the Commission's regulations, any appeal from this determination must be filed within 45 days of the date of this letter. The appeal must be in writing, addressed to David L. Morenoff, Acting General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and clearly marked "Freedom of Information Act Appeal." I would appreciate it if you would also send a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

Sincerely,

A handwritten signature in black ink, appearing to read "Leonard M. Tao". The signature is fluid and cursive, with the first name "Leonard" being the most prominent part.

Leonard M. Tao
Director
Office of External Affairs

cc: Pam Barnes
Project Manager – Certificates
Williams Pacific Connector Gas Operator, LLC
P.O. Box 58900
Salt Lake City, UT 84158-0900
Pam.J.Barnes@williams.com

Federal Energy Regulatory Commission
Washington, D.C. 20426

MAY 21 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-45

ELECTRONIC AND REGULAR MAIL

Mr. Ronald Rosenfeld



This letter responds to your appeal received on April 7, 2014 pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2013). Specifically, you appealed a determination by the Director of the Office of External Affairs, Leonard M. Tao, (Director) to withhold commercially sensitive information under FOIA Exemption 4.¹ As explained below, the Director's determination is affirmed in part.

BACKGROUND

On February 10, 2014, you filed a FOIA request for a copy of Accession No. 20140130-5363, Supplemental Information of Downeast LNG, Inc. (Downeast). The requested document responds to a determination by the Department of Transportation's (DOT) Pipeline and Hazardous Materials Safety Administration's (PHMSA) "design spill criteria" for the Downeast LNG Project under Docket Nos. CP07-52 *et al.* On February 21, 2014, in response to the Commission's submitter's rights notice, Downeast asserted that part of the filing consists of proprietary trade secret and confidential commercial information developed by CH•IV International, LLC (CH•IV). Downeast stated that the information is protected and disclosure would cause substantial competitive harm to CH•IV if released.

¹ 5 U.S.C. § 552(b)(4) (2012) (which protects from disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential).

FOIA Appeal No. FY14-45

- 2 -

On March 20 2014, the Director determined to release the document subject to a required five day holding period with the commercially sensitive information redacted. *See* 18 C.F.R. § 388.112(e). On April 8, 2014, you appealed the Director's determination. You asserted that "a substantial portion of the redactions are not warranted." You specifically requested that Commission staff conduct an independent evaluation "to assure that only information which would clearly 'cause substantial harm to the competitive position of CH•IV' is redacted."

DISCUSSION

After a careful review of your appeal, the Director's response, the pertinent records and the applicable legal authority, I find that the Director properly invoked FOIA Exemption 4 to protect the information at issue.² However, a portion of the withheld information is now publicly available online through the PHMSA. That information will be released as specified below.

To qualify for FOIA Exemption 4 protection, the information must be (1) commercial or financial, (2) obtained from a person, and (3) privileged and confidential. Generally, to be "confidential" for purposes of FOIA Exemption 4, disclosure of the information must either impair the government's ability to obtain similar information in the future, or cause substantial harm to the competitive position of the submitter of the information. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Under Exemption 4, a showing of actual harm is not necessary, but only a determination that the release of the information would create the likelihood of competitive harm. *See Journal of Commerce, Inc. v. United States Dep't of the Treasury*, No. 86-1075, 1987 WL 4922, at *2 (D.D.C. June 1, 1987) (holding that submitter was not required to document or pinpoint actual harm, but need only show its likelihood).

As an initial matter, your appeal does not dispute that some of the withheld material is confidential commercial information. Your appeal also does not refute that public release of the document would cause substantial competitive harm to CH•IV or that public release could harm the agency's ability to obtain similar information in the future.

CH•IV compiled the withheld information to develop an engineering solution to identify accidental LNG leak scenarios for design spills that relate to vapor dispersion models used to calculate exclusion zones for LNG import/export facilities. CH•IV staff

² I note that you previously inquired with Commission staff whether the initial determination letter applied to the Exhibits included in the document.

FOIA Appeal No. FY14-45

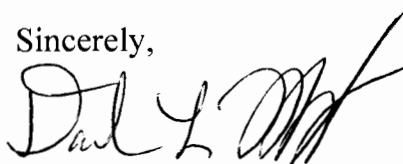
- 3 -

compiled this information over several months presumably at great expense. The release of this information would harm CH•IV by providing its competitors a road map of how CH•IV develops design spill criteria for LNG projects. Thus, CH•IV's methodology would be highly valuable in the hands of its competitors. Therefore, the Director properly withheld this information.

CONCLUSION

For the reasons stated above, your April 7, 2014 appeal is denied in part and granted in part. The additional information slated for FERC release will be made available to you no sooner than five (5) calendar days from the date of this letter. *See* 18 C.F.R. § 388.112(e). Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the data that you seek.

Sincerely,



David L. Morenoff
Acting General Counsel

cc: Tania Perez
Attorney for Downeast LNG, Inc.
Norton Rose Fulbright
Fulbright & Jaworski L.L.P.
666 Fifth Avenue 31st Floor
New York, New York 10103-3198
tperez@fulbright.com

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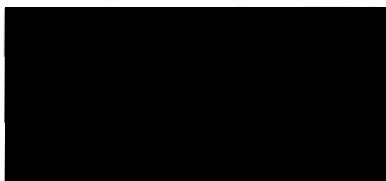
Federal Energy Regulatory Commission
Washington, DC 20426

MAY - 9 2014

Freedom of Information Act
Appeal FOIA NO. FY14-45

ELECTRONIC AND REGULAR MAIL

Mr. Ronald Rosenfeld



Dear Mr. Rosenfeld:

This letter responds to your April 7, 2014, appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2013). You appealed the decision issued on March 20, 2014 by Leonard M. Tao, Director of the Office of External Affairs (Director), which withheld commercially sensitive information under FOIA Exemption 4.¹

By letter dated May 1, 2014, Acting General Counsel, David L. Morenoff, reversed in part the Director's decision and determined to release additional information in redacted form. The Acting General Counsel's decision also provided notice to the submitter that part of the requested data will be released no sooner than five (5) business days after the issuance of this decision pursuant to 18 C.F.R. § 388.112(e). The five-day notice period has elapsed and I am now releasing a redacted version of the document to you.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles A. Beamon".

Charles A. Beamon
Associate General Counsel
General and Administrative Law

¹ 5 U.S.C. § 552(b)(4) (2012) (which protects from disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential).

FOIA Appeal No. FY14-45

- 2 -

cc: Tania Perez
Attorney for Downeast LNG, Inc.
Norton Rose Fulbright
Fulbright & Jaworski L.L.P.
666 Fifth Avenue, 31st Floor
New York, New York 10103-3198
tperez@fulbright.com

Enclosure

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

AUG - 8 2014

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-62

VIA CERTIFIED MAIL

Ms. Yasmin Gamboa, Esq.
The Street
14 Wall Street, 15th Floor
New York, NY 10005

Dear Ms. Gamboa:

This letter responds to your correspondence received July 15, 2014, which appeals the May 16, 2014 response of Leonard M. Tao, Director of the Office of External Affairs (Director), to the request filed on April 2, 2014, by Daniel Freed, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014). For the reasons explained below, I am upholding the Director's determination and denying your appeal.

Procedural History and Background

On April 2, 2014, pursuant to the FOIA, Mr. Freed, a reporter with *The Street*, sought a copy of "all FERC records from 2011 – 2013 containing the name Blythe Masters." On May 16, 2014, the Director issued a determination informing Mr. Freed that a search of the Commission's non-public documents determined that over 15,000 documents may be responsive to his request. The Director informed Mr. Freed that one of those documents, a 70 page memorandum (Memo), would be withheld in its entirety pursuant to FOIA Exemptions 4 and 7.¹ Mr. Freed was also advised that the remainder of the request would be processed on a rolling basis.²

¹ 5 U.S.C. 552(b)(4), (7) (2012).

² Commission staff continues to review the responsive documents, and the Director will make further determinations in response to Mr. Freed's request until all documents have been reviewed. Mr. Freed's right to appeal is preserved until the final determination has been issued.

Director's Determination

The Director found that the Memo should be withheld pursuant to FOIA Exemption 4, which protects from disclosure “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” See *National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). The Director, citing *National Parks*, maintained that the Memo contains confidential detailed financial information that is not customarily released to the public. The Director determined further that release of the Memo would likely cause significant harm to JP Morgan and would impair the Government’s ability to obtain necessary information in the future. The Director noted that the Memo relates to confidential settlement negotiations and that divulging confidential aspects of such negotiations would make it difficult for the Government to reach joint resolutions in furtherance of the public interest. See, e.g., *M/A-Com Info. Systems, Inc. v. U.S. Dep’t of Health & Human Services*, 656 F. Supp. 691, 692 (D.D.C. 1986) (finding that it is in the public interest to encourage settlement negotiations and that disclosure of confidential commercial information would impair the government’s ability to carry out its duties).

The Director determined that the Memo was also protected from disclosure in its entirety pursuant to FOIA Exemption 7, which protects “records or information compiled for law enforcement purposes.” Specifically, FOIA Exemption 7(E) affords protection to all law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”³

The Director noted that information contained in the Memo embodies FERC enforcement techniques and procedures that are confidential and must remain so in order to preserve their effectiveness, and as such, the Memo would be withheld pursuant to FOIA Exemption 7(E). “Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011), quoting *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009). See also *Williston Basin Interstate Pipeline Co. v. FERC*, 1989 U.S. Dist. LEXIS 3970 (D.D.C. April 17, 1989) (finding portions of a regulatory audit describing the significance of each page in the audit report, investigatory technique used, and auditor’s conclusions to constitute “the functional equivalent of a manual of investigative techniques.”).

³ 5 U.S.C. § 552(b)(7)(E).

Your Arguments on Appeal

On appeal, you contend that the Director improperly invoked FOIA Exemption 4. In particular, you assert that the Memo fails to meet any part of the three part test required for FOIA Exemption 4 protection as established by *National Parks*. Specifically, you state that: (1) the information is not commercial because you do not have a commercial interest in the information, (2) the information was not obtained from a person, and (3) actual substantial harm would not flow from release of the information. Moreover, you assert that when weighing the public interest against the alleged harm at issue, the balance favors release.

With respect to FOIA Exemption 7, you argue that the Agency has failed to demonstrate that release of the document would logically lead to the risk of circumventing the law. In your estimation, the information at issue would not reveal techniques and routines that are not known to the public.

DISCUSSION

FOIA Exemption 4

I agree with the Director's determination that the Memo contains confidential commercial information that could both significantly harm JP Morgan's competitive position and make it more difficult for the government to obtain similar information in the future.⁴ I find that the Memo meets all parts of the tests for FOIA Exemption 4 protection as established in *National Parks*.

The information is commercial

With respect to the commercial nature of the documents, courts, including the D.C. Circuit, have consistently held that "the terms 'commercial' and 'financial' in [FOIA Exemption 4] should be given their ordinary meanings." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983). "The term 'commercial' for Exemption 4 purposes is construed broadly to include information

⁴ Because I agree with the Director that the Memo meets the *National Parks* standard to withhold from disclosure required submissions, I have not made a determination as to whether the Memo would qualify for protection as a voluntary confidential submission. See *Critical Mass Energy Project v. NRC, et al.*, 975 F.2d 871 (D.C. Cir. 1992).

in which the submitting party has a ‘commercial interest.’” *Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d 146, 168 (D.D.C. 2004) (*citations omitted*). Thus, the pertinent question is not whether the requester will use the information in a commercial manner, but rather what is the inherent nature of the document itself. Notably, *Pub. Citizen* is clear that even non-commercial information could become commercial if the submitter (not the requester as stated in your appeal) has a commercial interest in the information. *Id.* Here, the document in question contains highly detailed information regarding JP Morgan’s trading and commercial strategies. Such information is commercial in nature.

The Memo contains information obtained from a Person

Moreover, under these circumstances, I do not agree with your conclusion that because the document is Commission generated, it does not qualify for FOIA Exemption 4. It is well established that Agency documents which contain commercial information may also qualify for Exemption 4 protection. *See e.g. Freeman v. Bureau of Land Mgmt.*, 526 F. Supp. 2d 1178, 1188 (D. Or. 2007) (holding that “government’s research piggybacks upon [company’s] data to such an extent that the government’s data is not truly independent for purposes of Exemption Four.”) The confidential commercial information in the Memo is similarly intertwined with any government suppositions. Release of the Memo would render public detailed confidential commercial information about JP Morgan and its traders.

Release of the Memo would likely substantially harm the Submitter(s) of the Information and impact the Commission’s ability to obtain such information in the future

Finally, I concur with the Director’s conclusion that release of the information could “likely” substantially harm JP Morgan. *See Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 337 F. Supp. 2d at 168. (*reiterating that National Parks “requires only that the substantial harm be ‘likely’”*). As discussed above, the Memo contains detailed commercial information about traders’ bidding strategies. The Memo also includes pricing and cost information that is routinely protected from disclosure. In addition, release could substantially hinder the government’s ability to obtain such information in the future and/or utilize the information as it did here – in an attempt to resolve matters before the Commission.

“Information regarding settlement negotiations may qualify for Exemption 4 protection if it is (1) commercial or financial information; (2) obtained from a person; and (3) confidential.” *Comptel v. F.C.C.*, 910 F.Supp. 2d 100, 117 (D.D.C. 2012). The document was generated as a result of confidential information obtained from JP Morgan,

and Commission staff's interaction with JP Morgan about such confidential data may be protected. In particular, the document, as the Director noted, was an integral part of confidential settlement negotiations. The need to maintain confidentiality in the interest of settlement negotiations is well established. *See, e.g., M/A-Com Info. Systems, Inc. v. U.S. Dep't of Health & Human Services*, 656 F. Supp. 691, 692 (D.D.C. 1986) (*M/A-Com Info. Systems, Inc.*) (finding that it is in the public interest to encourage settlement negotiations and that disclosure of confidential commercial information would impair the government's ability to carry out its duties); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 29-30 (D.D.C. 2000) (noting that even where submissions of information are mandatory, they may be protected if disclosure would impair an agency's ability to carry out its statutory purpose or discourage "forthcoming" (*i.e.*, complete, accurate, or fully cooperative) submissions of such information.).

You argue that "the courts have found that in making a FOIA Exemption 4 determination under the element of 'causing substantial harm', the denial must balance strong public interest in favor of disclosure against the right of private business to protect sensitive information." Appeal, pg. 3. However, the D.C. Circuit has explicitly rejected this approach, holding "that consequentialist approach to the public interest in disclosure is inconsistent with the '[b]alanc[e of] private and public interests' the Congress struck in Exemption 4." *Pub. Citizen Health Research Grp. v. Food & Drug Admin.*, 185 F.3d 898, 904 (D.C. Cir. 1999). Moreover, it must be emphasized that the settlement's terms are publicly known. The public's interest in the confidential details that were exchanged between FERC staff and JP Morgan in the process that led to the public settlement is therefore diminished.⁵ Accordingly, detailed confidential and proprietary information concerning the trading strategies of various individual employees of JP Morgan, which were utilized by FERC staff throughout its non-public investigation, including during settlement negotiations, may be protected.

FOIA Exemption 7

Given that I have determined that the information was correctly withheld under FOIA Exemption 4, I need not address whether the Director properly invoked FOIA Exemption 7(E). I nevertheless take this opportunity to note that though JP Morgan may have had a glimpse of the analyses and methodology FERC utilized to address certain issues, it would not be prudent to make a general public disclosure lest other would-be violators use it to their advantage in an attempt to evade responsibility for their

⁵ *See* Order Approving Stipulation and Consent Agreement, 144 FERC ¶ 61,068 (2013).

misconduct. Thus, even though I need not address FOIA Exemption 7(E), the Director seems to have had ample reason for invoking it.

Segregable Information

Finally, you assert that you would accept release of the memorandum with slight redactions of commercial and law enforcement/investigatory information. Any description or discussion of the issues and facts is inextricably intertwined with the confidential negotiation and processes that resulted in settlement. In other words, there is no clear line of demarcation between the descriptions of the issues and facts and the descriptions of analyses and methodology used by the Commission's Enforcement staff or the confidential commercial information provided by JP Morgan. To the extent that segregable portions of non-exempt information may be isolated, there is no duty to disclose material that would result in meaningless phrases outside the context of the larger document.⁶

CONCLUSION

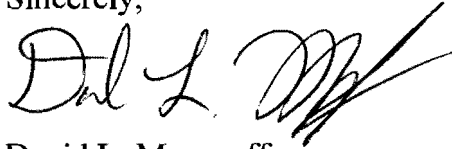
For the reasons explained above, I am upholding the Director's decision to withhold Item 1 of your request in its entirety.

Judicial review of my decision of your appeal is available to you in the United States District court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation.

⁶ See *Mead Data Ctr., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977); see also *Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp.2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists, because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words.")

You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "D.L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
Acting General Counsel

Certified Mail Receipt No. 7002 0860 0001 4093 4877

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

SEP 15 2014

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-76

VIA ELECTRONIC AND CERTIFIED MAIL

Mr. Tyler J. Storti
Stewart Sokol & Gray LLC
2300 SW First Ave
Suite 200
Portland, OR 97201
tstorti@lawssl.com

Dear Mr. Storti:

By correspondence received on April 29, 2014, your firm filed a request for information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.108 (2014). You requested access to privileged documents in Docket No. P-11945. Specifically, you requested materials found at the following eLibrary Accession Numbers: 20060728-0114; 20080626-0077; 20111115-5118; 20111212-5019; 20111215-5100; 20120312-5054; 20120410-0325; 20120605-5095; 20120611-5137; 20130320-5125; 20130320-5126; 20130325-5027; and 20130326-5120.

BACKGROUND

You appeal the June 11, 2014 and June 27, 2014 determinations of Leonard Tao, Director of FERC's Office of External Affairs (Director), which withheld the responsive documents in their entirety under one of the following FOIA Exemptions 3, 4, 5 and 7(F) as applicable.¹ Specifically, you raise the following issues: (A) the Director incorrectly

¹ See 5 U.S.C. § 552(b)(3) (protects from disclosure material specifically exempted from disclosure by statute); 5 U.S.C. § 552(b)(4) (protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential."); 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. § 552(b)(7)(F) (protects from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to endanger the life or physical safety of any individual.").

withheld documents under FOIA Exemption 3; (B) the Director incorrectly withheld documents under FOIA Exemption 4; (C) the Director incorrectly withheld documents under FOIA Exemption 5; (D) the Director incorrectly withheld documents under FOIA Exemption 6;² (E) the Director incorrectly withheld documents under FOIA Exemption 7(F);³ and (F) the Director failed to reasonably disclose segregable material. After a careful review of your appeal, the withheld information, and applicable law, I am upholding the Director's determinations. I address your arguments, in turn, below.

DISCUSSION

- A. Documents identified in eLibrary by Accession Nos. 20130326-5120, 20130320-5126, 20130325-5027, and 20130320-5125 were properly withheld under FOIA Exemption 3.

FOIA Exemption 3 protects documents "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 matters to be withheld." 5 U.S.C. § 552(b)(3). Accordingly, the Director properly invoked FOIA Exemption 3 to protect cultural resource information specifically exempted from disclosure by the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. § 470 *et seq* (2012).

In particular, the Director withheld cultural resource reports and/or surveys that provide the location, character, and ownership of certain historical resources, including maps showing the locations of specific historical sites, and information regarding a site's eligibility for the National Registry of Historical Places. This type of information may be protected because it contains detailed information about historical sites in an area that is not widely known. *See* 16 U.S.C. § 470w-3(a). Disclosure of the information could result in irreparable harm to historical resources. I, therefore, affirm the Director's decision to withhold these four documents pursuant to FOIA Exemption 3.

² The Director did not invoke FOIA Exemption 6 to protect the documents, so that issue will not be considered on appeal.

³ You asserted that the Director inappropriately withheld documents pursuant to FOIA Exemption 7(F). However, the Director withheld only the two documents located at eLibrary Accession Nos. 20111212-5019 and 20120312-5054 pursuant to FOIA Exemption 7(F). You did not take issue with the director's determination as to these two documents and stated that you would request those two documents through the Commission's Critical Energy Infrastructure Information process.

B. Documents identified in eLibrary by Accession Nos. 20111115-5118, 20120605-5095, 20120611-5137, and 20111215-5100 were properly withheld under FOIA Exemption 4.

To qualify for FOIA Exemption 4 protection, the information must be: (1) commercial or financial, (2) obtained from a person, and (3) privileged and confidential. Generally, to be confidential for purposes of FOIA Exemption 4, disclosure of the information must either impair the government's ability to obtain similar information in the future, or cause substantial harm to the competitive position of the submitter of the information. *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Under Exemption 4, a showing of actual harm is not necessary, but only a determination that the release of the information would create the likelihood of competitive harm. *See Journal of Commerce, Inc. v. United States Dept of the Treasury*, No. 86-1075, 1987 WL 4922, at *2 (D.D.C. June 1, 1987) (holding that submitter was not required to document or pinpoint actual harm, but need only show its likelihood).

The Director explained that the withheld material consisted of confidential financial and commercial information, including financing plans, agreements, interest rates, detailed project cost estimates, and average energy production statements. According to the submitter, the release of this information could harm Dorena Hydro LLC (Dorena) by providing its competitors a detailed road map of how Dorena calculates costs. *See Nadler v. F.D.I.C.*, 92 F.3d 93, 95 (2d Cir. 1996) (finding that budget and cost estimates, financial terms and agreements for cost-sharing, and rights and obligations between parties amounted to confidential commercial and financial information). Based on the submitter's representations and the absence of Commission requirements that such information otherwise be made public, I conclude that the Director properly withheld this information.

C. Documents identified in eLibrary by Accession Nos. 20060728-0114, 20080626-0077, and 20120410-0325 were properly withheld under FOIA Exemption 5.

The withheld material includes Commission staff's work papers and analyses that contain predecisional evaluations of the hazard potential, proposed licensing articles, and internal review of design documents. The withheld documents reflect staff's preliminary work, and they do not necessarily represent the official views of the agency. It is well established that such information may be withheld under FOIA Exemption 5. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (protecting against premature disclosure of staff's work product and guarding against the confusion that could result therefrom). The Director properly determined to withhold these documents pursuant to FOIA Exemption 5.

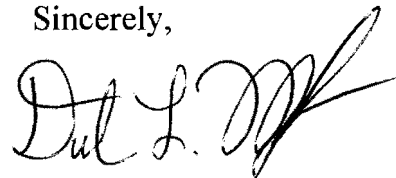
D. It is not possible to segregate non-privileged portions of the withheld documents.

Although I agree with your assertion that the Commission is required to produce purely factual portions of documents, the Commission is not obligated to produce facts that are inextricably intertwined with deliberative material or make redactions that would only result in disclosure of meaningless phrases. *See Mead Data Ctr., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977); *see also Nat'l Sec. Archive Fund, Inc. v. CIA*, 402 F. Supp.2d 211, 220-21 (D.D.C. 2005) (concluding that no reasonably segregable information exists, because "the non-exempt information would produce only incomplete, fragmented, unintelligible sentences composed of isolated, meaningless words."). The withheld material does not contain any information that is reasonably segregable, and all non-exempt material has been released to you. Therefore, no additional factual information can be released.

CONCLUSION

For the reasons stated above, your August 11, 2014 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "Dul L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

OCT 29 2014

Re: FOIA Appeal No. 14-78
Initial Release

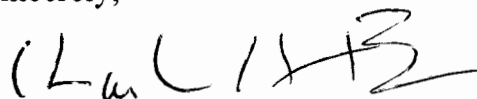
VIA REGULAR MAIL

Tyler J. Storti
Stewart Sokol & Larkin LLC
Attorneys at Law
2300 SW First Avenue
Suite 200
Portland, OR 97201-5047
tstorti@lawssl.com

Dear Mr. Storti:

Pursuant to the determination and notice provided to you on September 25, 2014, by General Counsel David L. Morenoff, please find copies of the cultural records relating to sites not eligible for listing on the National Register of Historic Places on the enclosed DVD. If you have any questions, please contact [REDACTED] at [REDACTED]

Sincerely,

A handwritten signature in black ink, appearing to read "C. A. Beamon", with a stylized flourish at the end.

Charles A. Beamon
Associate General Counsel
General and Administrative Law

Enclosure

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

SEP 2 5 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-78
Notice of Intent to Release

VIA ELECTRONIC AND REGULAR MAIL

Tyler J. Storti
Stewart Sokol & Gray LLC
2300 SW First Avenue
Suite 200
Portland, OR 97201
tstorti@lawssl.com

Dear Mr. Storti:

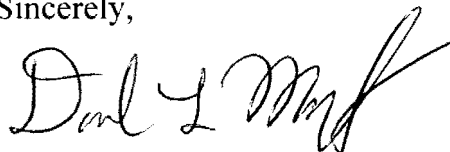
This letter responds to your appeal of the determination denying your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2014). Your appeal was untimely filed. The Commission regulations require that appeals be received "within 45 days of the determination" of your FOIA request. 18 C.F.R. § 388.110(a)(1). The Commission issued its determination on July 7, 2014. Appeals are considered received "upon actual receipt by the General Counsel." *Id.* Your appeal was received by the General Counsel on August 25, 2014, 49 days after the determination.

Although your appeal was untimely, based on Commission staff's subsequent review of the documents, I have nevertheless determined, as a courtesy, to release to you additional cultural records relating to sites not eligible for listing on the National Register of Historic Places. Given the potential volume of the pages to be reviewed, an estimated 6,000 pages, these records will be released to you on a rolling basis.

Pursuant to 18 C.F.R. § 388.112(e), this letter provides notice to the submitter that the documents not protected by FOIA Exemption 3, 5 U.S.C. § 552(b)(3), will be released to you no sooner than five (5) business days after the issuance of this decision. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records

Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at 301-837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

cc: Julie E. Pyper
License Compliance Manager
Grant County Public Utility District
PO Box 878
Ephrata, WA 98823
jpyper@gcpud.org

David J. Mishalanie, P.E.
Dam Safety/EAP Supervisor
Grant County Public Utility District
PO Box 878
Ephrata, WA 98823
dmishal@gcpud.org

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

SEP 30 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-93

VIA CERTIFIED MAIL

Christopher C. Horner
The Free Market Environmental Law Clinic
1489 Kinross Lane
Keswick, VA 22947
CHornerLaw@aol.com

Dear Mr. Horner:

This letter responds to your correspondence received August 15, 2014, which appeals the August 5, 2014 response of Leonard M. Tao, Director of the Office of External Affairs (Director), to the request you filed on June 23, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014). Specifically, you requested copies of all emails, dated from January 1, 2012 through May 31, 2012, which met the following search criteria:

- 1) Sent or received by either Jon Wellinghoff, or Norman Bay of FERC's Office of Enforcement,
- 2) Which use in either the subject field or their body,
 - a. "Constellation" or "Exelon"; and
 - b. "approve", "merge" (which includes "merger"), "consent", and/or "settle" (which also includes "settle" and "settlement")

You appeal the determination of the Director, which withheld fifty-five (55) documents in their entirety pursuant to FOIA Exemptions 4, 5, and 6,¹ and withheld portions of six (6) documents under FOIA Exemptions 5 and 6. Specifically, you raise the following issues: (A) the Director failed to justify the withholding of a document under FOIA Exemption 4; (B) the Director failed to justify withholding documents in whole or in part under FOIA Exemption 5; (C) the Director failed to disclose factual portions of pertinent documents; and (D) the Director failed to justify withholding portions of documents pursuant to FOIA Exemption 6.

¹ See 5 U.S.C. § 552(b)(4) (protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"); 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. § 552(b)(6) (protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

After a careful review of your appeal, the Director's response, the pertinent records and the applicable legal authority, I am upholding the Director's determination in part, and releasing portions of seven (7) documents that the Director withheld. These documents are partially redacted pursuant to FOIA Exemptions 5 and 6. A total of fifty-four (54) emails withheld in whole or in part are addressed in this appeal.² I discuss your arguments, in turn, below.

DISCUSSION

A. The Director Correctly Applied Exemption 4 To One (1) Document.

To qualify for FOIA Exemption 4 protection, the information must be: (1) commercial or financial information; (2) obtained from a person; and (3) confidential. *See National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir. 1974). Information is confidential if its release is likely to cause substantial harm to the competitive position of the person from whom it is obtained or would impair the government's ability to obtain such information in the future. *Id.* Settlement negotiation information may qualify for Exemption 4 protection if it otherwise meets the test described above. *See Comptel v. F.C.C.*, 910 F.Supp. 2d 100, 117 (D.D.C. 2012).

The document is an email communication between Commission staff of the Office of Enforcement (OE) and Constellation Energy Group Inc. (Constellation) representatives that contains confidential financial and commercial information concerning settlement negotiations with Constellation. In particular, the document contains detailed information concerning Constellation's financial position with regard to disgorgement, and was an integral part of confidential settlement discussions.

The need to maintain confidentiality in the interest of settlement negotiations is well established. *See, e.g., M/A-Com Info. Systems, Inc. v. U.S. Dep't of Health & Human Servs.*, 656 F. Supp. 691, 692 (D.D.C. 1986) (finding that it is in the public interest to encourage settlement negotiations and that disclosure of confidential commercial information would impair the government's ability to carry out its duties); *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 29-30 (D.D.C. 2000) (noting that even where submissions of information are mandatory, they may be protected if disclosure would impair an agency's ability to carry out its statutory purpose). Moreover, the information is highly sensitive and its release would likely impair the Commission's ability to obtain such information in the future. Consequently, I agree with the Director's determination to withhold the document pursuant to FOIA Exemption 4.

B. The Director Correctly Applied FOIA Exemption 5 To Fifty-Three (53) Documents.

Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions

² Upon further evaluation, staff has determined that seven (7) of the sixty-one (61) emails addressed in the Director's response are nonresponsive.

on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny").

The documents withheld in full or in part pursuant to Exemption 5 consist of internal staff opinions subject to supervisory review, internal staff communications, and names of lower level staff. The staff opinions and communications were communicated internally and relate to the official roles or perspectives of OE staff, including with respect to the Commission's investigation of and proposed settlement with Constellation. Agency staff must have the leeway to express their personal and internal opinions on official matters without fear that such opinions would be publicly released. OE staff may reasonably exchange views with their supervisors and other FERC staff concerning such matters. A disclosure of this information would chill future internal communication among staff, and may cause public confusion as to the agency's official position.

Moreover, in withholding staff's internal comments, an agency may also protect their identities. In fact, the U.S. District Court for the District of Columbia has stated that "if a document is deliberative in nature, the identity of the author is also privileged, because of the potential chilling effect and harm to the deliberative process." *Cofield v. City of LaGrange, GA*, 913 F. Supp. 608, 616 (D.D.C. 1996); *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), *cert denied*, 452 U.S. 905 (1981) (protecting identities of attorneys who provided legal advice to Secretary of State); *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 423-24 (D.D.C. 1976) (protecting identities of participants in internal IRS communications); *cf. Odland v. FERC*, 2014 WL 1244773 (D.D.C. March 27, 2014), *slip op.* at 7 (denying Plaintiffs' complaint that *Vaughn* Index was too vague because it omitted names of lower level FERC staff). Therefore, I agree with the Director's determination that internal staff deliberations and lower level staff names are properly withheld pursuant to FOIA Exemption 5.³

C. Factual Portions Of Seven (7) Additional Documents May Be Disclosed.

I agree with your assertion that the agency is required to produce purely factual portions of documents. Therefore, of the fifty-four (54) documents withheld in full or in part, I have determined to release an additional seven (7) documents that are partially redacted pursuant to FOIA Exemptions 5 and 6.⁴ The additional information which is hereby

³ In addition to the deliberative process privilege, some of the emails are also protected under FOIA Exemption 5 by the attorney-client privilege.

⁴ The document identified as Document 36 contains ten (10) personal email addresses of private citizens. Though not discussed by the Director, I am asserting Exemption 6 to withhold those personal email addresses. The personal email addresses of private citizens implicate a substantial privacy interest and are protected from disclosure. *See generally*

released consists of routine factual information which is not covered by a FOIA Exemption. *See Ctr. For Int'l Env't Law v. Office of the U.S. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) (segregable nonexempt information should be released).

As to the remaining forty-seven (47) documents, I agree with the Director's finding that these emails are protected in whole or in part, and any remaining factual portions are not reasonably segregable. To the extent additional factual portions exist, they are so inextricably intertwined with deliberative matter that disclosure would reveal the pre-decisional deliberations. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. U. S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process).

D. The Director Correctly Applied FOIA Exemption 6 To Withhold Names And Email Addresses From Thirty-Four (34) Documents.

FOIA Exemption 6 protects from disclosure "personnel . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). As a threshold matter, names and addresses are considered "personnel...and similar files" under FOIA Exemption 6. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (similar files includes "not just files, but also bits of personal information, such as names and addresses").

The Director explained he was asserting Exemption 6 to withhold lower level staff names and email addresses. Because of staff's unique investigatory and enforcement role, disclosure of their identities and contact information could subject them to unwanted contact by the media and others. *See Wood v. FBI*, 432 F.3d 78, 87-89 (2d. Cir. 2005) (applying Exemption 6 to protect the names of investigative personnel of FBI Office of Professional Responsibility); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir.1993) (holding that FBI agents and other government employees have an interest in guarding against the disclosure of their identities to the extent that disclosure might subject them to embarrassment or harassment in their official duties or personal lives), *abrogated by Milner v. Dep't of Navy*, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (U.S. 2011) (abrogated on grounds other than Exemption 6); *Moore v. Bush*, 601 F. Supp. 2d 6, 13 (D.D.C. 2009) (withholding name and phone number of an FBI support employee under Exemption 6 because disclosure could subject the employee to harassment). The public interest in disclosure of names and email addresses of lower level staff in this instance does not outweigh the substantial privacy interest.

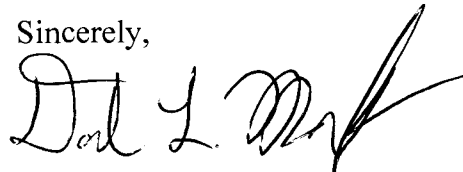
E. Though Not Invoked By The Director, A Further Review Of The Responsive Material Reveals That At Least Five (5) Of The Fifty-Four (54) Emails Are Also Exempt From Disclosure Under FOIA Exemption 7(E).

FOIA Exemption 7(E) protects all law enforcement information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7)(E). The information contained in these emails discloses techniques used by Commission staff in calculating disgorgement amounts. The emails embody FERC enforcement techniques and procedures that are confidential and must remain so in order to preserve their effectiveness, and as such, the emails should also be withheld pursuant to FOIA Exemption 7(E).

CONCLUSION

For the reasons stated above, your August 15, 2014 appeal is denied in part and granted in part. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

Enclosures (7)

Certified Mail Receipt No.

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

OCT 17 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-93
Supplemental Response

VIA CERTIFIED MAIL

Christopher C. Horner
The Free Market Environmental Law Clinic
1489 Kinross Lane
Keswick, VA 22947
CHornerLaw@aol.com

Dear Mr. Horner:

This letter responds to your correspondence received September 22, 2014, which appeals the September 11, 2014 supplemental response of Leonard M. Tao, Director of the Office of External Affairs (Director), to the request you filed on June 23, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014). Specifically, you requested copies of all emails, dated from January 1, 2012 through May 31, 2012, which met the following search criteria:

- 1) Sent or received by either Chairman Jon Wellinghoff, or Norman Bay of FERC's Office of Enforcement (OE),
- 2) Which use in either the subject field or their body,
 - a. "Constellation" or "Exelon"; and
 - b. "approve", "merge" (which includes "merger"), "consent", and/or "settle" (which also includes "settle" and "settlement")

The Commission identified that request as FOIA No. FY 14-93. On August 5, 2014, the Director released to you six (6) documents redacted pursuant to FOIA Exemptions 5 and 6 and withheld fifty-five (55) documents pursuant to FOIA Exemptions 4, 5, and 6.¹ You appealed the Director's determination on August 15, 2015. While the appeal was pending, staff identified an additional nine (9) responsive documents. In a supplemental letter dated September 11, 2014 the Director released one (1) redacted document and protected eight (8) documents pursuant to FOIA Exemptions 5

¹ See 5 U.S.C. § 552(b)(4) (protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential"); 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. § 552(b)(6) (protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

and 6. You filed a supplemental appeal on September 22, 2014 as to the Director's supplemental response. On September 30, 2014, I issued a determination on your August 15, 2015 initial appeal.

You raise the following issues in your September 22, 2014 supplemental appeal: (A) the Director failed to justify withholding documents in whole or in part under FOIA Exemption 5 and failed to disclose factual portions of pertinent documents; and (B) the Director failed to justify withholding portions of documents pursuant to FOIA Exemption 6.

After a careful review of your September 22, 2014 supplemental appeal, the Director's September 11, 2014 supplemental response, the pertinent records and the applicable legal authority, I am upholding the Director's supplemental response in full. The bases the Director provided for withholding documents in the initial response also applied in his supplemental response. Likewise, the reasoning I applied in my September 30, 2014 determination on your initial appeal also applies to your supplemental appeal. I discuss your arguments, in turn, below.

DISCUSSION

A. The Director Correctly Applied FOIA Exemption 5 To Nine (9) Documents.

As I explained in my response to your initial appeal, courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny").

The documents withheld in full or in part pursuant to Exemption 5 consist of internal staff opinions subject to supervisory review, internal staff communications, and names of lower level staff. The staff opinions and communications were communicated internally and relate to the official roles or perspectives of OE staff, including with respect to the Commission's investigation of and proposed settlement with Constellation. Agency staff must have the leeway to express their personal and internal opinions on official matters without fear that such opinions would be publicly released. OE staff may reasonably exchange views with their supervisors and other FERC staff concerning such matters. A disclosure of this information would chill future internal communication among staff, and may cause public confusion as to the agency's official position.

Moreover, in withholding staff's internal comments, an agency may also protect their identities. In fact, the U.S. District Court for the District of Columbia has stated that "if a document is deliberative in nature, the identity of the author is also privileged, because of the potential chilling effect and harm to the deliberative process." *Cofield v. City of LaGrange, GA*, 913 F. Supp. 608, 616 (D.D.C. 1996); *Brinton v. Dep't of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), *cert denied*, 452 U.S. 905 (1981) (protecting identities of attorneys who provided legal advice to Secretary of State); *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 423-24 (D.D.C. 1976) (protecting identities of participants in internal IRS communications); *cf. Odland v. FERC*, 2014 WL 1244773 (D.D.C. March 27, 2014), *slip op.* at 7 (denying Plaintiffs' complaint that *Vaughn Index* was too vague because it omitted names of lower level FERC staff).

I agree with your assertion that the agency is required to produce purely factual portions of documents. However, in this instance, to the extent factual portions exist, they are so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. U. S. Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977)) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process). Therefore, I agree with the Director's determinations that internal staff deliberations and lower level staff names are properly withheld pursuant to FOIA Exemption 5, and that the withheld material does not contain any information that is reasonably segregable.²

B. The Director Correctly Applied FOIA Exemption 6 To Withhold Names And Email Addresses From Nine (9) Documents.

As I also explained in my response to your initial appeal, FOIA Exemption 6 protects from disclosure "personnel . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). As a threshold matter, names and addresses are considered "personnel...and similar files" under FOIA Exemption 6. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (similar files includes "not just files, but also bits of personal information, such as names and addresses").

The Director explained he was asserting Exemption 6 to withhold lower level staff names and email addresses. Because of staff's unique investigatory and enforcement role, disclosure of their identities and contact information could subject them to unwanted contact by the media and others. *See Wood v. FBI*, 432 F.3d 78, 87-89 (2d. Cir. 2005) (applying Exemption 6 to protect the names of investigative personnel of FBI Office of Professional Responsibility); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir.1993) (holding that FBI agents and other government employees have an interest in guarding against the

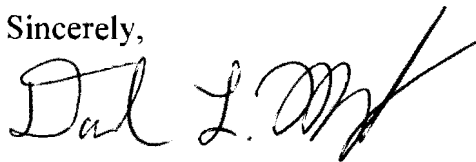
² In addition to the deliberative process privilege, some of the emails are also protected under FOIA Exemption 5 by the attorney-client privilege.

embarrassment or harassment in their official duties or personal lives), *abrogated by Milner v. Dep't of Navy*, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (U.S. 2011) (abrogated on grounds other than Exemption 6); *Moore v. Bush*, 601 F. Supp. 2d 6, 13 (D.D.C. 2009) (withholding name and phone number of an FBI support employee under Exemption 6 because disclosure could subject the employee to harassment). The public interest in disclosure of names and email addresses of lower level staff in this instance does not outweigh the substantial privacy interest.

CONCLUSION

For the reasons stated above, your September 22, 2014 supplemental appeal is denied in full. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Morenoff", with a long, sweeping flourish extending from the end.

David L. Morenoff
General Counsel

Certified Mail Receipt No. 7002 0860 0001 4095 6817

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

December 1, 2014

OFFICE OF THE GENERAL COUNSEL

Freedom of Information Act
Appeal FOIA NO. FY14-98

VIA CERTIFIED MAIL

Mr. Brian K. Cummings
LexisNexis
9443 Springboro Pike
Miamisburg, Ohio 45342
Brian.cummings@lexisnexis.com

Dear Mr. Cummings:

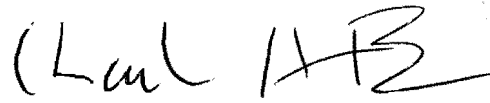
This letter responds to your October 31, 2014, appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2014). You appealed the decision issued on August 29, 2014, by Leonard M. Tao, Director of the Office of External Affairs (Director), which withheld commercially sensitive information under FOIA Exemption 4.¹

By letter dated November 19, 2014, General Counsel, David L. Morenoff granted your appeal and determined to release additional information in redacted form. The General Counsel's decision also provided notice to the submitter that part of the requested data will be released no sooner than five (5) business days after the issuance of this decision pursuant to 18 C.F.R. § 388.112(e). The five-day notice period has elapsed and I am now releasing

¹ 5 U.S.C. § 552(b)(4) (2012) (which protects from disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential).

redacted versions of the three (3) documents to you.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Beamon".

Charles A. Beamon
Associate General Counsel
General and Administrative Law

cc: Shelley Morgan, Esq.
Federal Client Manager
Thomson Reuters
1100 13th Street, NW
Suite 200
Washington, DC 20005
Shelley.morgan@thomsonreuters.com

Enclosures

Certified Mail Receipt: 7002 0860 0001 4094 0939

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

NOV 19 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-98

OFFICE OF THE GENERAL COUNSEL

ELECTRONIC AND REGULAR MAIL

Mr. Brian K. Cummings
LexisNexis
9443 Springboro Pike
Miamisburg, Ohio 45342
Brian.cummings@lexisnexis.com

Dear Mr. Cummings:

This letter responds to your appeal received on October 31, 2014 pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2014). As explained below, your appeal is granted.

On July 29, 2014, you filed a FOIA request for complete copies of any and all current contracts related to Award FERC12F0997 (Fedlink Contract LC09D7012) between the Commission and Thomson Reuters (West). On August 29, 2014, the Director determined to release the contracts, withholding certain portions, including grant totals, pursuant to FOIA Exemptions 4 and 6.¹ On October 31, 2014, you appealed the Director's determination, asserting that while redactions to personal information and unit pricing were appropriate, the Director erred in making redactions to "Grand Totals and Appropriation Information." You further noted that the appropriation data available from the Federal Procurement Data System and the grand total information is not protected from disclosure pursuant to FOIA Exemption 4. You requested that the Commission release this specific information.


Upon review of your appeal and the applicable legal authority, I agree that the grand total amounts and appropriation information should be released. It is well established that grand total amounts do not qualify for protection pursuant to Exemption 4. *See McDonnell Douglas v. NASA*, 180 F.3d 180 F.3d 303, 306 (D.C. Cir. 1999) (emphasizing that "[i]t is undisputed that the total price of the contract may be made public"). Moreover, information such as appropriation data that is in the public domain does not qualify for protection and must be disclosed. *See Niagara Mohawk Power*

¹ 5 U.S.C. § 552(b)(4) (protecting from disclosure trade secrets and commercial or financial information obtained from a person and privileged or confidential; 5 U.S.C. § 552(b)(6) protecting from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.")

Corp. v. U.S. Dep't of Energy, 169 F.3d 16, 19 (D.C. Cir. 1999) (finding that "if identical information is truly public, then enforcement of an exemption cannot fulfill its purposes").

For the reasons stated above, your October 31, 2014 appeal is granted. This appeal also constitutes notice to the submitter that this information will be made available to you no sooner than five (5) calendar days from the date of this letter. See 18 C.F.R. § 388.112(e). Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the data that you seek.

Sincerely,

A handwritten signature in black ink, appearing to read "D.L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

cc: Shelley Morgan, Esq.
Federal Client Manager
Thomson Reuters
1100 13th Street, NW
Suite 200
Washington, DC 20005
Shelley.morgan@thomsonreuters.com

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

DEC 11 2014

OFFICE OF THE GENERAL COUNSEL

Re: FOIA Appeal No. FY14-99

Mr. J. Tim Gross



Dear Mr. Gross:

This letter responds to your appeal received November 12, 2014, of the determination denying in part your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2014). As discussed below, I agree with the determination to withhold in part the information sought in your request and am denying your appeal.

Background

On July 30, 2014, you requested the landowner lists for the Atlantic Sunrise Expansion Project under Docket No. PF14-8, which are identified in the Commission's eLibrary database under Accession Nos. 20140502-5123, 20140722-5102, 20140714-5040 and 20140818-5070 (landowner lists). A search of the Commission's nonpublic files identified the documents responsive to your request, which were submitted with requests for privileged and confidential treatment. After notifying Transcontinental Gas Pipeline, LLC (Transco) of your request in accordance with the Commission's regulations, the Director of the Office of External Affairs (Director) on September 30, 2014, released the documents to you with the names and personal home addresses of individual landowners redacted pursuant to FOIA Exemption 6. *See* 5 U.S.C. § 552(b)(6).

In your appeal of the Director's determination, you present four arguments to support your contention that FOIA requires the release of the names and addresses of individual landowners. (Appeal at 2-4). First, you contend that the Director failed to make a threshold determination that the names and addresses are "personnel and medical files and similar files" as specified by Exemption 6. (Appeal at 4-5.) Second, you contend that the privacy interest here is minimal. (Appeal at 5-8.) Third, you assert that there is a public interest in disclosure to verify compliance with transparency and notification laws. (Appeal at 8-9.) Fourth, you argue that a balancing of the interests weighs in favor of a full release. (Appeal at 9-10.)

Discussion

The Director Correctly Applied Exemption 6 to Protect Personal Information of Private Landowners

FOIA Exemption 6 provides that an agency should not disclose “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *See* 5 U.S.C. § 552(b)(6). As the Director explained, it is well established that the names and personal home addresses of private landowners are protected from release under FOIA Exemption 6. *See, e.g., Bibles v. Oregon Natural Desert Ass’n*, 519 U.S. 355 (1997) [hereinafter *Bibles*] (protecting names and addresses of persons receiving Bureau of Land Management’s newsletter); *U.S. Dep’t of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) [hereinafter *FLRA*] (protecting names and home addresses of federal employees); *Carter, Fullerton & Hayes LLC v. FTC*, 520 F. Supp. 2d 134, 144-45 (D.D.C. 2007) (protecting names, addresses, and telephone numbers of consumers who filed complaints with the Federal Trade Commission); *National Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989) [hereinafter *Horner*] (protecting names and addresses of retired and disabled federal employees).

Moreover, you acknowledge (Appeal at 4) that Exemption 6 is interpreted very broadly to protect personal information of a particular individual. *See Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982); *Odland v. Fed. Energy Regulatory Comm’n*, No. CV 13-141 (RMC), 2014 WL 1244773 (D.D.C. Mar. 27, 2014) [hereinafter *Odland*]. In fact none of the authority cited in your appeal contradicts the Director’s determination.

Private Landowners have Significant Privacy Interest in Names and Personal Home Addresses

Contrary to your assertions (Appeal at 6), *FLRA* and *Bibles* determined that there is a substantial privacy interest in protecting the names and personal addresses of individual citizens. FERC precedent also recognizes the privacy interest of individual citizens in their names and addresses. *See, e.g., Columbia Gas Transmission Corp.*, 128 FERC ¶ 61,050 at P 32 (2009) (determining that releasing the names and addresses of private citizens on a landowner list “implicate[s] a privacy interest, and their mandatory release would constitute an unwarranted invasion of individual privacy.”) Accordingly, FERC typically protects landowner names and addresses unless the landowner has consented to release or otherwise voluntarily submitted that information in the proceeding, which is not the case here. *See, e.g., FERC Submission Guidelines*, at pp. 6-7 (January 14, 2014) available at <http://www.ferc.gov/help/submission-guide/user-guide.pdf>.

I am not persuaded by your assertion that Transcontinental and FERC have “routinely shared multiple versions of the landowner lists at issue[.]” FERC has never publicly shared this information with anyone and there is no indication that Transcontinental has made a public disclosure. I am also not persuaded that the information might be available through other public sources. *See Odland*, 2014 WL 1244773 at *11 (citing *ACLU v. Dep’t of Justice*, 655 F.3d 1, 12 (D.C. Cir. 2011); *Lazaridis v. U.S. Dep’t of State*, No. 10-1280 (RMC), 2013 WL 1226607 (D.D.C. Mar. 27, 2013) (finding that although plaintiff obtained withheld information by other means, the need to protect the material was not waived nor was the agency’s ability to invoke the FOIA exemption). Thus, your assertion that the information lacks a significant privacy interest is without merit.

Privacy Interest of Private Landowners Are Not Outweighed by Alleged Public Interest

“In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.” *See NARA v. Favish*, 541 U.S. 157, 172; *see also Martin v. Dep’t of Justice*, 488 F.3d 446, 458 (D.C. Cir. 2007) (quoting *Boyd v. Dep’t of Justice*, 475 F.3d 381, 387 (D.C. Cir. 2007)); *Carpenter v. Dep’t of Justice*, 470 F.3d 434, 440 (1st Cir. 2006). No such showing exists in this case.

Relying in part on *Columbia Riverkeeper v. FERC*, 650 F. Supp. 2d 1121 (D. Or. 2009), you contend that disclosure is in the public interest in order to shed light on FERC and Transco’s compliance with notification and public participation laws. You “intend to compare the stakeholder/landowner list as well as the path of the proposed pipeline to evaluate the accuracy of the information used by FERC to discharge its legal obligations . . . [including protecting] the public’s right to fully participate in the siting and permitting review for the Atlantic Sunrise Pipeline project.” (Appeal at 7-8). Specifically, you assert that disclosure of the entire mailing list “further the public interest by providing oversight of FERC’s process, ensuring no stakeholders are left out, and ensuring no disparate communication with stakeholders.” (Appeal at 8).

The *Riverkeeper* decision is not applicable here. In *Riverkeeper*, the magistrate observed that: FERC had previously disclosed comparable information on its eLibrary database;¹ there were possibly multiple examples of lack of notice to landowners; and FERC had not conducted an adequate search for responsive documents in view of

¹ When alerted to this fact, FERC took immediate corrective action to remove the information from public view and to ensure that such disclosure would not occur in the future.

apparent inconsistencies and omissions identified through discovery which are not present here, *Riverkeeper*, 650 F. Supp. 2d at 1126-31. With these considerations in mind, the magistrate judge ruled that Exemption 6 could not be invoked.

In *Odland*, a more recent case directly on point, the U.S. District Court for the District of Columbia affirmed FERC's protection of landowner lists under Exemption 6. See 2014 WL 1244773 at *10-11 (finding that *Riverkeeper* was not applicable because there was ample evidence of notice in the record). *Id.* The court held that disclosing the names and addresses of landowners would not "reveal anything about the workings of FERC" and therefore would not further the public interest.²

FERC has Complied with All Applicable Transparency Requirements

You explain that you seek public disclosure of the landowners lists "to evaluate the accuracy of the information used by FERC and its contractors to discharge its legal obligations to ensure the accuracy of information provided in support of new pipelines, the ability to take private individuals' land, and to envorde the public's right to fully participate in the siting and permitting review for the Atlantic Sunrise Pipeline Project." (Appeal at 8).

FERC's efforts with regard to transparency and public participation are demonstrated by the vast public record in FERC Docket No. PF14-8.³ In describing FERC's notification, the record indicates that the "the environmental mailing list includes federal, state, and local government representatives and agencies; elected officials; environmental and public interest groups; Native American Tribes; other interested parties; and local libraries and newspapers. This list also includes all affected landowners (as defined in the Commission's regulations)⁴ who are potential right-of-way grantors, whose property may be used temporarily for project purposes, or who own homes within certain distances of aboveground facilities, and anyone who submits comments on the

² I am not persuaded by your reliance on *Gilman v. U.S. Dep't of Homeland Security*, No. CV 09-0468 (BAH), 2014 WL 984309 (D.D.C. Mar. 14, 2014) (*Gilman*), which was decided prior to *Odland* and concerned the proposed construction of a wall on the Texas – Mexico border. *Gilman* found that revealing the identities of the landowners on the planned construction site of the wall "may shed light on, *inter alia*, the impact on indigenous communities, the disparate impact on lower-income minority communities, and the practices of private contractors." See 2014 WL 984309 at *8. Thus, your reliance on *Gilman* is misplaced.

³ At this time, there are over 1,450 documents in FERC Docket No. PF14-8.

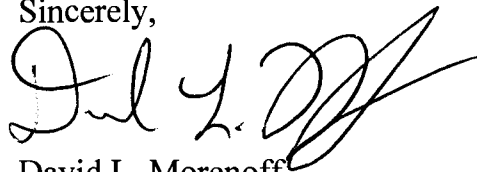
⁴ See 18 C.F.R. 157.21(f)(3) and 157.6(d)(2) (defining affected landowners).

projects.”⁵ In addition to the considerable public record, there were four public scoping meetings in Pennsylvania to inform the public of the project. Furthermore, the landowner lists, even as redacted, show that FERC has gone to great lengths to obtain a list of affected landowners and to send notice, which promotes transparency.

Conclusion

For the reasons stated above, the Director’s determination is hereby affirmed. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

⁵ See Notice of intent to prepare an Environmental Impact Statement for the planned Atlantic Sunrise Expansion Project, request for comments on environmental issues, and notice of public scoping meetings (July 18, 2014) [Accession No. 20140718-3009].

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

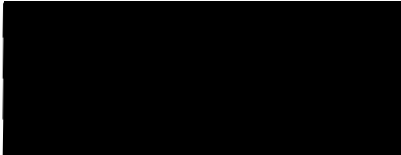
JAN 07 2015

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY14-104

VIA ELECTRONIC AND REGULAR MAIL

Ms. Barbara Blumenthal
Princeton Ridge Coalition



Dear Ms. Blumenthal:

This letter responds to your correspondence received November 21, 2014, which appeals the October 8, 2014 response of Leonard M. Tao, Director of the Office of External Affairs (Director), to the request you filed on August 27, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014). Specifically, you requested all communications between FERC and the Pipeline and Hazardous Materials Safety Administration (PHMSA) related to the Leidy Southeast Expansion Project under Docket Number CP 13-551.

BACKGROUND

You appeal the determination of the Director, which withheld two (2) of the eight (8) responsive documents in their entirety pursuant to FOIA Exemption 5.¹ The Director referred the remaining six (6) documents originally generated by the PHMSA to that agency for separate FOIA processing.² In your appeal, you assert that 18 C.F.R. § 380.9(b) prevents the Agency from withholding memoranda pursuant to FOIA Exemption 5 that transmit comments of Federal agencies on the environmental impact of a proposed action. *See* 18 C.F.R. § 380.9(b). After a careful review of your appeal, the withheld information, and applicable law, I am upholding the Director's determination in

¹ *See* 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency").

² The PHMSA issued a decision regarding those six (6) documents on October 7, 2014, and you appealed the PHMSA's decision to that agency on November 20, 2014.

part, and electing to make a discretionary release of one (1) document that could be withheld pursuant to Exemption 5. I address your argument below.

DISCUSSION

The Director properly invoked FOIA Exemption 5 to withhold the two (2) documents at issue. However, after further consideration, I have determined that a discretionary release is appropriate for one (1) document. The PHMSA released the majority of this document in the material referred to it for determination. The remaining portions of the document contain relatively minor comments by FERC staff. By way of discretionary release I am now providing you this document in full.

I am upholding the director's decision as to the other document he withheld. This document contains pre-decisional or draft language for an Environmental Assessment. The draft reflects staff's preliminary work with a cooperating agency, and it does not necessarily represent the official views of the agency. It is well established that such information may be withheld under FOIA Exemption 5. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (protecting against premature disclosure of staff's work product and guarding against the confusion that could result therefrom).

Although I agree with your assertion that the Commission is required to produce memoranda that transmit comments of Federal agencies on the environmental impact of a proposed action, the Commission is not required to produce pre-decisional correspondence with a cooperating Agency related to the preparation of an Environmental Assessment. For example, 18 C.F.R. § 385.2201(e)(1)(v) exempts from notice and disclosure off-the-record communications with cooperating agencies that are not parties in a specific contested proceeding. *See* 18 C.F.R. § 385.2201(e)(1)(v). The regulation further provides that communications may be exempt "where the communication involves requests for information by the Commission or matters over which the other agency and the Commission share regulatory jurisdiction, including authority to impose or recommend licensing conditions." *Id.*; *Arizona Pub. Serv. Co.*, 94 FERC ¶ 61076, 61351 (Jan. 25, 2001) ("Full disclosure of all off-the-record communications with a cooperating agency would necessarily require exposing the staff's deliberative process to public scrutiny and comment, and could deter the free exchange of ideas that is essential to meaningful interagency cooperation for preparing NEPA documents."). The Director, therefore, properly determined to withhold the document pursuant to FOIA Exemption 5.

CONCLUSION

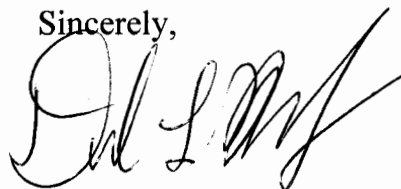
For the reasons stated above, your November 21, 2014 appeal is granted in part and denied in part. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States

FOIA Appeal No. FY14-104

-3-

District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
General Counsel

Enclosure

Certified Mail Receipt No. 7002 0860 0001 4095 4790

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

NOV 18 2014

Re: Freedom of Information Act
Appeal, FOIA No. FY14-105

VIA CERTIFIED MAIL

Christopher C. Horner
The Free Market Environmental Law Clinic
1489 Kinross Lane
Keswick, VA 22947
CHornerLaw@aol.com

Dear Mr. Horner:

This letter responds to your correspondence received October 20, 2014, which appeals the October 10, 2014 response of Leonard M. Tao, Director of the Office of External Affairs (Director), to the request you filed on August 28, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014). Specifically, you requested copies of the following records dated October 1, 2013 through November 25, 2013:

- 1) All emails sent to or from former Chairman Jon Wellinghoff which anywhere, whether the To:, From:, cc:, bcc: or Subject fields, or their body, use any of the words or terms "Stoel" or "recuse" or "future employment;"
- 2) All emails sent to or from Jon Wellinghoff which contain both of the words "solar" and "interconnection;" and
- 3) All emails sent from Jon Wellinghoff to Charles Beamon or from Charles Beamon to Jon Wellinghoff (any email having either party in the To:, From:, cc: or bcc: fields).

You appeal the determination of the Director, which withheld twenty-six (26) documents in full pursuant to FOIA Exemptions 5 and 6,¹ and withheld portions of twelve (12) documents under FOIA Exemptions 5 and 6.² Specifically, you raise the following issues: (A) the Director failed to justify withholding documents in whole or in part under FOIA Exemption 5; (B) the Director failed to disclose factual portions of pertinent

¹ 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency"); 5 U.S.C. § 552(b)(6) (protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

² Of the redacted documents, two (2) were redacted pursuant to Exemption 6 and ten (10) were redacted pursuant to Exemptions 5 and 6.

documents; and (C) the Director failed to justify withholding portions of documents pursuant to FOIA Exemption 6.

FERC staff has now determined that sixteen (16) of the thirty-eight (38) emails that the Director withheld in full or in part are nonresponsive because the dates do not fall into the timeframe specified in your request. This includes documents 6, 13, 14, and 15, which were previously released to you in part. A total of twenty-two (22) emails withheld in whole or in part are addressed in this appeal.³

After a careful review of your appeal, the Director's response, the pertinent records and the applicable legal authority, I am upholding the Director's determination in part, and releasing one (1) document in full and two (2) others with the exception of the names and email addresses of lower level staff. These documents are partially redacted pursuant to FOIA Exemptions 5 and 6. I discuss your arguments, in turn, below.

DISCUSSION

A. The Director Correctly Applied FOIA Exemption 5 To Nineteen (19) Documents.

Courts have consistently held that three policy purposes constitute the basis for the FOIA Exemption 5 deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982).

The documents withheld in full or in part pursuant to Exemption 5 consist of internal staff communications and pre-decisional deliberations between Office of General Counsel staff and former FERC Chairman Jon Wellinghoff, between Office of External Affairs staff who assist the Director with processing FOIA requests and the applicable program offices, and between former Chairman Wellinghoff and lower-level staff. These documents are protected from disclosure because Commission staff should have the leeway to engage in routine communications without fear that their every word will be publicly disclosed, possibly widely disseminated, and perhaps taken out of context. Disclosure could also result in a misleading public perception because the views of staff might not necessarily reflect official agency direction. *See Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny.").

Moreover, in withholding staff's internal discussions, an agency may also protect their identities. In fact, the U.S. District Court for the District of Columbia has stated that "if a document is deliberative in nature, the identity of the author is also privileged, because of

³ Taking into account the non-responsive material, fourteen (14) emails were protected in full and eight (8) emails were protected in part pursuant to FOIA Exemptions 5 and 6.

the potential chilling effect and harm to the deliberative process.” *Cofield v. City of LaGrange, GA*, 913 F. Supp. 608, 616 (D.D.C. 1996); *Brinton v. Dep’t of State*, 636 F.2d 600, 604 (D.C. Cir. 1980), *cert denied*, 452 U.S. 905 (1981) (protecting identities of attorneys who provided legal advice to Secretary of State); *Tax Reform Research Group v. IRS*, 419 F. Supp. 415, 423-24 (D.D.C. 1976) (protecting identities of participants in internal IRS communications); *cf. Odland v. FERC*, CV 13-141, 2014 WL 1244773 (D.D.C. March 27, 2014), *slip op.* at 7 (denying Plaintiffs’ complaint that the *Vaughn* Index was too vague because it omitted names of lower level FERC staff). Therefore, I agree with the Director’s determination that internal staff deliberations and lower level staff names are properly withheld pursuant to FOIA Exemption 5.

B. Factual Portions Of Three (3) Additional Documents May Be Disclosed.

I agree with your assertion that the agency is required to produce purely factual portions of documents. Therefore, of the twenty-two (22) documents withheld in full or in part, I have determined to release an additional three (3) documents. Two (2) of the three (3) documents are partially redacted pursuant to FOIA Exemptions 5 and 6. The additional information which is hereby released consists of routine factual information which is not covered by a FOIA Exemption. *See Ctr. for Int’l Env’t Law v. Office of the US. Trade Representative*, 505 F. Supp. 2d 150, 158 (D.D.C. 2007) (segregable nonexempt information should be released). These three (3) documents are enclosed.

As to the remaining nineteen (19) documents, I agree with the Director’s finding that these emails are properly protected in whole or in part, and any remaining factual portions are not reasonably segregable. To the extent additional factual portions exist, they are so inextricably intertwined with deliberative matter that disclosure would reveal the pre-decisional deliberations. *See In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. U. S. Dep’t of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency’s decision-making process).

C. The Director Correctly Applied FOIA Exemption 6 To Withhold Names And Email Addresses From Nineteen (19) Documents.

FOIA Exemption 6 protects from disclosure “personnel . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy.” 5 U.S.C. § 552(b)(6). As a threshold matter, names and addresses are considered “personnel...and similar files” under FOIA Exemption 6. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006) (similar files includes “not just files, but also bits of personal information, such as names and addresses”).

The Director explained he was invoking Exemption 6 to protect the names and email addresses of private individuals and lower-level employees. The personal email addresses of private citizens implicate a substantial privacy interest and are protected from disclosure. *See generally Bibles v. Oregon Natural Desert Ass’n*, 519 U.S. 355 (1997); *Odland v. Fed. Energy Regulatory Comm’n*, CV 13-141, 2014 WL 1244773 (D.D.C. Mar. 27, 2014). Similarly, disclosure of staff identities and contact information could subject them to unwanted contact by the media and others. *See Wood v. FBI*, 432 F.3d 78, 87-89 (2d. Cir.

2005) (applying Exemption 6 to protect the names of investigative personnel of FBI Office of Professional Responsibility); *Massey v. FBI*, 3 F.3d 620, 624 (2d Cir.1993) (holding that FBI agents and other government employees have an interest in guarding against the disclosure of their identities to the extent that disclosure might subject them to embarrassment or harassment in their official duties or personal lives), *abrogated by Milner v. Dep't of Navy*, 131 S. Ct. 1259, 179 L. Ed. 2d 268 (U.S. 2011) (abrogated on grounds other than Exemption 6); *Moore v. Bush*, 601 F. Supp. 2d 6, 13 (D.D.C. 2009) (withholding name and phone number of an FBI support employee under Exemption 6 because disclosure could subject the employee to harassment). The public interest in disclosure of names and email addresses of lower level staff and private citizens in this instance does not outweigh the substantial privacy interest.

CONCLUSION

For the reasons stated above, your October 20, 2014 appeal is denied in part and granted in part. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
General Counsel

Enclosures (3)

Certified Mail Receipt No. 7002 0860 0001 4094 1097

Federal Energy Regulatory Commission
Washington, DC 20426

March 21, 2014

VIA ELECTRONIC & REGULAR MAIL

Mr. Roy Mendelsohn



Dear Mr. Mendelsohn:

You filed a December 24, 2013 appeal of a Freedom of Information Act request, FY14-21. The Acting General Counsel issued a decision on January 31, 2014. In your February 12, 2014 letter, you continue to raise the same arguments disagreeing with the Commission's determination to withhold the documents you seek. Your letter does not provide any reason for changing the earlier decision, which informed you of your judicial appeal rights. Therefore, the earlier decision will not be revisited.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles A. Beamon".

Charles A. Beamon
Associate General Counsel
Office of General Counsel
Federal Energy Regulatory Commission

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

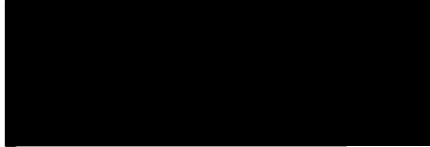
FEB 06 2015

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY15-15

VIA EMAIL AND CERTIFIED MAIL

Mr. Roy Mendelsohn



Dear Mr. Mendelsohn:

This letter responds to your December 19, 2014, appeal of the denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.108 (2014).

On November 15, 2014, you requested three documents identified in the Commission's eLibrary database under Accession Nos. 20141104-0167, 20141007-0209, 20141106-0184.¹ On December 11, 2014, the Director issued a determination denying your request for information pursuant to FOIA Exemption 5.² On December 19, 2014, you appealed the Director's determination. In your appeal you state that you have been previously granted access to related documents referring to the same studies, and you question the Director's determination that the two documents you request are exempt from disclosure under FOIA Exemption 5.

¹ As explained in the December 11, 2014 determination from the Director, the document identified under Accession No. 20141106-0184, is designated as Critical Energy Infrastructure Information (CEII) as defined in 18 C.F.R. § 388.113(c). The document is therefore exempt from mandatory disclosure pursuant to FOIA Exemption 7(F) and is subject to the terms of the CEII process. I understand that you have submitted a request to seek access to this CEII material by completing a CEII request form online at: <http://www.ferc.gov/legal/ceii-foia/ceii/eceii.asp>. Your CEII request is currently pending. The documents at issue in this FOIA appeal are Accession Nos. 20141104-0167 and 20141007-0209.

² See 5 U.S.C. § 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.")

FOIA Exemption 5 authorizes the Commission to withhold documents when release of the information could interfere with internal agency deliberations. The two documents you request include: (1) a Commission staff review of the Tenth Independent Consultant's Safety Inspection Report for the Buzzard Roost Project No. 1267 (submitted by the Licensee in a letter dated June 3, 2013), and (2) a Commission staff review of the Site Specific Probable Maximum Precipitation for Buzzard Roost Dam. These two documents consist of pre-decisional deliberative staff opinions and contain internal notes and comments among Commission staff.

Agency staff must have the leeway to express their personal and internal opinions on official matters without fear that such opinions would be publicly released. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny"). The staff opinions and concerns reflected in the withheld documents were preliminary in that they concerned the resolution of pending issues or possible course of future action. Thus, disclosure of this information would chill future internal communication among staff, and may cause public confusion as to the basis of agency action. Although you argue that you have been previously granted access to related documents referring to the same studies, the Commission generally does not release pre-decisional staff memos or staff commentary and notes on consultant safety reports.

For the reasons stated above, your December 19, 2014 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601

FOIA No. FY15-15

-3-

Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "Dal L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

Certified Mail Receipt No: 7002 0860 0001 4095 5001

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

APR 01 2015

Re: Freedom of Information Act
Appeal, FOIA No. FY15-22

VIA CERTIFIED MAIL

Todd McLawhorn
Siprut PC
17 North State Street, Suite 1600
Chicago, Illinois 60602
tmclawhorn@siprut.com

Dear Mr. McLawhorn:

This letter responds to your March 5, 2015, appeal of the Director of External Affairs' (Director) January 23, 2015, denial of the request filed by your colleague, Mr. Brandon Cavanaugh, on December 5, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. 388.110 (2014). As explained below, the Director's determination is affirmed.

Procedural History and Background

On December 5, 2014, pursuant to the FOIA, Mr. Cavanaugh requested a copy of the following documents:

The analysis data and supporting documents that were used to prepare FERC's response to Massachusetts Senators Elizabeth Warren's and Edward Markey's letter regarding the settlement between the Commission and JP Morgan Chase – specifically, a copy of the material used to answer question number 1 in FERC's August 26, 2013, letter.¹

A search of the Commission's non-public files identified four spreadsheets that were created and submitted by JP Morgan as privileged and confidential in a non-public Commission investigation. The Director stated that these documents contained

¹ Question 1 asked "[w]hat analysis did FERC conduct to evaluate harms to consumers? Did FERC's analysis take into account the ripple effect of manipulations and indirect costs to authorities and ratepayers? If so, please make that analysis available to our offices. Does the Commission believe that the \$125 million in disgorged unjust profits is sufficient to make ratepayers whole?"

proprietary financial information and that their release would impair the Commission's ability to obtain similar information in future proceedings.

On appeal, you assert that this information does not qualify for protection under FOIA Exemption 4.² In particular, you contend that any cost information contained in the spreadsheets would form the basis for public utility rates. You also note that the Commission concluded its investigation in 2013 and released detailed factual findings that were accepted by JP Morgan. You also state that the Commission should turn over any documents that it created that are responsive to the request.³ For the reasons explained below, I uphold the Director's determination.

DISCUSSION

The documents you seek consist of confidential financial information concerning the revenue earned by individual power plants, payments JP Morgan received from individual power plants, demand payments made by JP Morgan, and operation and maintenance costs. It is well established that Exemption 4 protects this type of information. *See Landfair v. U.S. Dep't of Army*, 645 F. Supp. 325, 327 (D.D.C. 1986) (holding that "business sales statistics . . . overhead and operating costs, and information on financial condition" are generally regarded as commercial or financial information, and thus subject to protection under FOIA Exemption 4); *see also, Washington Post Co. v. HHS*, 690 F.2d 252, 266 (D.C.Cir.1982)).

It is also well established that agencies may protect such information under Exemption 4 when it is obtained for investigative purposes. *See ISC Grp., Inc. v. U.S. Dep't of Def.*, CIV. A. 88-0631, 1989 WL 168858, at 2 (D.D.C. May 22, 1989) (holding that investigative reports containing "operations statements, financial summaries and forecasts . . . and other financial analyses" supports the conclusion that the report contains protected financial information pursuant to FOIA exemption 4).

I note that the documents relate to confidential settlement negotiations and may be protected on that basis as well. *See Comptel v. F.C.C.*, 910 F.Supp.2d 100, 117 (D.D.C. 2012) ("[i]nformation regarding settlement negotiations" may qualify for Exemption 4 protection). The need to maintain confidentiality in the interest of settlement negotiations is well established. *See, e.g., M/A-Com Info. Systems, Inc. v. U.S. Dep't of Health &*

² 5 U.S.C. 552(b)(4). FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." *See National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

³ The Commission did not create any documents in answering question number 1 of Senators Warren's and Markey's inquiry.

Human Servs., 656 F.Supp.691, 692 (D.D.C. 1986) (finding that it is in the public interest to encourage settlement negotiations and that disclosure of confidential commercial information would impair the government's ability to carry out its duties); *see also*, *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 29-30 (D.D.C. 2000) (noting that even where submissions of information are mandatory, they may be protected if disclosure would impair an agency's ability to carry out its statutory purpose or discourage "forthcoming" (*i.e.*, complete, accurate, or fully cooperative) submissions of such information).

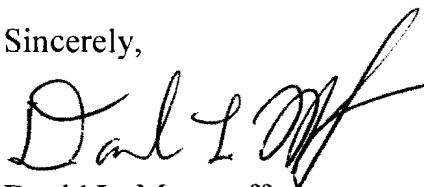
Finally, I agree with your assertion that the Agency has made a release of information through its public settlement with JP Morgan. As you have noted, the settlement's terms are publicly known. However, the release of that information does not necessarily justify the release of other internal confidential and proprietary information.

CONCLUSION

For the reasons explained above, I am upholding the Director's decision to withhold the documents in their entirety.

Judicial review of my decision of your appeal is available to you in the United States District court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

Certified Mail Receipt No. 7002 0860 0001 4095 7524

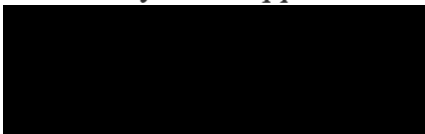
FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

JUN 04 2015

OFFICE OF THE GENERAL COUNSEL

Re: FOIA Appeal No. FY15-37

Ms. Keara Prom
Professional Institute of Landowner
Attorneys and Appraisers


Dear Ms. Prom,

This letter responds to your appeal received May 18, 2015, of the determination denying in part your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2014). As explained below, your appeal was not filed within the statutory time period nor does your appeal provide any reason to reverse the earlier determination.

On January 12, 2015, you submitted a request seeking a landowner list in Appendix B of Accession No. 20141230-5314 filed in FERC Docket No. PF15-10 by NEXUS Gas Transmission, LLC (NEXUS). After notifying NEXUS in accordance with the Commission's regulations,¹ the Director of the Office of External Affairs (Director), on February 24, 2015 released the document to you with the names and addresses of individual landowners redacted pursuant to FOIA Exemption 6. *See* 5 U.S.C. § 552(b)(6).²

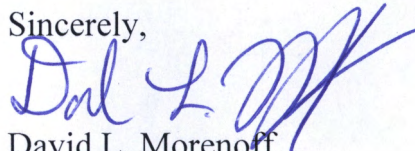
Your May 18, 2015 appeal of the February 24, 2015 determination is untimely. The February 24th letter stated that pursuant to "the FOIA and 18 C.F.R. §388.110(a)(1) of the Commission's regulations, any appeal from this determination must be filed within 45 days of the date of this letter." Your appeal was filed on May 18, 2015, which is well past the 45-day period (April 10, 2015) to file an appeal. Therefore, your appeal is denied as untimely. Aside from being untimely, the brief statement in which you ask for the unreacted mailing list without further explanation does not provide a rationale for challenging the Director's determination to withhold the document under FOIA Exemption 6.

¹ 18 C.F.R. § 388.112(d).

² The Director issued the Notice of Intent to Release letter to NEXUS on February 12, 2015, and you were copied on that correspondence.

Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,



David L. Morenoff
General Counsel

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

APR 14 2015

Re: Freedom of Information Act
Appeal, FOIA No. FY15-38

VIA CERTIFIED MAIL 7002 0860 0001 4095 6565

Mr. Joe Hyclak

Dear Mr. Hyclak:

This letter responds to your appeal received March 23, 2015 of the determination denying in part your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2014). As discussed below, I uphold the Director's determination and deny your appeal.

Background

On January 22, 2015, you submitted a FOIA request seeking a copy "of the Appendix B Stakeholder List-Landowners" in the pre-filing application submitted by NEXUS Gas Transmission (NEXUS) in FERC Docket No. PF15-10.

A search of the Commission's nonpublic files identified one document responsive to your request. The document, a landowner list, was submitted by NEXUS with a request for privileged and confidential treatment. After notifying NEXUS in accordance with the Commission's regulations,¹ the Director of the Office of External Affairs (Director), on February 27, 2015, released the document to you with the names and addresses of individual landowners redacted pursuant to FOIA Exemption 6. *See* 5 U.S.C. § 552(b)(6).

You appealed the Director's determination asserting that the public interest weighs in favor of disclosure of the requested information under FOIA Exemption 6. Specifically, you assert that the privacy interest is minimal because the protected information may be obtained from other sources. You also contend that the full record should be disclosed so that you can provide information to landowners near the proposed project about possible violations of law, *i.e.*, alleged or illegal unfair tactics by the applicant and FERC's failure to address them.

¹ 18 C.F.R. § 388.112(d).

Discussion

FOIA Exemption 6 provides that an agency should not disclose “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” *See* 5 U.S.C. § 552(b)(6). To overcome this exemption, it must be demonstrated that the public interest in disclosure outweighs the substantial privacy interest.²

1. Landowners have a strong privacy interest in protecting names and personal home addresses.

The names and personal addresses of private individuals are considered “personnel and medical files and similar files” under FOIA Exemption 6. *See Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152-53 (D.C. Cir. 2006); *Minnis v. USDA*, 737 F.2d 784, 786 (9th Cir. 1984) (names and personal addresses are considered “similar files” and protected from release under FOIA Exemption 6). Moreover, it is well established that the names and personal home addresses of private landowners implicate a strong personal privacy interest that is routinely protected under FOIA Exemption 6. *See, e.g., Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997); *U.S. Dep’t of Defense v. Federal Labor Relations Authority*, 510 U.S. 487 (1994) [*FLRA*]; *National Ass’n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 877-78 (D.C. Cir. 1989) (recognizing privacy interest of an individual avoiding unlimited disclosure of his name and address to deter unwanted contact); *Odland v. FERC*, 34 F.Supp.3d 3 (D.D.C. 2014). Consistent with these decisions, FERC precedent recognizes the privacy interest of individual citizens in their names and addresses. *See, e.g., Columbia Gas Transmission Corp.*, 128 FERC ¶ 61,050 at P 32 (2009) (determining that releasing the names and addresses of private citizens on a landowner list “implicate[s] a privacy interest, and their mandatory release would constitute an unwarranted invasion of individual privacy.”) In light of unwarranted invasions of privacy from disclosure of landowner lists, FERC practice is to protect landowner names and addresses unless the landowner has consented to or otherwise voluntarily submitted that information in the proceeding. *See, e.g., FERC Submission Guidelines*, at pg. 6-7 (January 14, 2014) available at <http://www.ferc.gov/help/submission-guide/user-guide.pdf>.

² *See NARA v. Favish*, 541 U.S. 157, 172 (2004); *see also Martin v. Dep’t of Justice*, 488 F.3d 446, 458 (D.C. Cir. 2007) (“In order to trigger the balancing of public interests against private interests, a FOIA requester must (1) show that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) show the information is likely to advance that interest.” (internal quotations omitted)).

Despite your contention, the privacy interest of the landowners concerning their names and personal home addresses is not waived or de minimis merely because the information might be publicly available through other sources. *See Odland*, 34 F.Supp.3d at 10 (citing *ACLU v. Dep't of Justice*, 655 F.3d 1, 12 (D.C. Cir. 2011)); *Lazaridis v. U.S. Dep't of State*, 934 F.Supp.2d 21, 35 (D.D.C. 2013) (finding that although plaintiff obtained withheld information by other means, the need to protect the material was not waived nor was the agency's ability to invoke the FOIA exemption). Therefore, I agree with established precedent that the landowners have a significant privacy interest in their names and addresses.

2. On balance, the landowners' significant privacy interest in their names and personal home addresses outweighs any public interest in disclosure.

A balancing of the public and private interests under FOIA Exemption 6 must consider "the extent to which disclosure of the information sought would shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to." *Bibles*, 519 U.S. at 355-56. You have not articulated a public interest in disclosing the information that outweighs the privacy interest of the landowners.

Even though public release of the names and addresses inherently exposes the landowners to an unwanted invasion of privacy, you contend that disclosure is in the public interest in order to shed light on FERC's (and NEXUS's) compliance with the Natural Gas Act and the National Environmental Policy Act in the information provided to landowners. You intend to use the list to notify landowners about the project and alleged illegal activity. However, disclosing names and personal home addresses will not reveal whether the landowners have received accurate information or whether violations of law have occurred. Rather, the information provided by FERC may be evaluated by reviewing the record. FERC's efforts with regard to transparency and public participation are demonstrated by the vast public record in FERC Docket No. PF15-10.³ The record describes notification procedures taken to date and the occurrence of several public meetings to inform the public about the project.⁴

³ At this time, there are four hundred and forty-five (445) documents filed in PF15-10, the bulk of which are comments from interested stakeholders.

⁴ *See NEXUS Gas Transmission, LLC submits its Open House Schedule and Stakeholder Notifications for the NEXUS Gas Transmission Project under Docket No. PF15-10* (January 1, 2015) [Accession No. 20150115-5294]; *NEXUS Gas Transmission, LLC submits its Request for Approval to Use the Pre-Filing Process for its*

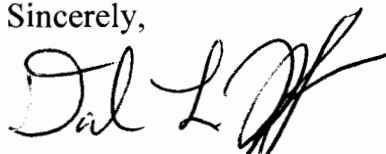
Moreover, using the full list to engage private citizens about the project does not meet the public interest standard. *See, e.g., Bibles*, 519 U.S. at 355 (rejecting asserted public interest in “providing persons on the BLM’s mailing list with additional information” because it does not reveal agency activities); *Horner*, 879 F.2d at 879 (rejecting public interest claim in disclosure of names and addresses where disclosure would aid in lobbying activities because it would not reveal agency activities).

To overcome FOIA Exemption 6, it must be demonstrated that the public interest in disclosure of the information outweighs the substantial privacy interest of the landowners. *See Horner*, 879 F.2d at 879 (observing that “even a modest privacy interest outweighs nothing every time.”). Here, I find that the balance weighs in favor of protecting the significant privacy interest of private landowners. *See Id.*

Conclusion

For the reasons stated above, the Director’s determination is upheld. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at 301-837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "Dal L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

MAY 22 2015

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY15-48

VIA CERTIFIED MAIL

Michael Aguirre, Esq.
Aguirre and Severson, LLP
501 West Broadway
Suite 1050
San Diego, CA 92101
maguirre@amslawyers.com

Dear Mr. Aguirre:

This letter responds to your April 8, 2015 appeal of the denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2015).

Background

On February 18, 2015, you requested copies of all investigative reports, information, and documents for the investigation of Southern California Edison Company (SCE) in Commission Staff's Notice of Alleged Violations dated January 22, 2014. You also requested that the Commission provide any documents and information related to the Order Approving Stipulation and Consent Agreement found at 149 FERC ¶ 61,061 (Docket No. IN14-8-000). On March 9, 2015, in a conversation with FERC staff, you agreed to narrow the scope of your request to "email communications between FERC Staff and SCE regarding the Staff Notice of Alleged Violations dated January 22, 2014."

On March 31, 2015, Leonard M. Tao, Director of the Office of External Affairs (Director), identified 374 responsive documents that he withheld in their entirety pursuant to FOIA Exemption 7(A).¹ In support of that decision, the Director stated that public


¹ 5 U.S.C. § 552(b)(7)(A) (which protects from disclosure "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.").

release of the 374 documents could be harmful to ongoing investigations conducted by the Commission's Office of Enforcement relating to the September 8, 2011 blackout of the Pacific Southwest.²

On Appeal, you argue that release of the information will not cause harm to any on-going FERC investigation because sanctions have already been issued against SCE and the incident happened almost four years ago. Without addressing the actual merits of your appeal at this time, I have determined to make a discretionary release of 20 responsive emails, which are enclosed. The names of non-senior level FERC staff have been redacted to protect their identities. I anticipate ruling on your appeal as to the remaining documents within the next 30 days.

Judicial review of this determination is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the documents that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
General Counsel

Certified Mail Receipt No. 7002 0860 0001 4096 0975

² A further examination of the documents has revealed that there are approximately 305 responsive emails to your initial request, some of these 305 documents may be duplicates.

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

JUL 16 2015

Re: Freedom of Information Act
Appeal, FOIA No. FY15-48

VIA CERTIFIED MAIL

Michael Aguirre, Esq.
Aguirre and Severson, LLP
501 West Broadway
Suite 1050
San Diego, CA 92101
maguirre@amslawyers.com

Dear Mr. Aguirre:

This letter responds to your correspondence received April 8, 2015, in which you appeal the March 31, 2015 denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2015). For the reasons set forth below, I am granting your appeal in part and denying it in part.

Background

On February 18, 2015, you requested certain information related to the investigation of Southern California Edison Company (SCE) in Commission Staff's Notice of Alleged Violations dated January 22, 2014 (Docket No. IN14-8-000). On March 9, 2015, you narrowed the scope of your request to "email communications between FERC Staff and SCE regarding the Staff Notice of Alleged Violations dated January 22, 2014."

On March 31, 2015, Leonard M. Tao, Director of the Office of External Affairs (Director), informed you that the 374 responsive documents¹ would be withheld in their entirety pursuant to FOIA Exemption 7(A).² In support of that decision, the Director

¹ A further examination of the documents revealed that there are 153 responsive emails, not 374. The remaining emails were found to be either non-responsive to your request or duplicates.

² Exemption 7(A) protects from disclosure "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)

stated that public release of the documents could be harmful to ongoing investigations conducted by the Commission's Office of Enforcement (OE) relating to the September 8, 2011 blackout of the Pacific Southwest.

In your April 8, 2015 appeal, you presented two arguments in support of release of the information: (1) that release of the information will not cause harm to any on-going FERC investigation because sanctions have already been issued against SCE and (2) no prejudice would result because the incident happened almost four years ago. In response to your appeal, Commission staff reviewed the documents again, and determined that 20 could be released. On May 22, 2015, I made a discretionary release to you of those documents.³

Discussion

After review of the responsive material and relevant law, I have determined that 73 additional emails may be released to you with the names of lower level Commission staff and their email addresses redacted pursuant to FOIA Exemption 6.⁴ Sixteen (16) of the above 73 emails contain attachments that are withheld in their entirety under FOIA Exemption 7(A), 13 of which are also covered by FOIA Exemption 4⁵, and three of which are also covered by FOIA Exemption 7(E).⁶ These email attachments consist of draft settlements, draft stipulations, and data requests. The 73 redacted emails are enclosed.

³ I advised you that I would rule on the remaining documents in approximately 30 days. In a subsequent conversation with Commission staff, you agreed to an extended deadline of July 17, 2015.

⁴ Exemption 6 provides that an agency should not disclose "personnel...and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).

⁵ Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4)

⁶ Exemption 7(E) affords protection to all law enforcement information that "would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E).

In addition to the 16 attachments noted above, 80 emails are also being withheld in their entirety under FOIA Exemptions 7(A) and 4. These emails consist of draft settlement documents, settlement negotiations, and SCE data responses.

FOIA Exemption 7(A)

On May 26, 2015, the Commission approved the sixth and final settlement agreement to arise out of the September 8, 2011 blackout, effectively terminating the Commission's investigation into SCE. Although FOIA Exemption 7(A) is normally used to protect a pending investigation, it may also be invoked when an investigation has been terminated if the agency retains oversight or some other continuing enforcement-related responsibility. *U.S. Dep't of Justice, Department of Justice Freedom of Information Act Reference Guide, August 2009 ed. pg. 533.* In this case, while the investigation has concluded, the content of the withheld documents as described above, if disclosed, would nevertheless be harmful to enforcement interests. Particularly, there is continuing agency oversight and agency enforcement-related responsibility. For example, SCE has agreed to semi-annual compliance filings for at least one year, and that it must make reports to the OE and the North American Electric Reliability Corporation (NERC) until all of the mitigation measures and Reliability Enhancements have been fully implemented and verified by OE.

Release of the withheld material could reveal sensitive information about enforcement investigative processes with regard to SCE, and could allow other entities to craft their compliance filings to conceal relevant information. Protecting this information helps to promote forthright compliance filings that are not strategically tailored to hide important information that may reveal additional violations. Accordingly, as to the above 16 attachments and 80 emails, I am upholding the Director's invoking of FOIA Exemption 7(A), even though the investigation has ended.

FOIA Exemption 4

Although not invoked by the Director, in addition to FOIA Exemption 7(A), I find that FOIA Exemption 4 is applicable to the 80 emails noted above and 13 of the 16 attachments because they contain confidential detailed financial or commercial information that is not customarily released to the public. These documents include SCE's responses to Commission data requests, and draft settlement proposals exchanged between the Commission and SCE during the course of the investigation which reveal confidential settlement negotiations. As stated in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), commercial or financial information may be protected from release if it is "likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause

substantial harm to the competitive position of the person from whom the information was obtained.”

Release of the confidential commercial and settlement documents could subject SCE to competitive disadvantage. Moreover, divulging confidential aspects of settlement negotiations would make it difficult for the government to reach joint resolutions in furtherance of the public interest. *See, e.g., M/A-Com Info. Systems, Inc. v. U.S. Dep’t of Health & Human Servs.*, 656 F. Supp. 691, 692 (D.D.C. 1986) (finding that it is in the public interest to encourage settlement negotiations and that disclosure of confidential commercial information would impair the government’s ability to carry out its duties). Accordingly, in addition to FOIA Exemption 7(A), 13 of the 16 withheld attachments and 80 withheld emails are also protected from disclosure pursuant to FOIA Exemption 4.

FOIA Exemption 7(E)

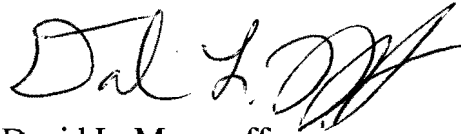
Similarly, although not invoked by the Director, three of the 16 attachments (investigative data requests) are protected from disclosure by FOIA Exemption 7(E) in addition to FOIA Exemption 7(A). These documents contain, consist of, or reflect FERC enforcement techniques and procedures that are confidential and must remain so in order to preserve their effectiveness. “Rather than requiring a highly specific burden of showing how the law will be circumvented, exemption 7(E) only requires that the [agency] demonstrate logically how the release of the requested information might create a risk of circumvention of the law.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011), *quoting Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1194 (D.C. Cir. 2009), *see also Williston Basin Interstate Pipeline Co. v. FERC*, 1989 U.S. Dist. LEXIS 3970 (D.D.C. April 17, 1989) (finding portions of a regulatory audit describing the significance of each page in the audit report, investigatory technique used, and auditor’s conclusions to constitute “the functional equivalent of a manual of investigative techniques.”). Disclosure of this information would reveal enforcement staff’s strategy and focus in addressing potential violations of law.

In addition, disclosure of this information could undermine the Commission’s investigative communications with the other entities involved and hinder their future cooperation. Moreover, sharing the information about the specifics of the Commission’s investigative techniques or methodology concerning SCE could undermine FERC’s ability to monitor and investigate other entities for violations that may be found through the compliance monitoring. Accordingly, in addition to FOIA Exemption 7(A), three of the 16 withheld attachments are also protected pursuant to FOIA Exemption 7(E).

Conclusion

The Director's determination is hereby affirmed in part and reversed in part. Judicial review of this determination is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the documents that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dal L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

Certified Mail Receipt No. 7002 0860 0001 4095 4875

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

JUL 22 2015

Re: FOIA Appeal,
FY15-58 (Buppert)

VIA CERTIFIED MAIL & ELECTRONIC MAIL

Gregory Buppert
Southern Environmental Law Center
201 West Main Street Suite 14
Charlottesville, VA 22902

Dear Mr. Buppert:

This letter responds to your correspondence received June 1, 2015, in which you appeal the April 7, 2015 denial of a request for information filed by your client, Mr. Rick Webb, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC, Agency or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2015). For the reasons set forth below, I am denying your appeal.

Background

On March 6, 2015, Mr. Webb filed a request for copies of all Geographic Information System (GIS) digital shapefiles associated with Dominion Transmission's (Dominion) Atlantic Coast Pipeline proposed routes in Docket Nos. PF15-5-000 and PF15-6-000. On April 17, 2015, Leonard Tao, Director of the Office of External Affairs (Director), issued a determination identifying one responsive document, which was withheld. The Director determined the document contained material designated as Critical Energy Infrastructure Information (CEII) as defined in 18 C.F.R. § 388.113(c). Based on that designation, the Director concluded the responsive document was exempt from mandatory disclosure pursuant to FOIA Exemption 7(F).¹ Mr. Webb was advised that he could seek access to the CEII material by completing a CEII request form online at: <http://www.ferc.gov/legal/ceii-foia/ceii/eceii.asp>.² Mr. Webb was also advised that, due to the sensitive nature of the requested material any release would be subject to the terms and conditions of a non-disclosure agreement.

¹ 5 U.S.C. § 552(b)(7)(F) (2012).

² On April 22, 2015 Mr. Webb filed a request for all GIS digital shapefiles associated with Dominion in Docket No. PF15-6-000 pursuant to the Commission's regulations at 18 C.F.R. § 388.113(c). That request is identified as CE15-75 and is currently pending.

In your June 1, 2015 appeal of the Director's decision, you argue that the Agency "erroneously" identified the shapefiles as CEII. You also argued that the information included in the shapefiles was no different than a detailed map of a proposed pipeline.

Discussion

The Director Correctly Applied FOIA Exemption 7(F).

Exemption 7(F) authorizes the Agency to withhold information that "could reasonably be expected to endanger the life or physical safety of an individual." 5 U.S.C. § 552(b)(7)(F) (2012). *See Amuso v. DOJ*, No. 07-1935, 2009 WL 535965, at *17 (D.D.C. Mar. 4, 2009) (explaining that FOIA Exemption 7(F) may be invoked to protect "any individual reasonably at risk of harm"); *see also L.A. Times Commcn's, LLC v. Dep't of the Army*, 442 F. Supp.2d 880, 898-900 (C.D.Cal. 2006) (applying FOIA Exemption 7(F) where disclosure could endanger the life or physical safety of many individuals). Applying the above authority to the shapefiles at issue, I find that the Director correctly withheld the requested files under FOIA Exemption 7(F).

The withheld material consists of digital shapefiles that include the precise geographic coordinates of over 200 miles of Dominion's proposed pipeline. Although the shapefiles are the digital footprint used to generate maps of Dominion's proposed pipeline routes, they consist of more than just detailed location information. The shapefiles enable a user to cross-reference varied layers of demographic information with various points along the proposed route. The requested shapefiles therefore include greater detail than the publicly available alignment sheets. Given the digital format of the shapefiles, as well as the inclusion of specific geographic coordinates, it is very likely that this information could be used in conjunction with other mapping tools to plan an attack on energy infrastructure, thus jeopardizing public safety. Accordingly, the information was properly withheld from disclosure under FOIA Exemption 7(F).

FOIA Exemption 4.

Although not invoked by the Director, in addition to FOIA Exemption 7(F), I find that the shapefiles are also protected from disclosure pursuant to FOIA Exemption 4.³ FOIA Exemption 4 protects commercial information that is privileged or confidential. Generally, courts apply FOIA Exemption 4 when the disclosure of the information would result in substantial competitive harm to the person from whom the information was obtained.⁴

³ 5 U.S.C. § 552(b)(4) (2012).

⁴ *See Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

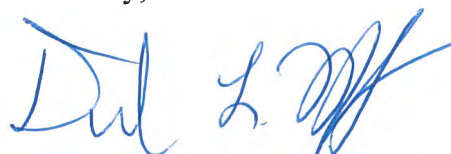
Pursuant to Exemption 4, documents that are supplied to the government may be withheld from disclosure as confidential if: “either (1) disclosure of the information sought is likely to impair the government’s ability to obtain necessary information in the future; or (2) disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.” *National Parks and Conservation Ass’n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974). Here, the information was presumably compiled at significant cost to Dominion and disclosure could be detrimental to Dominion’s financial interests. Moreover, disclosure of the information may inhibit companies from submitting shapefiles to the Commission in the future.

Further, where information is confidential and voluntarily supplied to the government, the supplying party need only establish that this information would not customarily be released to the public. *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992). Dominion voluntarily submitted these confidential shapefiles to Commission staff to assist with the Agency’s evaluation of a proposed project. To the Agency’s knowledge, Dominion has not publicly disclosed these shapefiles and it is not the Agency’s practice to disclose such information. Accordingly, though not invoked by the Director, I am applying FOIA Exemption 4 to protect this information from disclosure.

Conclusion

For the reasons stated above, your June 1, 2015 appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



David L. Morenoff
General Counsel

Certified Mail Receipt No: 7002 0860 0001 4094 1202

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

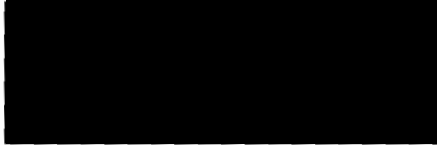
AUG - 4 2015

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY15-102

VIA CERTIFIED MAIL

Paul V. Nolan



Dear Mr. Nolan:

This letter responds to your correspondence received on July 10, 2015, in which you appeal the July 8, 2015 denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2015). Specifically, you appeal the determination by Leonard M. Tao, Director of the Office of External Affairs (Director), that no documents responsive to your request were identified in the Commission's non-public files. For the reasons set forth below, I am upholding the Director's determination and denying your appeal.

Background

On June 15, 2015, as amended June 18, 2015, you requested documents related to original construction cost information, including Commission audits, for Docket Nos. P-3442, P-2814, and P-3255. Upon receipt of the request, the Office of Energy Projects (OEP) was searched for documents responsive to your request. On July 8, 2015, the Director responded to your request indicating that "[a] search of the Commission's non-public files identified no documents responsive to your request."¹

On July 10, 2015, you appealed the Director's determination. You assert that responsive documents must exist in the non-public files or elsewhere, because documents were "filed in response to information required of a licensee under section 4.41 -- Initial cost statement." You also contend that if no information is available, the Commission should "request the required information from the licensees for the above captioned projects and conduct the requisite audits, etc."

¹ Around the same time, Commission staff informed you via email that there may be public material responsive to your request.

Discussion

I find that the Director properly responded to your request and I uphold the Director's determination. Pursuant to FOIA, Commission staff searched for responsive materials to this request in the Commission's non-public files. If a document is publicly available, a requester is advised to obtain such documents through the Commission's eLibrary database, through the Commission's website, or by contacting the Public Reference Room. *See, e.g., Cunningham v. Holder*, 842 F. Supp. 2d 338, 345–46 (D.D.C. 2012) (finding that in addition to Plaintiff's FOIA request, requiring Plaintiff to submit "a separate specific request for public records is consistent with FOIA's requirements"); *see also McLaughlin v. Dep't of Justice*, 598 F. Supp. 2d 62, 66 (D.D.C. 2009) (observing that a policy of presuming that FOIA requests are for only non-public records "comports with the statutory requirement that agencies 'make [responsive] records promptly available'").

In response to your appeal, staff completed a second search and confirmed that the non-public files do not contain responsive documents. The information you seek may be available from the Public Reference Room or through the eLibrary system. In order to assist you in locating any publicly available materials, you should contact the Public Reference Room by email at public.referenceroom@ferc.gov or via phone at 1-866-208-3676.²

Finally, your contention that the Commission should obtain information from the licensees is outside the scope of the FOIA process. FOIA does not require agencies to respond to requests by creating records. *See Krohn v. Dep't of Justice*, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency "cannot be compelled to create the [intermediary records] necessary to produce" the information sought). To the extent that you believe that the record needs to be supplemented, that is more appropriately raised in the underlying proceeding.

Conclusion

For the reasons stated above, your July 8, 2015 appeal is denied. Judicial review of this determination is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of

² Please be advised that there may be fees involved in assisting you in tracking down this publicly available information. Please also note that some of the information you are seeking may be older information and due to record retention schedules, those responsive records may no longer be available.

FOIA Appeal No. FY15-102

- 3 -

Columbia, which is the location of the documents that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read "David L. Morenoff", with a stylized flourish at the end.

David L. Morenoff
General Counsel

7002 0860 0001 4093 7816

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

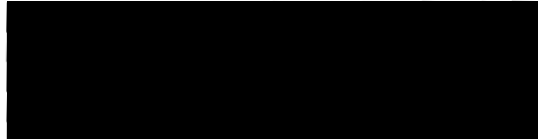
OFFICE OF THE GENERAL COUNSEL

OCT 14 2015

Re: Freedom of Information Act
Appeal, FOIA No. FY15-107

VIA CERTIFIED MAIL

Mr. Coyne Gibson



Dear Mr. Gibson:

This letter responds to your correspondence received September 24, 2015, in which you appeal the August 12, 2015 denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2015). For the reasons set forth below, your appeal is denied.

Background

On July 16, 2015, you submitted a FOIA request seeking a copy of "Accession Number 20150708-5199, Report of Trans-Pecos Pipeline, LLC (Trans-Pecos) under CP15-500, Response to FERC Data Request issued July 1, 2015." The document you requested consists of proposed pipeline interconnections for the Trans-Pecos Presidio Crossing project. On July 23, 2015, pursuant to 18 C.F.R. § 388.112(d), the Commission notified Trans-Pecos of your request. Trans-Pecos objected to release of the requested information on July 29, 2015 asserting that the material should be withheld pursuant to FOIA Exemption 4.¹ On August 12, 2015, the Director of the Office of External Affairs (Director) determined that the material was protected from disclosure pursuant to FOIA Exemption 4, and thereby denied your request.

On September 24, 2015, you filed an appeal arguing that the requested information is not protected by Exemption 4 because Trans-Pecos has already been awarded the pipeline and thus there is no actual competition or likelihood of substantial competitive harm. You further claim that Trans-Pecos has already disclosed the requested

¹ 5 U.S.C. § 552(b)(4) (protecting trade secrets and commercial or financial information).

information because it has publicly stated that interconnections will exist. As an alleged intervenor in Docket Number CP15-500, you also assert that the material may be released to you subject to a protective order.²

Discussion

I agree with the Director's determination to withhold the documents. FOIA Exemption 4 protects from disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552(b)(4). As stated in *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974), commercial or financial information may be protected from release if it is "likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained."

Under these standards, the requested information containing proposed pipeline interconnections qualifies for protection under Exemption 4. Although you assert that the material is no longer sensitive because Trans-Pecos has been awarded the construction contract, the proposed interconnection information is still commercially sensitive. In fact, Commission staff has been told that Trans-Pecos is currently in competitive commercial negotiations with various potential interconnecting parties. Releasing the material could harm not only Trans-Pecos's ongoing negotiations, giving it a disadvantage, but could also adversely impact the interconnecting parties in their negotiations with other parties seeking to establish interconnections. Indeed, information in the proposal stage is considered confidential commercial information. *See, e.g., Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 29 (D.D.C. 2000) (protecting information prior to transaction being finalized); *Raytheon Co. v. Dep't of Navy*, No. 89-2481, 1989 WL 550581, at *5 (D.D.C. Dec. 22, 1989) (protecting unawarded contracts); *M/A-Com Info. Sys., Inc. v. U.S. Dep't of Health and Human Services*, 656 F.Supp. 691, 692 (D.D.C. 1986) (protecting drafts in unsuccessful settlement negotiations).

Moreover, that Trans-Pecos publicly disclosed that there will be interconnecting pipelines does not vitiate the information's commercial sensitivity. The information must be *identical* to the information already publicly available to justify disclosure. *Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 151 (D.C. Cir. 2001)

² Requesting information subject to a protective order is governed by 18 C.F.R. § 388.112(b)(2). Under these regulations, a participant in a proceeding may make a written request to the filer of privileged information for a copy of the non-public document.

(emphasis in original). Trans-Pecos has not publicly identified the exact location or names of the potential interconnecting parties.

Release of such information could also impair the Government's ability to obtain such information in the future. The Commission relies on parties to provide accurate information during the certificate process in order to fulfill the Commission's statutory mandate. Companies involved in certificate proceedings would be less candid if there was a concern that the Commission would release commercially sensitive material. *Judicial Watch*, 108 F.Supp.2d at 30 (recognizing that impairing an agency's ability to carry out its statutory mandate justifies a finding of confidentiality).

Conclusion

For the reasons stated above, the Director's determination is hereby affirmed and I deny your appeal. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at 301-837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



Max Minzner
General Counsel

7002 0860 0001 4093 2880

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

NOV 04 2015

Re: Freedom of Information Act
Appeal, FOIA No. FY15-116

CERTIFIED MAIL

Mr. Earl Van Wormer, III, Chairman
Mr. Shane Nickle, Senior Planner
Schoharie County Board of Supervisors
P. O. Box 429, County Office Building
Schoharie, NY 12157

Dear Messrs. Van Wormer and Nickle:

This letter responds to your appeal received October 13, 2015 of the determination denying the request submitted by Mr. Nickle pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2015). As discussed below, I am granting your appeal in part and denying it in part.

Background

By letter received August 5, 2015, you requested "any information, including relevant Constitution Pipeline cultural resource survey reports, on the three archaeological sites in Schoharie County, NY identified where an 'adverse effect' would occur for the Constitution Pipeline project [Docket Nos. CP13-499-000 and CP13-502-000]." You noted that these three sites were discussed in a July 31, 2015 letter from David Swearingen of FERC to Reid Nelson of the Advisory Council on Historic Preservation. A search of the Commission's nonpublic files identified one document responsive to your request. Specifically, the search identified an enclosure to the July 31 letter entitled "Documentation for Adverse Effect on Three Archaeological Sites in Schoharie County, New York and Culturally Sensitive Rock Stacks in Delaware County, New York and Susquehanna County, Pennsylvania." The document was prepared by FERC staff and marked as privileged.

By letter dated September 2, 2015, the Director of the Commission's Office of External Affairs withheld the document in its entirety pursuant to FOIA Exemption 3, which is discussed in detail below. The Director also stated that there are no reasonably segregable portions of the document that could be released.

In your appeal of the Director's determination, you assert that the Schoharie County Board of Supervisors should have the chance to review the impacted sites and recommend mitigation actions that could help decrease the negative impacts of the pipeline installation on important archaeological sites in Schoharie County. You opine that the withholding of the identification of the three archaeological sites would "demonstrate discourtesy to our role and involvement in the project." Appeal at 1. You also maintain that the Board is willing to adhere to any requirements that FERC places on disclosure of the information as long as the Board is given the chance to make comprehensive recommendations based on detailed information.

Discussion

FOIA Exemption 3 provides that the disclosure requirements of FOIA do not apply to documents "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 matters to be withheld." 5 U.S.C. § 552(b)(3).

The Director invoked the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. § 470, *et seq.* (2012), which protects the nature and location of certain archaeological and cultural resources. Specifically, the NHPA requires an agency to withhold from public disclosure information about the location, character, or ownership of a historic resource if it is determined that disclosure may, *inter alia*, risk harm to the historic resource. *See* 16 U.S.C. § 470w-3(a). The Director found that the responsive document in this case "provides information concerning the location, nature, and character of architectural and cultural resources and artifacts." Director's Letter at 2.

I have reviewed the responsive document and have determined that while it contains material that is protected by FOIA Exemption 3, it also contains some segregable portions that arguably do not describe the location, nature, and character of certain archaeological and cultural resources, within the meaning of the NHPA. Accordingly, I have determined to make a partial release to you of those segregable portions. The detailed descriptions of the three affected archeological sites (pp. 6-7) have been redacted pursuant to FOIA Exemption 3.

Conclusion

For the reasons stated above, your appeal of the Director's determination is hereby granted in part and denied in part. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at (301) 837-0348; or toll-free at 1-877-684-6448.

Sincerely,



Max Minzner
General Counsel

Enclosure

Certified Mail Receipt No. 7002 0860 0001 4096 3846

Federal Energy Regulatory Commission
Washington, D.C. 20426

DEC 01 2015

Re: FOIA Appeal No. FY15-129,
Request for Expedited Treatment

Mr. Robert Godfrey
Save Passamaquoddy Bay
P.O. Box 222, Moose Island
Eastport, ME 04631
infor@savepassamaquoddybay.org

Dear Mr. Godfrey:

On October 8, 2015, the Director of the Office of External Affairs (Director) issued an initial determination letter denying your request for expedited processing of your September 28, 2015 request for documents under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2015). You appealed that determination on October 20, 2015. As explained below, Commission staff is administratively closing your request for expedited processing because the response to your request has been completed.

On October 27, 2015, the Director issued a determination pursuant to your FOIA request in which he partially released conference call logs. On November 3, 2015, [REDACTED] of my staff spoke with you about your FOIA request and the Director's October 27, 2015 determination. During that conversation, you expressed your belief that the Agency had not conducted an adequate search of its non-public files for the information you sought. In light of that conversation, the Agency conducted a second search of its non-public files.

On November 27, 2015, the Director issued a supplemental response to your original FOIA request and released an additional ten documents in their entirety. Accordingly, your requested relief as to the expedited processing of your request has been effectively provided and no further relief is available. *See Muttitt v. Dept. of State*, 926 F. Supp. 2d 284, 295-97 (D.D.C. 2013) (the Court concluded that a FOIA requester's expedited processing claim is moot when an agency has provided a final substantive response to an individual's FOIA request). If you have any questions regarding the processing of your request, please contact [REDACTED] of my staff at [REDACTED].

Sincerely,



Charles A. Beamon
Associate General Counsel

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

November 18, 2015

Re: Extension of Time, Freedom of
Information Act Appeal, FOIA
Appeal No. FY15-129

VIA ELECTRONIC AND REGULAR MAIL

Mr. Robert Godfrey
Researcher and Webmaster
Save Passamaquoddy Bay
P. O. Box 222, Moose Island
Eastport, ME 04631
info@savepassamaquoddybay.org

Dear Mr. Godfrey:

On October 18, 2015, the Office of the General Counsel requested an extension of time to reply to your Freedom of Information Act, 5 U.S.C. § 552 (2012), appeal received on October 20, 2015. The extension of time is necessary because of "the need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request." See 18 C.F.R. § 388.110(b)(1) and (b)(4)(iii) (2015).

The General Counsel's response was initially due on November 18, 2015. By this letter, I am advising you that, upon consideration of the General Counsel's request, the time within which to respond to your appeal is extended until December 3, 2015.

Cordially,



Nathaniel J. Davis, Sr.,
Deputy Secretary.

cc: Max Minzner
General Counsel
Federal Energy Regulatory Commission
Washington, D.C. 20426

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

SEP 27 2016

Re: Freedom of Information Act
Appeal, FOIA No. FY16-4

VIA CERTIFIED MAIL

Robert S. Fleishman, Esq.
Morrison & Foerster LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
rfleishman@mofo.com

Dear Mr. Fleishman:

This letter responds to your correspondence received August 12, 2016, in which you appeal the denial of your request filed on October 13, 2015 pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *as amended by* the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016), and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2016). For the reasons set forth below, your appeal is denied.

BACKGROUND

On October 13, 2015, you filed a request for information on behalf of ETRACOM LLC and Michael Rosenberg (collectively ETRACOM) seeking records relating to FERC's investigation of ETRACOM's trading activity during 2011 within the CAISO market. Specifically, you requested:

1. Relevant portions of transcripts, recording, or notes from Staff depositions or interviews of, or communications or correspondence with CAISO, the CAISO Department of Market Monitoring (DMM), or market participants relating to Staff's investigation of ETRACOM;
2. Documents or materials related to CAISO's flaws or errors in designating and implementing markets for energy and/or congestion revenue rights (CRRs) at all interties on the borders of the CAISO system prior to July 2011;
3. Documents or materials related to when CAISO became aware of flaws or errors in the designing and implementing energy and/or CRR markets at all interties on the borders of the CAISO system prior to July 2011, including the

- steps CAISO took to remedy the flaws or errors and when CAISO disclosed the flaws or errors to FERC and/or market participants;
4. Documents or materials related to any referral to FERC by DMM regarding CAISO's potential violations of its tariff due to flaws or errors in designing and implementing markets for energy and/or congestion revenue rights (CRRs) at the New Melones Intertie prior to July 2011;
 5. Documents or materials related to any self-report to FERC by CAISO for its potential violations of its tariff due to flaws or errors in designing and implementing markets for energy and/or congestion revenue rights (CRRs) at the New Melones Intertie prior to July 2011;
 6. Documents or materials related to a memorandum created by DMM entitled "Etracom at New Melones: Follow Up," dated December 9, 2013;
 7. Documents or materials related to any Staff or DMM determination that ETRACOM's trading activity or portfolio at the New Melones Intertie in May 2011 was similar to or different from ETRACOM's virtual/convergence bids and offers at other internal and external CAISO nodes during 2011; and
 8. Documents or materials related to the algorithmic or software errors at fully encumbered interties in general – or the New Melones intertie in particular – including the extent of such errors, correction, and any documents related to CAISO's violation of its tariff by such errors.

Given the considerable volume of records that were identified as potentially responsive to the request, the Commission responded on a rolling basis with letters issued on November 25, 2015, January 22, 2016, February 26, 2016, May 5, 2016, May 27, 2016, and June 27, 2016. In these responses, the Director of the Office of External Affairs (Director), determined that 15,982 records were exempt from disclosure under FOIA Exemptions 4, 5, 7(A) and 7(E).¹ You appeal the Director's determinations arguing that the records were withheld without adequate justification and that the Commission failed to disclose segregable portions of the records. You also assert that the Commission should produce a Vaughn Index. As discussed below, I uphold the Director's determination to withhold the records.

¹ 5 U.S.C. § 552(b)(4), (b)(5), (b)(7)(A), and (b)(7)(E).

DISCUSSION

As an initial matter, 4,297 non-public records are now considered responsive. After the Commission responded to your request, you agreed to exclude records post 2011 for request Item 8, rendering 9,812 nonresponsive.² Additionally, 1,873 records were wrongly identified as responsive in the Fourth Response Letter.³ Of the 4,297 responsive documents, 4,254 are covered by Exemption 7 because they relate to the pending ETRACOM enforcement proceeding; 113 are also covered by Exemption 4; and 4,184 are also covered by Exemption 5, as discussed in detail below.

Exemption 7(A)

The Director determined that 4,254⁴ records were compiled by the Commission pursuant to a pending investigation into ETRACOM's trading activity and were exempt from disclosure under Exemption 7(A). The records withheld under 7(A) are: 1) correspondence with the CAISO Department of Market Monitoring (DMM) regarding DMM's referral, and market data and analysis provided by DMM pursuant to the referral; 2) OE staff analysis and communications discussing various aspects of litigation strategy and the investigation; 3) internal agency memoranda relating to the investigation and draft letters prepared by staff; and 4) market data relevant to the matters in the case.⁵ You claim on appeal that because FERC's investigation is completed, Exemption 7(A) cannot apply to these records.

FOIA Exemption 7(A) protects "records or information compiled for law enforcement purposes" and authorizes the withholding of information when release of the requested information "could reasonably be expected to interfere with enforcement

² See Final Response Letter on June 29, 2016.

³ 1,916 records were initially identified in the Fourth Response Letter as responsive. Upon re-examination, only forty-three are potentially responsive.

⁴ As discussed below, ninety-one of these records are also covered by Exemption 4 and 4,163 records are also covered by Exemption 5.

⁵ A number of records contained in the investigatory file are correspondence with ETRACOM's representatives and material provided to the Commission by ETRACOM during the course of the investigation. In a conversation with Commission staff on November 20, 2015, you agreed that the Commission did not need to produce these records.

proceedings.” 5 U.S.C. § 552(7)(A). It is well established that an agency may invoke Exemption 7(A) to protect records during the entire course of an enforcement proceeding, even after the investigative stage has ended. *See Kay v. FCC*, 976 F. Supp. 23, 38 (D.D.C. 1997), *aff’d*, 172 F.3d 919 (D.C. Cir. 1998) (unpublished decision) (finding that the agency could withhold documents under Exemption 7(A) “until all reasonably foreseeable proceedings stemming from that investigation are closed”); *see also Kansi v. U.S. Dep’t of Justice*, 11 F.Supp. 2d 42, 44 (D.D.C. 1998) (approving agency use of Exemption 7(A) to withhold records until court appeal was finalized).

Since the ETRACOM matter continues in federal district court, a pending law enforcement proceeding exists for purposes of FOIA Exemption 7(A). Releasing all of these investigatory records could interfere with FERC’s ongoing enforcement proceeding by allowing you greater access to information, now before a federal court. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 241-43 (1978) (noting that FOIA is not a discovery tool). Moreover, releasing the information provided by DMM could potentially discourage witness cooperation in this case and other future matters, and the release of the internal staff analysis, communications and draft materials could hinder the flow of ideas between Commission personnel litigating the ETRACOM matter or other cases. *See, e.g., J.P. Stevens & Co., Inc. v. Perry*, 710 F.2d 136, 143 (4th Cir. 1983) (holding that release of internal correspondence and correspondence with third parties could create “chilling effect” on potential witnesses, dry up sources of information, hamper the free flow of ideas between agency employees and supervisors, and make future enforcement cases more difficult). Thus, I uphold the Director’s determination that the documents compiled pursuant to the ETRACOM investigation were properly withheld under Exemption 7(A).⁶

Exemption 4

The Director determined that 113 records were exempt from disclosure as confidential commercial information under Exemption 4. Ninety-one are DMM commercial records from the ETRACOM investigation including DMM’s 2011 referral and attachments, emails between DMM and the Commission discussing the referral and investigation, and the 2013 DMM follow-up memo.⁷ Twenty-two commercial records relate to the Commission’s investigation of Deutsche Bank Energy Trading (DBET). These records include DMM market data and DMM’s referral analysis, and records

⁶ Because Exemption 7(A) protects the ETRACOM investigation records, I do not address Exemption 7(E), which the Director also invoked to protect these records.

⁷ These ninety-one records are also exempt under FOIA Exemption 7(A).

provided by DBET during the course of the investigation including market data and business practices in defense of its actions.

You argue on appeal that the records were not voluntarily provided to the Commission and that applying the test set forth in *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1976), disclosure of the records would not cause substantial competitive harm to the entities from which they were obtained because the records relate to activity prior to 2011.

FOIA Exemption 4 protects from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.” 5 U.S.C. § 552(b)(4). Information that is submitted voluntarily to an agency is deemed confidential if “it is of a kind that would customarily not be released to the public by the person from whom it was obtained.” *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d 871, 879 (D.C. Cir. 1992). Whereas information that is required to be submitted to the agency is deemed confidential if release is “likely to have either of the following effects: (1) impair the Government’s ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained.” *National Parks*, 498 F.2d at 770.

The DMM records are market data and the process by which DMM analyzes trading practices and potential manipulation. DMM does not customarily make such information public. And, even if the documents were not voluntarily submitted, the material is protected because making the information publicly available would undercut DMM’s function by revealing methods and techniques used by DMM, and compromise the efficiency and integrity of the market and its participants, regardless of when the material was provided. *See, e.g., Gavin v. SEC*, 2007 WL 2454156 at *8-9 (D. Minn. Aug. 23, 2007) (protecting market surveillance data by the New York Stock Exchange because it would reveal sensitive surveillance information, and methods and techniques used by the NYSE to investigate anomalous trading).

Likewise, DBET provided the records to the Commission voluntarily during a non-public investigation and it is not the type of information customarily released to the public by DBET. Even if the information was not voluntarily submitted, it is still exempt because it includes DBET’s trading practices and internal business strategies the release of which could put DBET at a disadvantage by giving competitors details about DBET’s energy trading business and litigation risk.⁸

⁸ Pursuant to 18 C.F.R. § 388.112(d), the Commission notified DMM and DBET of your request. Both entities filed comments opposing the release of records under Exemption 4 citing commercial harm and that the records are not customarily released.

Finally, the records are exempt because releasing material provided by DMM and companies under investigation by the Commission is likely to impair the Commission's ability to obtain such information in the future. If investigated companies and DMM expect that the information that they provide in a non-public investigation is likely to be released under FOIA, they will be less forthcoming and cooperative. *Judicial Watch, Inc. v. Export-Import Bank*, 108 F.Supp.2d 19, 29-30 (D.D.C. 2000) (noting that even where submissions of information are mandatory, they may be protected if disclosure would impair an agency's ability to carry out its statutory purpose or discourage "forthcoming" (i.e., complete, accurate, or fully cooperative) submissions of such information). Accordingly, I agree with the Director that these records are protected by Exemption 4.

Exemption 5

The Director determined that 4,184 internal records from the ETRACOM and DBET proceedings were predecisional deliberative records protected from disclosure under FOIA Exemption 5.⁹ The records at issue here consist of internal memos from junior to senior staff outlining FERC's enforcement and litigation strategy and proposing ideas, draft letters (Order to Show Cause, Preliminary Findings, Section 1b.19, and responses to requests for exculpatory material), factual and legal analyses, and communications among OE staff regarding the investigation. You appeal the application of Exemption 5 arguing that factual material is not protected by the privilege and that disclosing enforcement records will not harm the deliberative process.

FOIA Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). FOIA exemption 5 incorporates various privileges, including the deliberative process privilege. Courts have consistently held that three policy purposes constitute the basis for the deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's action. *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also EPA v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that "[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny.").

⁹ 4,163 of these records are from the ETRACOM proceeding and are also protected under Exemption 7(A). The remaining twenty-one records relate to the DBET matter.

Factual material may be considered deliberative if the factual portions are inextricably intertwined with the deliberative matter such that disclosure would reveal the pre-decisional deliberations. See *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997); *Mead Data Central, Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 256 (D.C. Cir. 1977) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process). It is how the document is used in the process, not the specific content of document that is dispositive. *Montrose Chemical Corp. of California v. Train*, 491 F.2d 63, 71 (D.C. Cir. 1974) (stating that the privilege protects the "deliberative process," in addition to deliberative material).

These records are staff's thinking, opinions, and recommendations prior to issuing penalties, the release of which would harm the decision making process by opening up staff's preliminary thinking prior to a final decision. Such material is the very definition of predecisional deliberative records. *Taxation With Representation Fund v. I.R.S.*, 646 F.2d 666, 677 (D.C. Cir. 1981) ("advisory opinions, recommendations, and deliberations comprising part of a process by which government decisions and policies are formulated" are protected). Contrary to your argument on appeal that Exemption 5 does not apply because your request largely focused on CAISO and DMM material, the documents that the Director withheld under the deliberative process privilege are entirely the work of FERC staff.

Portions of the records that contain facts are staff's factual analysis and summaries of factual information. These analyses and summaries are protected from disclosure because disclosure would reveal Commission thought processes during the investigation as to what information staff deemed important prior to final enforcement action. See *Montrose Chemical*, 491 F.2d at 68 (finding that factual summaries are deliberative because they would show agency mental processes); *Mapather v. Dep't of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993) (determining that extracting and organizing facts in a document qualified for withholding under the deliberative process privilege).¹⁰

Finally, given the nature of your request—you sought mostly internal enforcement records—many of the records are documents and communications by and among attorneys and analysts in OE that include their legal recommendations and opinions, analysis of the data, and drafts of material prepared in anticipation of litigation. These records are also properly protected under the work-product and attorney-client privileges.

¹⁰ To the extent that you are claiming that factual information that has not been analyzed or summarized by staff should be produced, that factual information is protected by Exemption 7(A) throughout the enforcement proceeding.

Given the foregoing, I conclude that the Director correctly determined that the material is exempt under FOIA Exemption 5.

Segregation

FOIA requires that “reasonably segregable” information be disclosed after exempt information is redacted unless the non-exempt portions are “inextricably intertwined with exempt portions.” 5 U.S.C. § 552(b); *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). However, an agency is not required to “commit significant time and resources to the separation of disjointed words, phrases, or even sentences which taken separately or together have minimal or no information content.” *Mead Data*, 566 F.2d at 261, n. 55. Additionally, an agency is not required to commit an exorbitant amount of time and agency resources culling out nonexempt information because the significant burden placed on the agency in doing so renders the material not “reasonably segregable.” *Lead Industries Ass’n, Inc. v. Occupational Safety and Health Administration*, 610 F.2d 70, 86 (2d Cir. 1979) (“if the portion of nonexempt factual material is relatively small and so interspersed with exempt material that separation by the agency and policing of this by the courts would impose an inordinate burden, the material is still protected because, although not exempt, is not ‘reasonably segregable’”); see *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1039 (7th Cir. 1998) (holding that while a few portions of investigative records were not exempt under FOIA, the agency was not required to segregate the nonexempt information because it would take eight work years to complete the segregation).

Under these standards, the Commission met its segregability duty. Your FOIA request revealed 4,297 documents, totaling tens of thousands of pages. Staff reviewed the records and determined that they were all exempt from disclosure as investigatory, deliberative and commercial records. Staff determined that the small portions of the responsive documents that were not technically exempt would yield no informative information and would require considerable staff resources to segregate and produce. Thus, I uphold the Director’s determination that the material was not “reasonably segregable.”

Vaughn Index

Contrary to your assertion, the Commission is not required to create a Vaughn Index. A Vaughn Index is typically only required to support an agency’s case in court when dispositive motions are filed. See *Mullen v. U.S. Army Criminal Investigation Command*, 2011 WL 5870550 at 4-5 (E.D. Va. Nov. 22, 2011) (discussing when a Vaughn Index is required); *Stimac v. U.S. Dep’t of Justice*, 620 F.Supp. 212, 213 (D.D.C.

1985) (finding that plaintiff's request for Vaughn Index was premature until the agency filed its motion for summary judgment and detailed affidavits).

CONCLUSION

For the reasons stated above, the Director's determination is hereby affirmed and your appeal regarding the specified records is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at 301-837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,



Max Minzner
General Counsel

Certified Mail Receipt No. 7002 0860 0001 4094 2247

Federal Energy Regulatory Commission
Washington, D.C. 20426

FEB 03 2016 Re: FOIA Appeal No. FY16-10

Mr. Nick Ochsner
WBTV News
1 Julian Price Place
Charlotte, NC 28202
nochsnr@wbtv.com

Dear Mr. Ochsner,

This letter responds to your appeal received December 21, 2015, of the determination denying your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2015).

BACKGROUND

On October 28, 2015, you submitted a request asking for the public release of "the emergency action plan (EAP) compiled by Alcoa Power Generating Inc. [Alcoa] for its dams on the Yadkin River in North Carolina (Yadkin Project)." Commission staff identified thirty-six documents that consist of the initial EAP and subsequent updates. After notifying Alcoa in accordance with Commission regulation,¹ the Director of the Office of External Affairs (Director), on December 11, 2015, withheld all the documents in their entirety under FOIA Exemptions 6 and 7.² Specifically, the Director withheld the personal information of emergency responders under FOIA Exemption 6, and Critical Energy Infrastructure Information (CEII)³ under FOIA Exemption 7(F).⁴

¹ 18 C.F.R. § 388.112(d).

² 5 U.S.C. § 552(b)(6) and (7)(F).

³ CEII is defined in 18 C.F.R. § 388.113(c) as (1) "specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure that: (i) relates details about the production, generation, transportation, transmission, or distribution of energy; (ii) could be useful to a person in planning an attack on critical infrastructure; (iii) is exempt from mandatory disclosure under the Freedom of Information Act [FOIA], 5 U.S.C. 552; and (iv) does not simply give the general location of the critical infrastructure.

⁴ Though the material was not appropriate for release under FOIA, the Director advised you that you could seek access to the material subject to a non-disclosure agreement under the CEII regulations. 18 C.F.R. § 388.113(d)(4). On appeal, you asserted that a release under the CEII regulations would preclude you from warning the public and that, as it relates to you as a journalist, the non-disclosure agreement would violate your First Amendment rights. (Appeal at 2.) Your argument is misplaced. Under the FOIA and numerous other laws, the government

On appeal, you are not challenging the Director's application of FOIA Exemption 6,⁵ but you are challenging the Director's assertion of FOIA Exemption 7(F). You stated that the Director cited FOIA Exemption 7(F) when the authority relied on actually discusses FOIA Exemption 7(E). (Appeal at 1.) You also stated that some material is likely CEII, but not all the information withheld is CEII. (Appeal at 1.) Additionally, you clarified your request in two ways. First, you explained that you are not seeking inundation maps. (Appeal at 1.) Second, you indicated you are only "seeking access to parts of Alcoa's EAP that discusses what residents should do in the event of Dam Failure." (Appeal at 2.) As explained below, I am denying your appeal.

DISCUSSION

I. The Material is Non-responsive to the Request, as Clarified on Appeal.

Based on the clarifications to the request on appeal, the inundation maps and the other parts of the EAP are non-responsive. The inundation maps, which you do not seek, comprise a significant portion of the EAP filings. Moreover, according to FERC guidelines, rather than being found in the EAP, state and local emergency management authorities would generally prepare a separate plan for what residents should do in an emergency.⁶ For the Yadkin Project, the North Carolina Emergency Operations Center (EOC), the Yadkin County Emergency Management Office, and/or other local emergency responders would react to notification from the licensee of an emergency and implement their separate plans for residents. You might consider contacting these agencies. In any event, the EAP does not have the information you seek.

II. The Documents are Otherwise Protected under FOIA.

I agree with you that *Public Employees for Environmental Responsibility v. U.S. International Boundary & Water Commission* held that FOIA Exemption 7(E), rather than FOIA Exemption 7(F), protects EAP information. 740 F.3d 195, 205 (D.C. Cir. 2014) [hereinafter *PEER*]. *PEER*, however, also protected inundation maps, which are a part of the EAP filings, under FOIA Exemption 7(F). Regardless of whether the Director

may lawfully restrict use of or limit access to sensitive, privileged, or otherwise protected information.

⁵ You do not dispute the rationale for FOIA Exemption 6 so that will not be addressed. (Appeal at 2).

⁶ See Office of Energy Projects, *Engineering Guidelines, Revised Chapter 6 – Emergency Action Plans*, page 9 (July 2015) available at <http://www.ferc.gov/industries/hydropower/safety/guidelines/eng-guide/chap6.pdf>. (stating "[S]tate and local emergency management authorities will generally have some type of plan in place, either a local Emergency Operations Plan or a Warning and Evacuation Plan.").

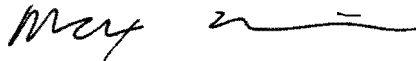
invoked Exemption 7(E) or 7(F), *PEER* provides that EAPs and inundation maps are properly exempt from public disclosure under FOIA. Accordingly, I agree with the Director regarding FOIA Exemption 7(F), and I am invoking FOIA Exemption 7(E) to the extent that it is applicable.

The documents here, like the EAP in *PEER*, reflect the guidelines, responsibilities, techniques and procedures used for emergency responses, which must remain confidential to preserve their effectiveness. 740 F.3d at 205. Disclosure of this information could result in circumvention of those techniques, and therefore, falls within the ambit of FOIA Exemption 7(E). As to FOIA Exemption 7(F), the Director correctly concluded that the EAP material is CEII because it provides details about vulnerability and infrastructure at the Yadkin Project. If released, that information could be used for an ill motive or to subvert an emergency response, thereby endangering lives and safety of citizens near the project. Regarding your contention that certain information in the EAP is not CEII, any such information is otherwise intertwined with exempt CEII.

Moreover, I note that Congress recently enacted the Fixing America's Surface Transportation Act, which specifically exempts from disclosure under FOIA this type of material.⁷ This recent law eliminates any ambiguity that may have existed as to whether material that FERC already classifies as CEII may be withheld under FOIA. This Congressional action reinforces my conclusion that the Director correctly found that this material should not be disclosed as you requested.

For the foregoing reasons, your appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,



Max Minzner
General Counsel

⁷ Fixing America's Surface Transportation (FAST) Act, Public Law No. 114-94, at Section 61003 (December 4, 2015) (establishing applicability of FOIA Exemption 3, 5 U.S.C. § 552(b)(3)).

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

MAR 17 2016

Re: Freedom of Information Act
Appeal, FOIA No. FY16-19

VIA CERTIFIED MAIL

Jonathan R. Schofield, Esq.
Parr Brown Gee & Loveless
101 South 200 East
Suite 700
Salt Lake City, UT 84111
jschofield@parrbrown.com

Dear Mr. Schofield:

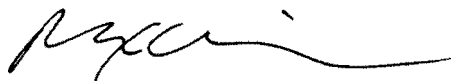
This letter responds to your correspondence received February 18, 2016, in which you appeal the January 5, 2016 denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2015). For the reasons set forth below, I am denying your appeal.

On December 4, 2015, you requested documents pertaining to the company PacifiCorp as it relates to the Wood Hollow Fire in Central Utah that occurred on June 23, 2012. On January 5, 2016, Leonard M. Tao, Director of the Office of External Affairs (Director), denied your request in its entirety. In particular, the Director stated that the Commission could neither confirm nor deny the existence of the documents you sought. In your February 18, 2016 appeal, you state that in the course of litigation with PacifiCorp, you became aware that FERC conducted an investigation into PacifiCorp's potential role in causing the Wood Hollow Fire. You note that the investigation took place years ago, has likely concluded, and that any related documents should be disclosed. You also state that there is no basis for withholding any documents because the investigation is over.

After reviewing your appeal, the underlying FOIA request, the Director's determination, and the pertinent legal authority, I am upholding the Director's determination. In particular, although you believe an investigation once existed and is now over, there has been no public disclosure by this Agency that would support or negate your speculation nor does any document you obtained from PacifiCorp constitute a public disclosure by this Agency. The Director was therefore well justified in opting to neither confirm nor deny the existence of any documents or by implication any investigation. See *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Accordingly, your appeal is denied.

Judicial review of this determination is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which is the location of the documents that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,



Max Minzner
General Counsel

Certified Mail Receipt No. 7002 0860 0001 4093 6697

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

OFFICE OF THE GENERAL COUNSEL

APR 20 2016

Re: Freedom of Information Act
Appeal, FOIA No. FY16-26

VIA CERTIFIED MAIL

7002 0860 0001 4096 1354

Mr. Alexander J.E. English
Associate Attorney
The Law Offices of Carolyn Elefant
2200 Pennsylvania Avenue, NW
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Washington, DC 20037
alexander.english@lawofficesofcarolynelefant.com

Dear Mr. English:

This letter responds to your correspondence received March 15, 2016, in which you appeal the February 3, 2016 denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2015). For the reasons set forth below, your appeal is denied.

Background

On January 8, 2016, you requested information regarding the Commission's Dispute Resolution Division (DRD) casework in the last five years concerning landowners and pipelines and "records regarding DRD's operational procedures." On February 3, 2016, the Director of the Office of External Affairs (Director) determined that the 911 identified documents were protected from disclosure pursuant to FOIA Exemptions 3 and 5,¹ and thereby denied your request.

By a letter dated March 7, 2016, you filed an appeal arguing that the requested information is not protected by Exemption 3 because some of the requested information does not qualify as a "dispute resolution communication," and is thus not exempt from disclosure under the Alternative Dispute Resolution Act, 5 U.S.C. § 574(j) (ADRA).

¹ 5 U.S.C. § 552(b)(3) (protecting information "specifically exempted from disclosure by statute"); 5 U.S.C. § 552(b)(5) (protecting pre-decisional deliberative material).

You also asserted that Exemption 5 does not apply to the standard operating procedures document because it is the working policy of the agency.

Discussion

I agree with the Director's determination to withhold the documents.² FOIA Exemption 3 protects documents exempt from disclosure by statute. 5 U.S.C. § 552(b)(3). Section 5 U.S.C. § 574(j) of ADRA specifically exempts a "dispute resolution communication" from disclosure under FOIA. A dispute resolution communication means "any oral or written communication prepared for the purposes of a dispute resolution proceeding, including any memoranda, notes or work product of the neutral." 18 C.F.R. § 385.604(b)(3).

The 910 documents identified as responsive to this request fall squarely within the definition of a dispute resolution communication. The records are entries made by DRD Staff in a database used for tracking landowner communications in the dispute resolution process. Contrary to your assertions, these records do not contain any initial agreements to engage in dispute resolution or any settlement agreements resulting from dispute resolution proceedings.

I further find that the draft standard operating procedure was appropriately withheld under Exemption 5. In October of 2015, Commission Staff determined that it was necessary to write operating procedures for the Commission's DRD Helpline. The document identified as responsive to your request is DRD Staff's preliminary thoughts on possible revisions to its Helpline procedures. Until this document is finalized, it does not reflect the Commission's final decision and may be withheld under Exemption 5 in order to avoid confusion about agency rationales that may not become part of the final agency action. *See, e.g., Hamilton Securities Group Inc. v. Dep't of Housing and Urban Development*, 106 F.Supp.2d 23, 30-32 (D.D.C. 2000) (recognizing the predecisional and deliberative nature of draft documents and finding that drafts qualify for withholding so as not to "threaten the integrity of the agency's policymaking processes").

Conclusion

For the reasons stated above, the Director's determination is hereby affirmed and your appeal regarding the specified records is denied. Judicial review of this decision is

² In the course of responding to this appeal, the Commission identified an additional twenty-three (23) records potentially responsive to your request. You will receive a separate response letter addressing these records.

available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek. You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. You may contact OGIS by mail at Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; email at ogis@nara.gov; telephone at (301) 837-1996; facsimile at 301-837-0348; or toll-free at 1-(877) 684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read 'Max Minzner', with a long horizontal flourish extending to the right.

Max Minzner
General Counsel