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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

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2nd (final) release date: 10-March-2017

Posted date: 16-January-2017
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Note: Material released March 2017 begins on PDF page 138

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

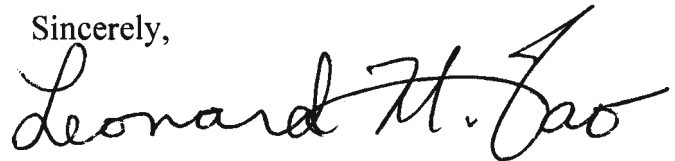
will endeavor to provide you with another determination within twenty (20) business days of the date of this letter. If you have any questions regarding this matter, please contact the undersigned by facsimile at (202) 208-2106 or contact Toyia Johnson of my staff at (202) 502-8004.

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.

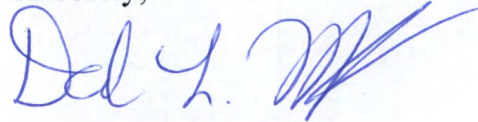
Supp.2d 1 (D.D.C. 2000) (citing *N.L.R.B.* at 132, 151 (clarifying the scope of the working law exception to FOIA Exemption 5)).

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.

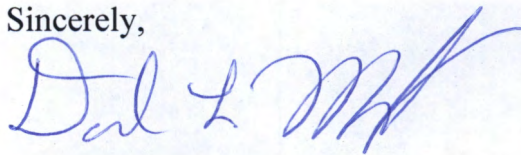
B. The Director Correctly Determined that None of the Withheld Documents Were Segregable or Appropriate for Discretionary Release.

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*

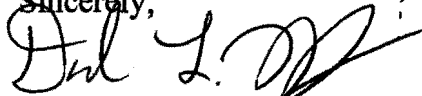
considerable public record, there were seven public meetings in Southern Oregon to inform the public of the project.¹⁰ Furthermore, the landowner lists, even as redacted, show that FERC has gone to great lengths to obtain a list of affected landowners and send notice. Full disclosure of the list would 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. A. 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

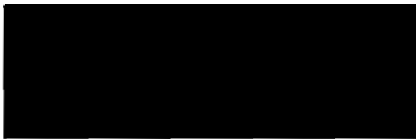
JUN 03 2014

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

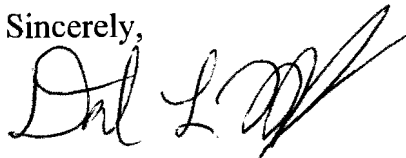
individuals after a violation of the law; and holding that critical infrastructure emergency action plans and inundation maps were created for law enforcement purposes and protected under FOIA Exemptions 7(E) and 7(F)).

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

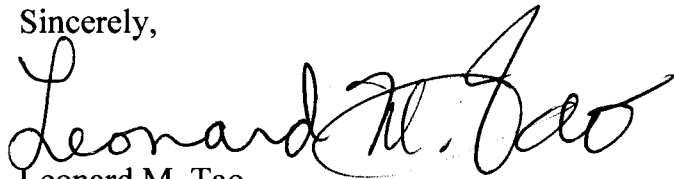
134, 144-45 (D.D.C 2007); *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989). To overcome the presumption in favor of protecting individual privacy, it must be demonstrated that the public interest in disclosure of the information outweighs the substantial privacy interest 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

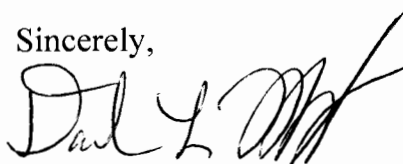
- 3 -

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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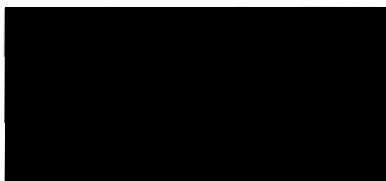
Federal Energy Regulatory Commission
Washington, DC 20426

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

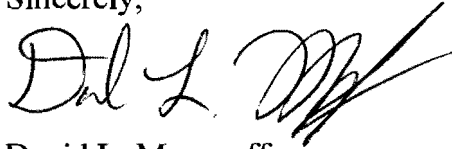
For the reasons explained above, I am upholding the Director's decision to withhold Item 1 of your request in its entirety.

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.

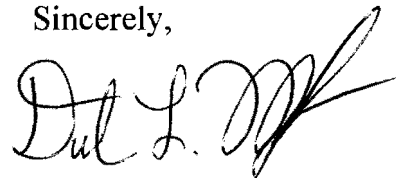
D. It is not possible to segregate non-privileged portions of the withheld documents.

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

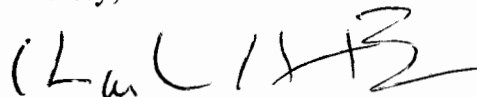
VIA REGULAR MAIL

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:

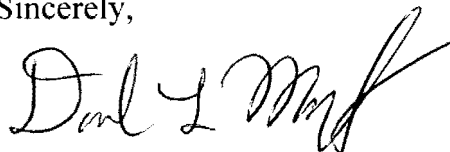
This letter responds to your appeal of the determination denying your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2014). Your appeal was untimely filed.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

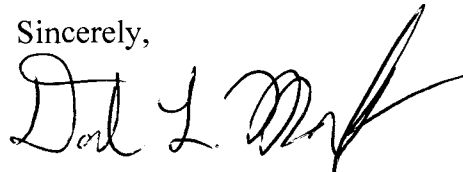
E. Though Not Invoked By The Director, A Further Review Of The Responsive Material Reveals That At Least Five (5) Of The Fifty-Four (54) Emails Are Also Exempt From Disclosure Under FOIA Exemption 7(E).

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

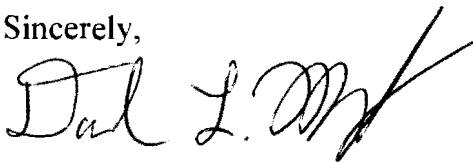
² In addition to the deliberative process privilege, some of the emails are also protected under FOIA Exemption 5 by the attorney-client privilege.

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 of the signature.

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:

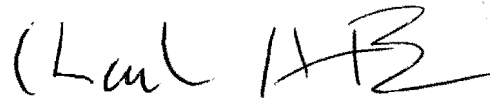
This letter responds to your October 31, 2014, appeal pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.110 (2014). You appealed the decision issued on August 29, 2014, by Leonard 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@lexisnexus.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.

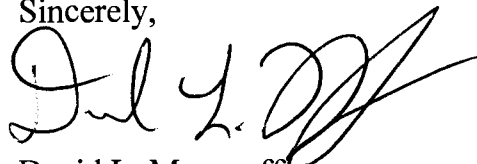
⁴ See 18 C.F.R. 157.21(f)(3) and 157.6(d)(2) (defining affected landowners).

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

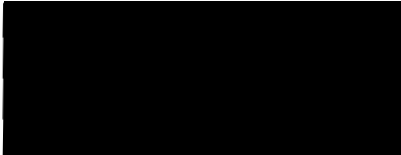
JAN 07 2015

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

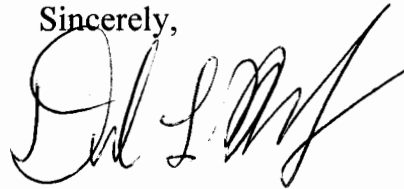
For the reasons stated above, your November 21, 2014 appeal is granted in part and denied in part. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States

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,

A handwritten signature in black ink, appearing to read "D. L. Morenoff", written in a cursive style.

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

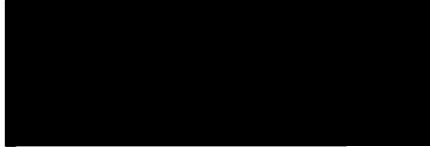
FEB 06 2015

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 extending from 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).

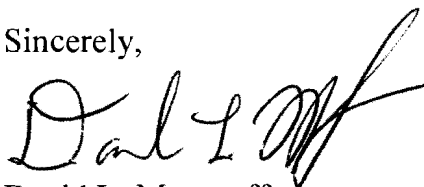
Finally, I agree with your assertion that the Agency has made a release of information through its public settlement with JP Morgan. As you have noted, the settlement's terms are publicly known. However, the release of that information does not necessarily justify the release of other internal confidential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

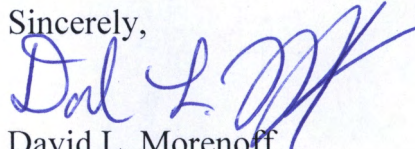
Your May 18, 2015 appeal of the February 24, 2015 determination is untimely. The February 24th letter stated that pursuant to "the FOIA and 18 C.F.R. §388.110(a)(1) of the Commission's regulations, any appeal from this determination must be filed within 45 days of the date of this letter." Your appeal 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*

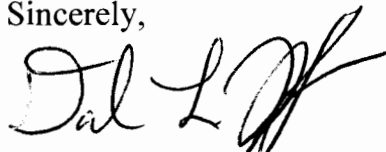
Moreover, using the full list to engage private citizens about the project does not meet the public interest standard. *See, e.g., Bibles*, 519 U.S. at 355 (rejecting asserted public interest in “providing persons on the BLM’s mailing list with additional information” because it does not reveal agency 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,

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

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)

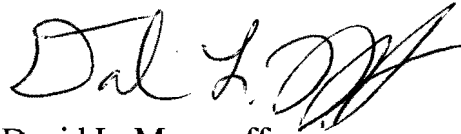
Similarly, although not invoked by the Director, three of the 16 attachments (investigative data requests) are protected from disclosure by FOIA Exemption 7(E) in addition to FOIA Exemption 7(A). These documents contain, consist of, or reflect FERC enforcement techniques and procedures that are confidential 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).

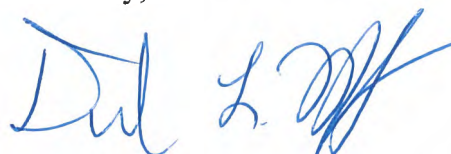
Pursuant to Exemption 4, documents that are supplied to the government may be withheld from disclosure as confidential if: “either (1) disclosure of the information sought is likely to impair the government’s ability to obtain necessary information in the future; or (2) disclosure is likely to cause 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

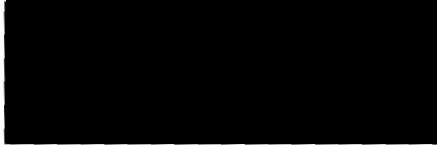
AUG - 4 2015

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

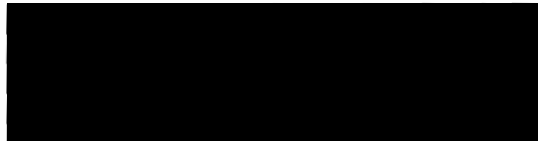
OFFICE OF THE GENERAL COUNSEL

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.").

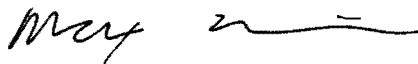
invoked Exemption 7(E) or 7(F), *PEER* provides that EAPs and inundation maps are properly exempt from public disclosure under FOIA. Accordingly, I agree with the Director regarding FOIA Exemption 7(F), and I am invoking FOIA Exemption 7(E) to the extent that it is applicable.

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:

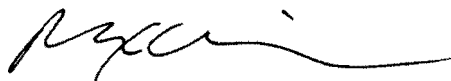
This letter responds to your correspondence received February 18, 2016, in which you appeal the January 5, 2016 denial of your request filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 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
Fourth Floor East
Washington, DC 20037
alexander.english@lawofficesofcarolynelfant.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

Federal Energy Regulatory Commission
Washington, D.C. 20426

MAR 10 2017

Re: Final Response Letter
FOIA No. FY17-5

VIA ELECTRONIC & REGULAR MAIL

This is the final response to your correspondence received November 1, 2016, in which 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 requested "a copy of each FOIA Appeal letter received and each FOIA Appeal response processed during FY2014, FY2015 and FY2016."

On December 15, 2016, you received an initial response letter releasing the forty (40) FOIA Appeal response letters processed during FY2014, FY2015, and FY2016 with personal information redacted in accordance with FOIA Exemption 6.¹ That letter also informed you that given the amount of Commission staff time required to process your request, additional responses would follow on a rolling basis.²

At this time the remaining responsive documents (all FOIA Appeal letters received during FY2014, FY2015 and FY2016) are being released to you, with personal information of individuals who submitted FOIA appeals redacted in accordance with FOIA Exemption 6. *See, e.g.,* *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997); *National Ass'n*

¹ 5 U.S.C. 552(b)(6). (Protecting "personnel . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.")

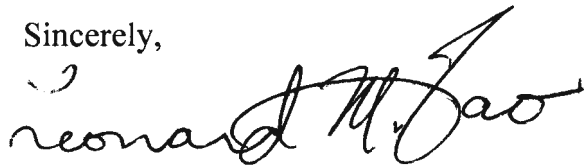
² *See S. Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, No. Civ. S-06-2845, 2008 U.S. Dist. LEXIS 107177, 47 (E.D. Cal. June 20, 2008) (supporting the practice of releasing documents on a rolling basis); *Hinton v. Fed Bureau of Investigations*, 527 F. Supp. 223, 225 (E.D. Penn. 1981)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

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. This concludes the agency's processing of this FOIA request.

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 90 days of the date of this letter. The appeal must be in writing, addressed to David Morenoff, 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,

A handwritten signature in black ink, appearing to read "Leonard M. Tao", written in a cursive style.

Leonard M. Tao
Director
Office of External Affairs

Enclosures (40)

FREEDOM OF INFORMATION ACT APPEAL

November 21, 2013

Mr. David L. Morenoff
Acting General Counsel
FERC
888 First Street, NE
Washington, DC 20426

BY ELECTRONIC MAIL: FOIA-CEII@ferc.gov

Re: Appeal of Initial Determination to Withhold Certain Information, FOIA FY-2014-1

Dear FERC General Counsel,

We appeal FERC's denial of the above-captioned FOIA request by the Energy & Environment Legal Institute (EELI) and the Free Market Environmental Law Clinic (FMELC) ("appellants"), communicated in its letter dated October 31, 2013. Specifically, FERC withheld 36 responsive records in their entirety on the grounds that each of these consist of internal staff opinions and analysis and intra-agency communications between FERC and the Office of Personnel Management[, and] contain personnel information related to a career Senior Executive Service position, and inter- or intra-agency deliberative communications that are exempt from disclosure under FOIA Exemption 5", none of which is reasonably segregable. It thereby withheld each document in full on two bases, that each is exempt under exemptions b(5) and exemption b(6).

We appeal for reasons detailed herein. In sum, FERC did not identify the agency decision each record was pre-decisional to justifying its withholding in full; similarly, although

the Commission must offer specific justification or otherwise provide reason to conclude the withheld information is properly withheld within the cited exemption, FERC simply withheld all responsive records in full without justifying these withholdings, providing requesters no information or means by which we could make a reasoned conclusion about the legitimacy of these withholdings and denial. Also, FERC did not justify its reliance on FOIA's b(6) privacy exemption which reliance also appears from the available information to be misplaced.

Further, FERC has again withheld from requesters *emails* in full which is a facially impermissible practice given the simplicity of redacting such records' factual information. FERC previously did this in response to one of our requests, 13-078 and, on appeal, did not address our objections. Here, we try again to elicit substantiation for the practice now common to both denials.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552. In response, FERC denied our request in full by withholding information in (the entirety of) all responsive records, about which FERC provides no identifying information to substantiate or allow us to assess the withholding, and apparently misapplied the required b6 balancing test. Pursuant to 18 C.F.R. § 388.110, you have jurisdiction because "A person whose request for records, request for fee waiver or reduction, or request for expedited processing is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination." 18 C.F.R. § 388.110 (a)(1). Further, all procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as an "Freedom of

Information Act Appeal” and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed within 45 days of the date of FERC’s October 31, 2013 denial.

II. PROCEEDINGS BELOW

This appeal involves one FOIA request, sent by electronic mail on October 2, 2013 to FERC at FOIA-CEII@ferc.gov, seeking (bold in original, footnote omitted):

“1) all **emails, text messages, or instant messages** (and any attachments thereto), 2) and **any other records**, 3) which are held or 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.

Responsive records will be dated over the one-year period from October 2, 2012 through the date you process this request.

Please note that we do not seek applications submitted in response to this posting.”

FERC assigned this request identification number FY-2014-1.

On October 31, 2013, FERC denied our access to responsive records, writing, in pertinent part, that it is withholding all 36 responsive records in their entirety on b(6) grounds, specifically that each of these “consist of emails that reflect internal staff opinions and analysis and intra-

agency communications between FERC and the Office of Personnel Management[, and] contain personnel information related to a career Senior Executive Service position” (Denial Letter, p. 1). Also, FERC stated that “[a]ll thirty-six emails are inter- or intra-agency deliberative communications that are exempt from disclosure under FOIA Exemption 5” (*Id.* at p. 2). FERC also claimed that none of the responsive records contain reasonably segregable information. (*Id.* at p. 3)

Relevant to this appeal, in our original request EELI and FMELC wrote, *inter alia*:

“We seek discussions about ‘converting’ and/or filling the position, and particularly a challenge to the method by which it was filled by naming the individual who already held the position at the time of the job posting, and who in fact was not intending to leave the position when FERC posted the job opening. The position apparently was merely being converted on the request of someone in FERC, who we understand to be Chairman Wellinghoff, making the individual who held it a ‘career’ for reasons someone within FERC apparently found important...

Also, on information and belief requesters assert that the manner in which FERC filled this posted job ‘opening’ raised questions and challenge. We understand that this was because the individual who held the post prior to the job opening announcement and after, Norman Bay [sp], indicated to others that he was not in fact leaving the job being advertised, but that the Chairman, around the time he was making preparations to leave that job and therefore for FERC after he departed, simply wanted Mr. Bay to be ‘career’.

These Senior Executive Service (SES) positions are finite in number across the federal government and within the Commission, and are highly coveted. For these reasons and interest in FERC and its internal machinations -- including in replacing its current chairman -- this matter is of public interest and responsive records will significantly inform the public on the same.”

The public interest in such developments are manifest and relevant to the instant appeal.

The original request also further discussed the public, congressional and media interest in the

rumored nomination of Mr. Bey to chair FERC, which level of public interest in this matter affirms the clear nature of the, for these purposes, public's interest in disclosure, which as a matter of law compels disclosure.

FERC impermissibly left unstated the privacy interest that supposedly outweighs the public interest in shedding light on how an agency performs its statutory duties -- and what we are reliably informed is a challenge to apparent politicization of and otherwise impermissible proceeding in the federal hiring process¹ -- and how and why it so outweighs the public interest in this matter. See *Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994) ("We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA balancing analysis -- the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens 'know what their government is up to.'" (quoting *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989))); *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) (noting that if requested information falls within Exemption 6, the next step in the analysis is to determine whether "disclosure would constitute a clearly unwarranted invasion of personal privacy . . . [by] balanc[ing] the privacy interest that would be compromised by disclosure against any public interest in the requested information").

Instead, the entirety of FERC's articulation is:

"All thirty-six emails also contain personnel information that is exempt from disclosure under FOIA Exemption 6 (citations omitted)...These communications and documents

¹ On their face these records affirm the apparent effort to convert the position to SES, and so are of public interest. A requester need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. See *Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir 2003).

directly concern an individual's personnel information. The public interest in disclosure in this instance does not outweigh the individual's substantial privacy interest in personnel-related information concerning an application and evaluation for a career Senior Executive Service position that was not ultimately filled (citations omitted)".

Denial Letter at p. 2.

This is the epitome of "boilerplate". Neither this boilerplate nor that FERC took its statutorily permissible time to offer this boilerplate gives confidence that FERC has sufficiently deliberated and fairly considered this request.

III. Standards of Review: All Doubts Must be Resolved in Favor of Disclosure

By this FERC is in violation of the blackletter law that an agency cannot rely on "boilerplate" privilege claims, or simply recite that the withholding of a document meets statutory standards without tailoring "the explanation to" each "specific document," and with a "contextual description" of how those standards apply to "the specific facts" of each document. *King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987) ("[c]ategorical description [s] of redacted material coupled with categorical indication of anticipated consequences of disclosure" was "clearly inadequate."); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) ("generalized" or conclusory exemption claims are insufficient); *Wiener v. FBI*, 943 F.2d. 972, 977–79 (9th Cir. 1991) ("boilerplate" explanations without an effort to "tailor the explanation to the specific document withheld" were insufficient); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999) (agency's *Vaughn* Index must apply statutory standards for exemption "to the specific facts of the documents at hand," giving a "contextual description" of "the documents subject to redaction" and "the specific redactions made to the various documents."); *ACLU v. Office of the Director of Nat. Intelligence*, No. 10-449, 2011 WL 5563520, *6 (S.D.N.Y. Nov. 15, 2011)

(improper for an agency to submit a *Vaughn* Index “proffering conclusory and nearly identical justifications for” withholding each document); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009) (agency must “disclose as much information as possible” in its *Vaughn* Index,” and not merely “parrot” or “recite the statutory standards”).

But that is exactly what FERC has done here and the presumption toward disclosure requires that FERC’s withholding be reversed as improper.

FERC must provide requesters sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and should “describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. DoJ*, 830 F.2d at 223-24.

It is also well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in the underlying request to FERC to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.” Similarly, FERC’s withholdings are not consistent with statements by the President and Attorney General, *inter alia*, that **“The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today”** (President Barack Obama, January 21, 2009), and **“Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

FERC’s denial of the records was in error, for reasons already stated and below, and should be reversed with the withheld responsive records made available.

III. ARGUMENTS AND SUPPORT

A. FERC Improperly Denied Appellants' Request for records on Exemption (b)(6) Grounds, and Should Be Reversed

We repeat by reference here the above recitations of FERC's assertions in its initial determination and the authorities cited indicating the impropriety of this determination.

Appellants will stipulate, *arguendo*, that these records are indeed of the sort for which the Supreme Court established a balancing test in *U.S. Dept. of State v. Washington Post Co.*, 456 U.S. 595 (1982), requiring the agency weigh the public's interest in release against any privacy interest, which the agency must identify.

DoJ's Guidelines assert, "Once it has been established that information meets the threshold requirement of Exemption 6, the focus of the inquiry turns to whether disclosure of the records at issue 'would constitute a clearly unwarranted invasion of personal privacy' which requires a balancing of the privacy interest that would be compromised by disclosure against any public interest in the requested information."² That balancing test, properly conducted, informs a conclusion that FERC must release the responsive records.

For example, it is true that federal civilian employees have a protectable privacy interest *in purely personal details that do not shed light on agency functions*. However, as the original request made plain and nothing in FERC's denial challenged, the requested records go to the heart of an agency's performance of its functions, and must be released. *See e.g., Habeas Corpus Resource Ctr. v. DOJ*, No. 08-2649, 2008 WL 5000224, at *4 (N.D. Cal. Nov. 21, 2008)

² DoJ Guidelines at p. 418, citing "*Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008); *News-Press v. DHS*, 489 F.3d 1173, 1196-97 (11th Cir. 2007).] Thus, the next step in the Exemption 6 analysis is determining the privacy interests at issue. [citing FOIA Update, Vol. X, No. 2, at 7 ('Exemption 6 and Exemption 7(C): Step by Step Decisionmaking').]"

(ordering release of email chains regarding the decision to hire a DOJ attorney because “[p]laintiff’s interest - and the public’s interest - in determining whether [attorney’s] hiring was improper is sufficient to outweigh any minimal privacy interest [the attorney] may have in keeping these opinions from the public”); *Cowdery, Ecker & Murphy, LLC v. Dep’t of Interior*, 511 F. Supp. 2d 215, 219 (D. Conn. 2007) (“Because exemption 6 seeks to protect government employees from unwarranted invasions of privacy, it makes sense that FOIA should protect an employee’s personal information, but not information related to job function.”)

FERC plainly erred in its unsupported assertion that release of records as described “would constitute a clearly unwarranted invasion of personal property.” Per FERC, the responsive information -- the entirety of 36 emails discussing converting a position to SES and an employee seeking to fill his current own position upon that conversion, apparently at the request of the Chairman -- is not in fact the sort of personal detail protected by b(6). This is plain on its face and nothing FERC provided in its denial challenges this.

Instead, on information and belief, and as asserted in our original request, these records involve machinations to convert a position into a scarce and highly coveted SES position, machinations that drew complaint from at least one other career employee for impropriety; whether this was for purposes of burnishing the employee’s positioning for possible succession of current Chairman Wellinghoff, or simply to ensure Mr. Wellinghoff’s colleague remained in his position after Wellinghoff’s pending departure from his position, the circumstance plainly belies any claim that there is minimal public interest and overwhelming threat of an unwarranted invasion of personal privacy.

FERC must *demonstrate* otherwise, and did not.

The requested records relate to the operation of government and FERC's compliance with various applicable employment and other laws. In *Department of Defense v. F.L.R.A.*, the Supreme Court reaffirmed that "[FOIA's] basic policy of 'full agency disclosure unless information is exempted under clearly delineated statutory language,' indeed focuses on the citizens' right to be informed about what their government is up to. Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose."³

That Court continued to note that information addressing the agency's conduct is distinct from information about individual persons which happens to be contained in government files. FERC must heed that same distinction in the instant matter.

As the Ethics in Government Act recognized, it is of critical importance to ensure confidence in the integrity of the Federal Government by demonstrating that high-level employees are able to carry out their duties without compromising the public trust. As such, the general and policy-oriented public will benefit through the dissemination of the findings and works produced as a result of the information received.

As such the disclosure of the requested documents will be of informative value and be "likely to contribute to an understanding of Federal government operations or activities", and on a matter of great public interest -- federal employee obedience to the law -- both generally but particularly now, amid a seemingly endless series of scandals revealing federal employee abuses

³ 510 U. S. 487, 495-96 (1994)(citing *U.S. Dept. of Justice v. Reporters Committee*, 489 U.S. 749 (1989), at 773, quoting *Department of Air Force v. Rose*, 425 U. S. 352 (1976), at 360-361) (other internal quotation marks and citations omitted).

(IRS targeting of political opponents and unlawfully sharing private information, false-identity and private email accounts, cronyism, *etc.*).

Further, despite information we reliably possess but seek to confirm, there is currently no information publicly available regarding the requested information. Absent disclosure of the records requested, the public has no basis for formally understanding what certain individuals in a position to know have *informally* communicated to some of the relevant Washington policy community. This is made more pertinent by the prospect that the individual at the center of the above-described machinations will be named soon to chair FERC, a position of enormous responsibility, power and public trust and, as of the recent nomination process, controversy.

We also submit on appeal that that case for the public's interest in whether FERC employees, particularly such high-profile and influential employees, and anyone dealing with the above-described machinations to recast a position as SES, possibly as a benefit to a particular individual for personal or political reasons, are complying with applicable laws is self-evident. These records and what they would inform the public are similar to those described in *Washington Post Company v. U.S. Dept. of Health and Human Services et al.*, 690 F.2d 252, 264 (D.C. Cir. 1982), as the sort in which "the public has a singularly strong interest in disclosure." The records requested will contribute to the public understanding of the government's compliance with policies and practices governing permissible activities for its employees but particularly relating to such a high-profile employee and possible appointee to such a position.

i. FERC made no substantive case that releasing responsive communications is “a clearly unwarranted violation” of any employee’s privacy

FERC must actually make that finding of what quantifiable privacy interest is at stake and how it prevails here, as opposed to merely stating it. FERC did not, however, make its own required showing.

The authority FERC cites makes plain that:

“the agency has the burden of showing that the intrusion into individuals’ personal privacy is clearly unwarranted for the Exemption 6 balancing test. (*Lepelletier v. FDIC*, 164 F.3d 37) at 46. An initial determination must be made identifying the privacy interest as substantial or *de minimis*. *Multi AG Media LLC v. USDA*, 515 F.3d 1224, 1229 (D.C. Cir. 1981) []. A substantial privacy interest exists in avoiding embarrassment, retaliation, or harassment and intense scrutiny by the media that would likely follow disclosure. *U.S. Dep’t of State v. Ray*, 502 U.S. 164, 176, n. 2 [], *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 167 (2004) [].”

Judicial Watch, Inc. v. United States Dep’t of State, 875 F. Supp. 2d 37, 46 (D.D.C. 2012).

Also:

“After the public and private interests have been identified, and the private interest has been characterized as substantial, the two factors are weighed to determine whether the information should be released because the intrusion is ‘clearly unwarranted.’ *See, e.g. Ray*, 502 U.S. at 176 n.12, 112 S. Ct. 541, 548 (1991). The “clearly unwarranted” language creates a heavy burden for the agency. *Morley v. CIA*, 508 F.3d 1108, 1127, 378 U.S. App. D.C. 411 (D.C. Cir. 2007).”

Id.

FERC has a burden that it failed to meet at any level. Because the balance is tilted toward disclosure, FERC “must show that disclosure would constitute a “clearly unwarranted” invasion of personal privacy. *See Wash. Post v. HHS*, 690 F.2d at 261. It did not do so.

Appellants have already detailed the public interest in disclosure, in our original request and *supra*. In fact, given that the information is *not* “about a particular individual” but about an individual filling his own current position but in a recast, more desirable and highly coveted slot (as SES), even to the extent it is about a particular individual the public interest in such maneuvering plainly outweighs any privacy interest in keeping that secret, let alone constituting a “clearly unwarranted” violation.

As such, FERC failed to overcome the manifest public interest in learning of FERC’s operations or activities and performance of its statutory duties.

Regardless, none of that recited by FERC rises to the level of quantifying what some employee’s privacy interest in the requested records is. FERC merely asserts the interest exists, and overcomes the public’s interest in understanding efforts to recast a senior position as described, above, seemingly for one or more reasons cited, above. To allow the government to make documents exempt by the simple means of asserting a privacy interest exists (and is superior) would subvert FOIA’s disclosure mandate and gut Exemption b(6) and judicial precedent applying it.

The law regarding the privacy interest that FERC must identify is fulsome. We refer to DoJ’s own Guidelines to detail how FERC abdicated its duty:

“Initially, it must be determined ‘whether disclosure of the files “would compromise a substantial, as opposed to de minimis, privacy interest,” because “if no significant privacy interest is implicated . . . FOIA demands disclosure.”’ The Court of Appeals for

the District of Columbia Circuit has explained that, in the FOIA context, when assessing the weight of a protectible privacy interest, '[a] substantial privacy interest is anything greater than a de minimis privacy interest.' When a substantial privacy interest is found, the inquiry under the privacy exemptions is not finished, it is only advanced to "address the question whether the public interest in disclosure outweighs the individual privacy concerns." Thus, as the D.C. Circuit has held, 'a privacy interest may be substantial -- more than de minimis -- and yet be insufficient to overcome the public interest in disclosure.'" [pp. 425-26; extensive citations omitted]

We also point to the Court's language in *DoD v. FLRA*, examining the distinction between the privacy interests at issue in different FOIA exemptions, specifically Exemptions 6 and 7.

"Exemption 7(C) is more protective of privacy than Exemption 6: The former provision applies to any disclosure that '*could reasonably be expected to constitute*' an invasion of privacy that is 'unwarranted,' while the latter [NB: Exemption 6, which is the exemption at issue here] bars any disclosure that '*would constitute*' an invasion of privacy that is '*clearly unwarranted*'" (emphasis added). Exemption b(6) is the weaker of the two, and does not justify FERC's withholdings.

Plainly FERC has not made its required demonstrations, particularly problematic given it withholds all responsive records, in their entirety. That the records are emails no less, which inherently carry easily segregable information, and therefore whose withholding FERC further leaves the impression that this wholesale withholding fails to reasonably consider appellants' request.

The information must be of the sort that "the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." "[A] court must balance the public interest in disclosure against the interest Congress intended the [e]xemption to protect." *Department of Defense v. FLRA*. "As the Supreme Court stressed in [*Department of Air Force v. Rose*, 425 U.

S. 352 (1976)] at 378 n.16 [], Congress's choice of the 'clearly unwarranted' standard was a 'considered and significant determination,' made despite repeated objections by government witnesses to the heavy burden it creates. Thus, under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act." *Washington Post Company v. U.S. Dept. of Health and Human Services et al.*, (D.C. Cir. 1982), 690 F.2d 252, 261.

All of which authorities state directly and clearly appellants' point here, that the privacy interest cannot be merely asserted as existing and trumping, but must be quantified. FERC has failed to do so. What is the specific interest -- saying 'privacy' is insufficient -- is it negligible, non-trivial, or even substantial? How so? How does this credibly apply to the entirety of a record, let alone each and every responsive record?

For failing to satisfy its obligation, FERC's initial determination should be reversed.

ii. FERC improperly failed to conduct the balancing test

Regardless of the failings of FERC's mere assertion of a privacy interest in the withheld (in full) records, FERC also made no case to overcome the public's interest in disclosure, but effectively ignored appellants' effort as insufficient to require a balancing test at all. Weighing the unquantified privacy interest against appellants' articulation of the public interest, FERC could of course not plausibly claim the former outweighs the latter in any balancing test.⁴

⁴ *Associated Press v. DOJ*, 549 F.3d at 66, noting that, "Notwithstanding a document's private nature, FOIA may nevertheless require disclosure if the requester can show that revelation of the contents of the requested document would serve the public interest."; *Scales v. EOUSA*, 594 F. Supp. 2d 87, 90 (D.D.C. 2009) found that, "Given the significant individual privacy interest, disclosure of 7(C) material is warranted only when the individual's interest in privacy is outweighed by the public's interest in disclosure." (Exemption 7(C)); *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) at 1230-33 found that the significant public interest in disclosure of the databases outweighs the "greater than de minimis" privacy interest of individual farmers.

This wholly elides the intent and operation of FOIA as well as *U.S. Dept. of State v. Washington Post Co.*, is arbitrary and capricious, and should be reversed.

- a. **In a proper balancing test the requested records are of heightened public interest which substantially outweighs the mere (asserted) existence of a privacy interest, or any relevant privacy interest**

In balancing the relative interests, “the ‘clearly unwarranted’ language of Exemption 6 weights the scales in favor of disclosure”.⁵ DoJ Guidelines note how, “When engaging in this analysis, it is important to remember that the Court of Appeals for the District of Columbia Circuit has declared that ‘under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act.’”⁶

⁵ *Ripskis v. HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984); see also, e.g., *Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (“Exemption 6’s requirement that disclosure be clearly unwarranted instructs us to tilt the balance (of disclosure interests against privacy interests) in favor of disclosure.” (quoting *Wash. Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982))).

⁶ DoJ Guidelines pp. 417-18; citing “*Multi Ag*, 515 F.3d at 1227 (quoting *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002)); see also *Consumers’ Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1057 (D.C. Cir. 2009) (stating that FOIA’s ‘presumption favoring disclosure . . . is at its zenith under Exemption 6’); *Lawyers’ Comm. for Civil Rights of S.F. Bay Area v. Dep’t of the Treasury*, No. 07-2590, 2008 WL 4482855, at *20 (N.D. Cal. Sept. 30, 2008) (‘The burden remains on the agency to justify any withholdings under Exemption 6 since the presumption in favor of disclosure under this exemption is as strong as that with other exemptions.’).”

Appellants particularly note *Washington Post Company v. U.S. Dept. of Health and Human Services et al.* (690 F.2d 252 (D.C. Cir. 1982)),⁷ which involved a FOIA request for information concerning possible conflicts of interest by scientific consultants employed by the National Cancer Institute.

There as here the agency refused to provide the records on the grounds that their release would constitute a clearly unwarranted invasion of personal privacy. While also dealing with certain discovery issues not relevant here, the court rejected agency efforts to exempt such information from disclosure under Exemptions 4 and 6, and specifically when “perform[ing] the balancing of disclosure interests against privacy interests mandated by Exemption 6” rejected the agency’s claim about disclosure constituting a “clearly unwarranted invasion of personal privacy.” As the court found, viewing contemporary possible conflicts which must be disclosed to an agency as “employment history”:

Considering the employment information first, we believe that disclosure would be only a minimal invasion of privacy. As the Supreme Court recently noted, “employment history ... is not normally regarded as highly personal.” *United States Department of State v. Washington Post*, 456 U.S. at ----, 102 S.Ct. at 1960; see *Board of Trade v. Commodity Futures Trading Commission*, 627 F.2d 392, 399 (D.C.Cir.1980) (occupations of sources

⁷ While portions of this opinion were overturned (*Wash. Post Co. v. HHS*, 865 F.2d 320 (1989)), the applicable Exemption 6 holdings remain good law cited widely by, e.g., DoJ’s own Guidelines. See DoJ Guidelines FN 165 citing *Wash. Post Co. v. HHS* for the proposition that “A central purpose of the FOIA is to ‘check against corruption and to hold the governors accountable to the governed.’”; FN 223 (“Exemption 6’s requirement that disclosure be clearly unwarranted instructs us to tilt the balance (of disclosure interests against privacy interests) in favor of disclosure.”) (quoting *Wash. Post Co. v. HHS*, 690 F.2d 252, 261); FN 224, “In balancing these interests, ‘the “clearly unwarranted” language of Exemption 6 weights the scales in favor of disclosure’”; FN 223, Exemption 6 “‘creates a “heavy burden” for an agency invoking Exemption 6, citing *Morley*, 508 F.3d at 1127, (quoting *Wash. Post Co. v. HHS*, 690 F.2d 252, 261; FN 225 ‘the presumption in favor of disclosure is as strong [under Exemption 6] as can be found anywhere in the Act.’ 690 F.2d at 261.”

of information "may (raise) some slight privacy interest"). In addition, although its brief discusses the privacy interest in Form 474's financial information, the government does not even attempt to explain why the information on consultants' non-federal employment raises privacy concerns....

The government asserts that Form 474 contains "intimate details" of personal finances, but does not explain why it reaches that conclusion. The cases it cites recognize in dictum that personal financial information "may" implicate privacy concerns "insofar as it contains 'embarrassing disclosures' or involves 'sufficiently intimate details.'" *National Parks & Conservation Association v. Kleppe*, 547 F.2d 673, 685 (D.C.Cir.1976) (*National Parks II*) (emphasis added); see *Simpson v. Vance*, 648 F.2d 10, 14 (D.C.Cir.1980). But even those cases do not say that embarrassing personal financial information is exempt under Exemption 6, only that such information is sufficiently private so that it must be balanced against disclosure interests to determine if the invasion of privacy is clearly unwarranted....

While public knowledge of affiliation with some organizations may, in some circumstances, lead to embarrassment or harm, we perceive little such danger from disclosure of affiliations related to one's scientific consulting. (opinion footnotes omitted).⁸

This is in many ways directly parallel to the instant case. The court there ordered the records be released, concluding, "In sum, when the strong interest in disclosure of potential abuses of official position is balanced against the consultants' relatively slight privacy interest in the [financial information required to be disclosed], we have no trouble concluding that disclosure is not 'clearly unwarranted.'"⁹

FERC's initial determination should also be reversed for similar reasons.

⁸ *Wash. Post v. HHS*, 690 F.2d at 261-62.

⁹ *Id.* at 265.

b. Any relevant privacy interest is not sufficient to justify withholding the requested records

The privacy interest generalized about and cited in FERC's initial determination merely as existing is not one that is "generally" afforded protection from disclosure. By the fact that the identified and withheld records are responsive to appellants' search parameters indicates they are not of the kind the DoJ's Guidelines describe as typical personal information of the sort for which "Generally, privacy interests cognizable under the FOIA are found to exist", as "such personally identifying information as a person's name, address, phone number, date of birth, criminal history, medical history, and social security number."¹⁰

c. The public interest in disclosure is clear and as a matter of law compels disclosure

We repeat by reference here the public interest in the records and all else noted, above.

The records appellants seek, by their description in the original request, clearly relate to operations of government and fulfillment of an agency's statutory duties, as opposed to personal information of the sort typically protected by Exemption 6.

The public interest set forth by appellants outweighs the merely asserted, never elaborated and surely not properly balanced privacy right held by some employee seeking to fill his current position after it is converted to an SES position, federal hiring requirements notwithstanding (and which was indeed apparently aborted by complaint). FERC's initial determination was improper and should be reversed.

¹⁰ DoJ Guidelines p. 424.

B. FERC Improperly Withheld Information as Deliberative, Without Showing it is Directly Related to Actual Policy Formulation of the Kind Contemplated by Exemption 5

Citing FOIA's deliberative-process privilege FERC improperly relies on a boilerplate justification for withholding the entirety of each and every responsive record, emails, in full.

FERC's rationale for withholding this information sheds no light whatsoever on the information it is withholding, and thus fails to meet FERC's burden of showing that the material is privileged.

See King v. United States Dep't of Justice, 830 F.2d 210, 219–25 (D.C.Cir.1987); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009); *Wiener v. FBI*, 943 F.2d 972, 977–79 (9th Cir. 1991); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999).

Regarding the examples challenged herein, FERC has failed to *show* (as opposed to merely allege) that the information is protected. The withheld information, by nature of it being responsive to appellants' request, appears on its face to be at best "peripheral to actual policy formulation", and therefore is not properly withheld. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994). It has no discernible connection to any identifiable agency policy or proposal, *compare Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C.Cir.1975) (finding an agency's efforts to evaluate and change its personnel policies, rules and standards too amorphous to qualify as a process for the purposes of the deliberative process privilege), and even if it did somehow indirectly affect agency policy, that would not be sufficient to justify withholding it. To be privileged, communication must not only be "antecedent to the adoption of an agency policy," *Jordan v. U.S. Dept. of Treasury*, 591 F.2d 753, 774 (D.C. Cir. 1978); *see Houser v. Blank*, No. 10-3105, Slip Copy, 2013 WL 873793, *3 (S.D.N.Y. March 11, 2013) (communications that

“mostly . . . reflect decisions that had already been made” are not protected); *Badhwar v. U.S. Dept. of Justice*, 622 F.Supp. 1364, 1372 (D.D.C. 1981) (“There is nothing predecisional about a recitation of corrective action already taken”), but also must be deliberative, *i.e.*, “a *direct* part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1976) (emphasis added).

Further, FERC offers no agency decision to which each and every responsive record is pre-decisional. “In determining whether a given document is predecisional, courts have considered whether the agency can ‘pinpoint the specific agency decision to which the document correlates ... and ... verify that the document precedes, in temporal sequence, the ‘decision’ to which it relates.’ [citing *Ethyl Corp. v. U.S. Envtl. Prot. Agency*, 25 F.3d 1241, 1248 (4th Cir. 1994)] (quoting *Providence Journal Co. v. U.S. Dep’t of the Army*, 981 F.2d 552, 557 (1st Cir. 1992)).” *Fox News Network, LLC v. U.S. Dept. of Treasury*, 911 F.Supp.2d 261, 278 (S.D.N.Y. 2012). *accord In re Delphi Corp.*, 276 F.R.D. 81 (S.D.N.Y. 2011). An agency “needs to identify the particular policy decisions to which the various documents correspond. ...[I]n [*Tigue v. U.S. Dep’t of Justice*, F.3d 70, 76 (2d Cir.2002)] the Second Circuit also stated that, ‘while the agency need not show *ex post* that a decision was made, it must be able to demonstrate that, *ex ante*, the document for which ... privilege is claimed related to a specific decision facing the agency.’ *Tigue*, 312 F.3d at 80 (discussing *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997)).” *Fox News*, 911 F.Supp.2d at 278. The agency “needs to identify the particular decisions to which the documents correspond. In the alternative, if a decision was not made based upon the document, [the agency] must identify the specific issue facing the agency

that the document addressed and note that a decision was not made.” *Id.* Regarding this standard, FERC’s production failed on all withholdings identified herein, which we challenge.

The *Fox News* court also detailed how, “[t]o be deliberative, a document must actually be ‘related to the process by which policies are formulated.’ *Grand Cent. P’ship*, 166 F.3d at 482. ... [The agency] must actually identify and explain the role that a given document has played in the decisionmaking process. *See, e.g., Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C.Cir.1980) (‘agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process’).” *Fox News*, 911 F.Supp.2d at 279.

Moreover, not every report or memorandum (let alone email, relevant to a move to convert a position to SES and fill it with the current position-holder in apparent violation of federal hiring practices) qualifies as deliberative, even when it reflects the author’s views on policy matters. *See Hennessey v. U.S. Agency for Int’l Development*, No. 97-1133, 1997 WL 437998, *5 (4th Cir. Sept. 2, 1997) (determining that “report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5,” citing *Petroleum Info. Corp. v. Dept. of Interior*, 976 F.2d 1420, 1437 (D.C. Cir. 1992)); *Judicial Watch v. Reno*, 154 F.Supp.2d 17, 18 (D.D.C. 2001) (“It is not enough to say that a memorandum ‘expresses the author’s views’ on a matter [because the] role played by the document in the course of the deliberative process must also be established”).

- i. **FERC improperly withheld records in full without explaining why it could not produce the records in redacted form, despite its manifest ability to redact and produce even the minimal information when it wishes to do so.**

Unfortunately, FERC decided to withhold three dozen emails, every record identified as responsive, in full, although the law was very clear even before the ostentatious claims of this being “the most transparent administration, ever”, and serial administration vows to err on the side of disclosure as never before: all factual information must be released unless it is simply impractical to segregate it, including, *e.g.*, To, From, Date, and Subject information. Withholding emails in full is also a facially impermissible practice given the simplicity of redacting such records’ factual information.

FERC does not provide any individualized justification for withholding the fully-withheld documents in their entirety. Under 5 U.S.C. § 552(b), any “reasonably segregable” information must be disclosed—that is, information that can be separated from the rest of a document—even if the document is otherwise exempt from disclosure, unless the exempt and non-exempt portions are “inextricably intertwined with exempt portions.” *Trans-Pacific Policing v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C.Cir.1999) (court has “an affirmative duty to consider the segregability issue *sua sponte*.”); *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977). An agency must provide a “detailed justification,” not just “conclusory statements” to demonstrate that it has released all reasonably segregable information. *Mead Data*, 566 F.2d at 261. “The government must show with reasonable specificity why a document cannot be further segregated.” *Marshall v. F.B.I.*, 802 F.Supp.2d

125, 135 (D.D.C. 2011); *see Quinon v. FBI*, 806 F.3d 1222, 1227 (D.C. Cir. 1996) (“reasonable specificity” required). FERC has done nothing of the sort.

This is further odd given FERC’s demonstrated ability to find a way, when the will is sufficient, to release even the tiniest bits of documents, eliminating all substantive discussion among FERC employees, and leaving in nothing but the sender and recipients, date and time of transmission, and subject line, or portions thereof.¹¹ Similarly, it withheld everything in every email. Yet despite FERC’s ability to redact any conceivably sensitive material, it chose to withhold more than two dozen documents in their entirety. This is improper and must be overturned on appeal.

IV. CONCLUSION

FERC’s Initial Determination improperly denied in full appellants’ request by improperly withholding all responsive records, in full, without sufficiently demonstrating or otherwise supporting any withholding, including by simply asserting (but making no effort to quantify) a privacy interest, and that it is superior to the public’s interest in disclosure, despite the obvious, strong public interest in disclosure. By statute and regulation FERC is obligated to reverse this initial determination, and provide non-exempt content of responsive records unless withholding is justified by an express exemption from FOIA, justifying any redactions.

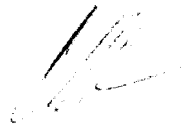
We request the Commission proceed on this appeal with the required bias toward disclosure, consistent with the law’s clear intent, judicial precedent affirming this bias, and President Obama’s directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009)

¹¹ *See, e.g.*, FOIA #s FY13-75, FY13-78.

("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears").

If you have any questions please do not hesitate to contact the undersigned.

Respectfully submitted,



Christopher C. Horner, Esq.
On behalf of EELI and ELC

1489 Kinross Lane
Keswick, VA 22947
202.262.4458 (M)
CHornerLaw@aol.com

cc: Mr. Charles A. Beamon
Associate General Counsel
FERC
888 First Street, NE
Washington, DC 20426
BY ELECTRONIC MAIL: FOIA-CEII@ferc.gov

STEVEN G. SOLES
STS ENERGY PARTNERS LP
26 Bultonwood Drive
Exton, PA 19341
stevenstsenery@gmail.com

December 11, 2013

VIA FEDERAL EXPRESS

David L. Morenoff, Esquire
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Charles A. Beamon, Esquire
Associate General Counsel,
General and Administrative Law
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

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

Dear Attorneys Morenoff and Beamon:

Please accept this letter as an appeal of the Federal Energy Regulatory Commission's (the "Commission") November 26, 2013 denial of the above-referenced Freedom of Information Act Request (the "FOIA Request"). A copy of the FOIA Request is enclosed for your reference as Exhibit "A."

Factual and Procedural Background

STS Energy Partners LP (the "Applicant") filed the FOIA Request on October 31, 2013. The FOIA Request concerns information related to the Commission's March 6, 2008 *Order Denying Complaint* in Black Oak Energy LLC, *et al.* v. PJM Interconnection LLC (the Black Oak Order I") and the Commission's September 17, 2009 *Order Accepting Compliance Filing* in Black Oak Energy LLC, *et al.* v. PJM Interconnection LLC (the "Black Oak Order II"). The Black Oak Energy proceedings are referred to herein as the "Black Oak Proceedings."

The Black Oak Proceedings generally concern PJM Interconnection LLC's ("PJM") allocation of the surplus of marginal transmission line losses ("MLSA") attributable to Up-to-Congestion ("UTC") trading. Prior to the initial complaint filed in the Black Oak Proceeding, PJM did not allocate a portion of the MLSA to UTC traders. Black Oak Energy, along with

other UTC market participants, challenged PJM's allocation method seeking, in part, an order from the Commission requiring PJM to allocate a portion of the MLSA to UTC traders.

In Black Oak Order I, the Commission affirmed PJM's method of not providing MLSA to UTC traders stating, in part, that such an allocation "may result in arbitrageurs making trades that would not be profitable based solely on price differentials alone" (referred to herein as the "UTC Arbitrage Principle"). See Black Oak Order I, 122 FERC ¶ 61,208 at P. 51. One year later, however, the Commission reversed its position on the UTC Arbitrage Principle by approving a revision to PJM's tariff whereby UTC traders were included in the MLSA. See Black Oak Order II, 128 FERC ¶ 61,262 at P.23. Fully understanding, even encouraging, that UTC traders would carry out the UTC Arbitrage Principle when it approved PJM's tariff amendment in Black Oak II, the Commission has subsequently taken the position that the UTC Arbitrage Principle constitutes market manipulation (the "PJM UTC Investigation"). See 132 FERC ¶ 61,169, Docket No. IN10-5-000.¹

The Applicant filed its FOIA Request on October 31, 2013. By letter dated November 26, 2013, the Commission's FOIA Officer notified the Applicant that a search of the Commission's records had produced approximately 294 documents that "are responsive to" the FOIA Request. The Commission, however, is withholding the documents in their entirety solely on the basis of FOIA Exemption 5 (the "FOIA Deliberative Process Exemption"). A copy of the Commission's November 26, 2013 letter is attached as Exhibit "B."

Basis of Appeal

Without being able to know the substance or subject matter of the 294 documents referenced in the Commission's November 26th letter, it is difficult to appeal the Commission's decision to withhold the documents under the FOIA Deliberative Process Exemption. As you know, the Commission will have the burden in federal court to prove the 294 documents qualify for protection under the FOIA Deliberative Process Exemption. See Brennan Ctr. v. Dep't of Justice, 697 F.3d 184, 201-202 (2nd Cir. 2012).

With respect to any document that contains information concerning the UTC Arbitrage Principle, the "working law" exception to the FOIA Deliberative Process exemption requires disclosure by the Commission. Under the "working law" principle, if a document has become the Commission's "effective law and policy," it will be subject to disclosure as the "working law" of the Commission. NLRB v. Sears, Roebuck, & Co., 421 U.S. 132, 153 (1975). The United States Supreme Court explained that an agency's "working law" should be disclosed

¹ It is believed that the Commission's Office of Enforcement ("OE") is investigating numerous entities as part of the PJM UTC Investigation for UTC trading activities based on the UTC Arbitrage Principal. The Commission has approved a settlement with one entity involved in the PJM UTC Investigation in which OE alleged that Oceanside Power LLC conducted market manipulation by scheduling UTC trades that followed the UTC Arbitrage Principal. See 142 FERC ¶ 61,088, at PP 6-11 (February 1, 2013).

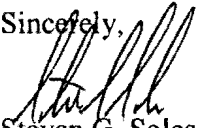
David L. Morenoff, Esquire
Charles A. Beamon, Esquire.
December 11, 2013
Page 3 of 3

because "the public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted." Id. at 152.

In Black Oak Order I and Black Oak Order II, the Commission: (i) demonstrated that it fully understood that providing MLSA to UTC traders would influence their behavior to conduct trades based on the UTC Arbitrage Principle; and (ii) consented to UTC traders conducting the UTC Arbitrage Principle by approving a revision to PJM's tariff to provide MLSA to UTC traders. By approving PJM's tariff revision to provide MLSA to UTC traders, the Commission endorsed the UTC Arbitrage Principle, thus making it the working law of the agency.² Since it is the "working law" of the Commission, any of the 294 documents that contain information about the UTC Arbitrage Principle must be disclosed.

The Applicant reserves the right to raise additional grounds of appeal in federal court upon receipt of the Vaughn Index from the Commission.

If you have any questions, or would like to discuss this matter, please feel free to call me.

Sincerely,

Steven G. Soles

Enclosures

² Subsequent to Black Oak Order II, PJM again amended its tariff to remove the requirement that UTC traders obtain transmission service. Order Accepting Tariff Revisions, 132 FERC ¶ 61,244 (Sept. 17, 2010). As such, UTC traders are no longer eligible for MLSA, therefore they are unable to implement the UTC Arbitrage Principle. Regardless, the UTC Arbitrage Principle approved by the Commission in Black Oak Order II was the "working law" of the agency for the period between the Commission's order in Black Oak Order II and its September 17, 2010 Order approving PJM's tariff revision.

Exhibit “A”

Received via Fed Ex: October 31, 2013

Track 3

Due Date: December 2, 2013

STEVEN G. SOLES
STS ENERGY PARTNERS LP
26 Buttonwood Drive
Exton, PA 19341
stevenstsenrgy@gmail.com

October 30, 2013

VIA FEDERAL EXPRESS

Leonard Tao, Esq., Director
Office of External Affairs
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Freedom of Information Act Request

Dear Director Tao:

Please accept this letter as a Freedom of Information Act ("FOIA") request.

The items in this FOIA request relate to the Federal Energy Regulatory Commission's (the "FERC") March 6, 2008 Order Denying Complaint in Black Oak Energy LLC, *et al.* v. PJM Interconnection LLC (the "Black Oak Order I") and the FERC's September 17, 2009 Order Accepting Compliance Filing in Black Oak Energy LLC, *et al.* v. PJM Interconnection LLC (the "Black Oak Order II").

The FERC citation for the Black Oak Order I is 122 FERC ¶ 61,208. The docket number for the Black Oak Order I is EL08-14-000.

The FERC citation for the Black Oak Order II is 128 FERC ¶ 61,262. The docket number for the Black Oak Order II is EL08-14-002.

As required under the FOIA and the FERC's regulations, I agree to pay a reasonable fee to process my request, not to exceed \$1,500.00. Please notify me if the fee exceeds \$1,500.00. This request is for commercial purposes.

The FOIA request includes the following items:

1. Internal agency documents prepared by the FERC's staff analyzing the issues addressed by the FERC in the Black Oak Order I and the Black Oak Order II.

2. Documents prepared by the FERC's Office of Energy Market Regulation ("OEMR") or other FERC department or staff, analyzing or discussing the concept found in paragraph 51 of the 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." *See Black Oak Order I, 122 FERC ¶ 61,208 at P 51.*

OFFICE OF
EXTERNAL AFFAIRS
2013 OCT 31 P 4:41
FEDERAL ENERGY
REGULATORY COMMISSION

Received via Fed Ex: October 31, 2013

Leonard Tao, Esq
October 30, 2013
Page 2

Track 3

Due Date: December 2, 2013

3. Documents prepared by the FERC's OEMR, or other FERC departments or staff, analyzing or discussing the FERC'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.

4. Documents prepared by the FERC's OEMR, or other FERC departments or staff, in preparation of issuing Black Oak Order II that analyze or discuss the FERC'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 FERC's decision in Black Oak II on that concept.

As required under the FOIA, please provide the requested records to me within twenty working days of the receipt of this letter. My preference is to receive the documents in PDF format. A PDF copy of the documents may be sent to me either on disc or via e-mail to stevenstsenenergy@gmail.com. If you need to send paper documents, please send the requested items via federal express to the contact below. Please contact me when the documents are ready and I will provide you with the federal express account number prior to shipping the materials.

STS Energy Partners LP
Attn: Steven G. Soles
26 Buttonwood Drive
Exton, PA 19341

Thank you for your prompt consideration and assistance in this matter. If you have any questions about the FOIA request, please feel free to e-mail me at stevenstsenenergy@gmail.com or by phone at (484) 879-6555.

Sincerely,

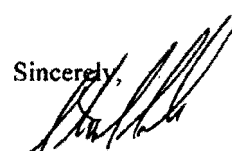

Steven G. Soles

Exhibit “B”

Federal Energy Regulatory Commission
Washington, DC 20426

NOV 26 2013

Re: FOIA No. FY14-08
Response Letter

VIA EMAIL AND REGULAR MAIL

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

Dear Mr. Soles:

On October 31, 2013, you 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 (2013). You requested 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)* 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)* 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." See *Black Oak Order I*, 122 FERC ¶ 61,208 (2008) at P 51.
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.
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*¹ that paying excess loss charges may

¹ See *Black Oak Order I*, 122 FERC ¶ 61,208 (2008) at P 51.

influence arbitrageurs virtual trades, and the ultimate effect of the Commission's decision in *Black Oak II* on that concept.

A search of the Commission's non-public files identified (294) documents that are responsive to your request: (180) draft orders, (87) emails, (20) internal memoranda, (3) draft briefs, (2) draft deficiency letters, (1) internal draft motion to stay between staff, and (1) draft order granting an extension of time. After review of the responsive material and relevant law, the Commission has determined to deny your request entirely pursuant to FOIA Exemption 5² for the reasons stated below.

FOIA Exemption 5

FOIA Exemption 5 incorporates various privileges, including the deliberative process privilege which is at issue here. See 5 U.S.C. § 552(b)(5) 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 (187) draft orders, briefs, motions and deficiency letters consist of deliberative process materials and contain notes and comments between Commission staff in OEMR and the Office of the General Counsel, and other Commission offices. Similarly, the (20) responsive memoranda consist of deliberative process materials. These documents contain precisely the information that Exemption 5 is designed to protect: pre-decisional conversations among staff with staff legal analysis that is submitted to superiors for review. Certain 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.*


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.")

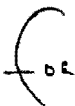
United States Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977)) (recognizing that FOIA Exemption 5 protects all communications including purely factual material that would expose to public view an agency's decision-making process). Given the deliberative nature of the information contained in the (20) internal memoranda, they are exempt from disclosure in their entirety under FOIA Exemption 5. The (87) emails Commission staff identified also contain information that is deliberative and not appropriate for discretionary release.

After review of the responsive material and relevant law, Commission staff has determined to withhold all (294) draft orders and legal documents, memos and email communications in their entirety under FOIA Exemption 5. There is no segregable nonexempt material that I may otherwise release to you, and none of the material is appropriate for a discretionary release.

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." Please also send a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

Sincerely,


Leonard M. Tao
Director
Office of External Affairs





FREEDOM OF INFORMATION ACT APPEAL

December 11, 2013

Mr. David L. Morenoff
Acting General Counsel
FERC
888 First Street, NE
Washington, DC 20426

BY ELECTRONIC MAIL: FOIA-CEI@ferc.gov

Re: Appeal of Initial Determination to Withhold Certain Information, FOIA FY-2014-10

Dear FERC General Counsel,

We appeal FERC's partial denial of the above-captioned FOIA request by the Competitive Enterprise Institute ("CEI") ("appellant"), communicated in its letter dated December 4, 2013.

We appeal for reasons detailed herein. In sum, in withholding these documents and redacting other information as b(5) deliberative process, FERC did not identify the particular agency decision for which each record was allegedly pre-decisional. The Commission must offer specific justification or otherwise provide reason to conclude the withheld information is properly withheld within the cited exemption. Yet with three exceptions among forty-five documents at issue, FERC simply withheld all responsive records in full without justifying these

withholdings, providing no information or means by which we could make a reasoned conclusion about the legitimacy of these withholdings and denials.

Further, FERC has again withheld from us *emails in full* which is as a general matter is facially impermissible given the simplicity of redacting such records' factual information.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552. In response, FERC denied our request in full by withholding information all responsive records, in their entirety with three exceptions out of forty five. Pursuant to 18 C.F.R. § 388.110, you have jurisdiction because "A person whose request for records, request for fee waiver or reduction, or request for expedited processing is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination." 18 C.F.R. § 388.110 (a)(1). Further, all procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as an "Freedom of Information Act Appeal" and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed within 45 days of the date of FERC's December 4, 2013 denial.

II. PROCEEDINGS BELOW

This appeal involves one FOIA request, sent by electronic mail on October 31, 2013 to FERC at FOIA-CEII@ferc.gov, seeking (bold in original):

"copies of all **emails, text messages, or instant messages** (and any attachments thereto) which are held or were sent **to or from** (including also as cc: or bcc:) **Jeff Wright** (Office of Energy Projects, Director), **Ann Miles** (Office of Energy Projects, Deputy Director), **Sandra Waldstein** (Director, State, International and Public Affairs Division), **Lauren**

O'Donnell (Gas-Environment and Engineering, Division Director), and/or **David**

Morenoff (Office of the General Counsel, Acting General Counsel), which:

1) anywhere include “Dow”, “LNG”, “export” and/or “terminal”;

also, please provide any such records which

2) mention, or are to or from (including also as cc: or bcc:) any one or more of the

following: Andrew Liveris, Keith Belton, Peter Molinaro, Kevin Kolevar, Paul Cicio,

Jennifer Diggins.

Responsive records will be dated over the period from August 1, 2012

through the date you process this request, inclusive.

Responsive communications will have been sent to or from official email

accounts or to or from any other account used at any time for FERC-related business.”

FERC assigned this request identification number FY-2014-10.

On December 4, 2013, FERC informed requester it had identified 45 responsive records, including 43 emails, one memorandum, and one letter from an outside interest group, withholding the memorandum and 41 of those 43 emails in their entirety, redacting one other, on the grounds that each of these “*contain* pre-decisional conversations among staff with staff legal analysis that is submitted to superiors for review” Letter at 2 (emphasis added). While also stating that “Certain factual portions are so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations”, *Id.*, FERC withheld each document in full, with one exception.

Further, FERC provides no identifying information about the information or records withheld to substantiate or allow us to assess the withholding. This is the epitome of “boilerplate”.

Also, in support, we note that FERC cites the authority that releasing “*all* such records” (emphasis added) -- those containing deliberative information -- would violate deliberative process protection Letter, page 2. That is, it cited authority justifying the existence of a deliberative process exemption as justification for the instant, wholesale withholding.

III. Standards of Review: All Doubts Must be Resolved in Favor of Disclosure

By this FERC is in violation of the blackletter law that an agency cannot rely on “boilerplate” privilege claims, or simply recite that the withholding of a document meets statutory standards without tailoring “the explanation to” each “specific document,” and with a “contextual description” of how those standards apply to “the specific facts” of each document. *King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987) (“[c]ategorical description [s] of redacted material coupled with categorical indication of anticipated consequences of disclosure” was “clearly inadequate.”); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (“generalized” or conclusory exemption claims are insufficient); *Wiener v. FBI*, 943 F.2d. 972, 977–79 (9th Cir. 1991) (“boilerplate” explanations without an effort to “tailor the explanation to the specific document withheld” were insufficient); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999) (agency’s *Vaughn* Index must apply statutory standards for exemption “to the specific facts of the documents at hand,” giving a “contextual description” of “the documents subject to redaction” and “the specific redactions made to the various documents.”); *ACLU v. Office of the Director of Nat. Intelligence*, No. 10-449, 2011 WL 5563520, *6 (S.D.N.Y. Nov. 15, 2011)

(improper for an agency to submit a *Vaughn* Index “proffering conclusory and nearly identical justifications for” withholding each document); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009) (agency must “disclose as much information as possible” in its *Vaughn* Index,” and not merely “parrot” or “recite the statutory standards”)(FERC does not owe a *Vaughn* Index proper at this stage but similar information an Index is necessary now for them to substantiate their privilege claims in response to our FOIA request).

But that is exactly what FERC has done here and the presumption toward disclosure requires that FERC’s withholding be reversed as improper.

FERC must provide requesters sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and should “describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. DoJ*, 830 F.2d at 223-24.

It is also well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, ““general philosophy of full agency disclosure”” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)).

Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See,*

e.g., *Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in the underlying request to FERC to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.” Similarly, FERC’s withholdings are not consistent with statements by the President and Attorney General, *inter alia*, that **“The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today”** (President Barack Obama, January 21, 2009), and **“Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

FERC's denial of the records was in error, for reasons already stated and below, and should be reversed with the withheld responsive records made available.

III. ARGUMENTS AND SUPPORT

A. FERC Improperly Withheld Information as Deliberative, Without Showing its Direct Relationship to Actual Policy Formulation of the Kind Contemplated by Exemption 5

Citing FOIA's deliberative-process privilege FERC improperly relies on a boilerplate justification for withholding the entirety of all responsive records, all but one of which are emails and, with three exceptions, in full. FERC's rationale for withholding this information sheds no meaningful, useful light whatsoever on the information it is withholding, and thus fails to meet FERC's burden of showing that the material is privileged. *See King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009); *Wiener v. FBI*, 943 F.2d 972, 977–79 (9th Cir. 1991); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999).

FERC has failed to *show* (as opposed to merely allege) that the information is protected, leaving it, at best, “peripheral to actual policy formulation”, and therefore is not properly withheld. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994). It has no discernible connection to any identifiable agency policy or proposal, *compare Vaughn v. Rosen*, 523 F.2d 1136, 1143 (D.C.Cir.1975) (finding an agency's efforts to evaluate and change its personnel policies, rules and standards too amorphous to qualify as a process for the purposes of the deliberative process privilege), and even if it did somehow indirectly affect agency policy, that would not be sufficient to justify withholding it. To be privileged, communication must not only

be “antecedent to the adoption of an agency policy,” *Jordan v. U.S. Dept. of Treasury*, 591 F.2d 753, 774 (D.C. Cir. 1978); *see Houser v. Blank*, No. 10-3105, Slip Copy, 2013 WL 873793, *3 (S.D.N.Y. March 11, 2013) (communications that “mostly . . . reflect decisions that had already been made” are not protected); *Badhwar v. U.S. Dept. of Justice*, 622 F.Supp. 1364, 1372 (D.D.C. 1981) (“There is nothing predecisional about a recitation of corrective action already taken”), but also must be deliberative, *i.e.*, “a *direct* part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters.” *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1976) (emphasis added).

Further, by withholding emails in full even, instructively, the easily segregable factual information such as To and From, FERC prevents appellants from even discerning if privilege is proper on the basis that the correspondence was purely internal. This is merely one of many reasons that purely factual information as a general matter must be released. FERC is engaging in wholesale withholding of factual information prevents appellants from making even the most basic of such assessments.

Further, FERC offers no agency decision to which responsive records it chooses to withhold from the public are pre-decisional. “In determining whether a given document is predecisional, courts have considered whether the agency can ‘pinpoint the specific agency decision to which the document correlates ... and ... verify that the document precedes, in temporal sequence, the ‘decision’ to which it relates.’ [citing *Ethyl Corp. v. U.S. Envtl. Prot. Agency*, 25 F.3d 1241, 1248 (4th Cir.1994)] (quoting *Providence Journal Co. v. U.S. Dep’t of the Army*, 981 F.2d 552, 557 (1st Cir.1992)).” *Fox News Network, LLC v. U.S. Dept. of Treasury*, 911 F.Supp.2d 261, 278 (S.D.N.Y. 2012). *accord In re Delphi Corp.*, 276 F.R.D. 81 (S.D.N.Y.

2011). An agency “needs to identify the particular policy decisions to which the various documents correspond. ...[I]n [*Tigue v. U.S. Dep’t of Justice*, F.3d 70, 76 (2d Cir.2002)] the Second Circuit also stated that, ‘while the agency need not show ex post that a decision was made, it must be able to demonstrate that, *ex ante*, the document for which ... privilege is claimed related to a specific decision facing the agency.’ *Tigue*, 312 F.3d at 80 (discussing *Maricopa Audubon Soc’y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997)).” *Fox News*, 911 F.Supp.2d at 278. The agency “needs to identify the particular decisions to which the documents correspond. In the alternative, if a decision was not made based upon the document, [the agency] must identify the specific issue facing the agency that the document addressed and note that a decision was not made.” *Id.* Regarding this standard, FERC’s production failed on all withholdings it cites, which we challenge.

The *Fox News* court also detailed how, “[t]o be deliberative, a document must actually be ‘related to the process by which policies are formulated.’ *Grand Cent. P’ship*, 166 F.3d at 482. ... [The agency] must actually identify and explain the role that a given document has played in the decisionmaking process. *See, e.g., Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 868 (D.C.Cir.1980) (‘agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process’).” *Fox News*, 911 F.Supp.2d at 279.

Moreover, not every report or memorandum (let alone email) qualifies as deliberative, even when it reflects the author’s views on policy matters. *See Hennessey v. U.S. Agency for Int’l Development*, No. 97-1133, 1997 WL 437998, *5 (4th Cir. Sept. 2, 1997) (determining that “report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5,”

citing *Petroleum Info. Corp. v. Dept. of Interior*, 976 F.2d 1420, 1437 (D.C. Cir. 1992)); *Judicial Watch v. Reno*, 154 F.Supp.2d 17, 18 (D.D.C. 2001) (“It is not enough to say that a memorandum ‘expresses the author’s views’ on a matter [because the] role played by the document in the course of the deliberative process must also be established”).

- i. **FERC improperly withheld records in full without explaining why it could not produce the records in redacted form, despite its manifest ability to redact and produce even the minimal information when it wishes to do so.**

Unfortunately, FERC decided to withhold more than forty emails identified as responsive, in full, although the law was very clear even before the recent, ostentatious claims of this being “the most transparent administration, ever”, and serial administration vows to err on the side of disclosure as never before: all factual information must be released unless it is simply impractical to segregate it, including, *e.g.*, To, From, Date, and Subject information. Withholding emails in full is also a facially impermissible practice given the simplicity of redacting such records’ factual information.

FERC does not provide any individualized justification for withholding the fully-withheld documents in their entirety. Under 5 U.S.C. § 552(b), any “reasonably segregable” information must be disclosed—that is, information that can be separated from the rest of a document—even if the document is otherwise exempt from disclosure, unless the exempt and non-exempt portions are “inextricably intertwined with exempt portions.” *Trans-Pacific Policing v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C.Cir.1999) (court has “an affirmative duty to consider the segregability issue *sua sponte*.”); *Mead Data Cent., Inc. v. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977). An agency must provide a “detailed justification,” not just “conclusory statements” to demonstrate that it has released all reasonably segregable

information. *Mead Data*, 566 F.2d at 261. “The government must show with reasonable specificity why a document cannot be further segregated.” *Marshall v. F.B.I.*, 802 F.Supp.2d 125, 135 (D.D.C. 2011); *see Quinon v. FBI*, 806 F.3d 1222, 1227 (D.C. Cir. 1996) (“reasonable specificity” required). FERC has done nothing of the sort.

Consider Enclosure 2.pdf, page 1, redacting in full contents of an email forwarding information the email speaks of as being “historical information,” the axiomatic example of factual information segregable from protected opinion or strategies/decisionmaking, even under the broadest reading of b(5) permitting factual, not just opinion, material to be withheld under the theory that it is inextricably intertwined with deliberative material.

FERC’s practice of withholding email in their entirety is further odd given FERC’s demonstrated ability to find a way, when the will is sufficient, to release even the tiniest bits of documents, eliminating all substantive discussion among FERC employees, and leaving in nothing but the sender and recipients, date and time of transmission, and subject line, or portions thereof.¹ Similarly, it withheld everything in every responsive email but two. Yet despite FERC’s ability to redact any conceivably sensitive material, it chose to withhold more than forty documents in their entirety. This is improper and must be overturned on appeal.

IV. CONCLUSION

FERC’s Initial Determination improperly denied in full appellants’ request by improperly withholding all responsive records, in full, without sufficiently demonstrating or otherwise supporting any withholding, including by simply asserting (but making no effort to quantify) a privacy interest, and that it is superior to the public’s interest in disclosure, despite the obvious,

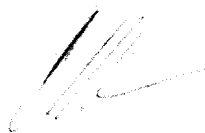
¹ *See, e.g.*, FERC FOIA #s FY13-75, FY13-78.

strong public interest in disclosure. By statute and regulation FERC is obligated to reverse this initial determination, and provide non-exempt content of responsive records unless withholding is justified by an express exemption from FOIA, justifying any redactions.

We request the Commission proceed on this appeal with the required presumption toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears").

If you have any questions please do not hesitate to contact the undersigned.

Respectfully submitted,



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FREEDOM OF INFORMATION ACT APPEAL
#FY14-12

December 23, 2013

David Moernoff
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Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Mr. Moernoff,

Regarding FERC's November 14 determination regarding my FOIA request No. FY14-12, I hereby wish to file an appeal regarding the decision made on my waiver of the processing of fees.

In the November 14 letter announcing this determination, Mr. Leonard Tao of the Office of External Affairs quoted the applicable regulation as stating that fees may be waived when the information being sought is "in the public interest," "is likely to contribute significantly to public understanding of the operations or activities of the government" and "is not primarily in the commercial interest of the requester."

Mr. Tao wrote in the letter that I failed to meet the threshold for the information being sought as contributing significantly to public understanding. But Mr. Tao did not describe the nature of the threshold or what further information was necessary as to meet this threshold, simply saying that "without more," the waiver would be denied.

In this appeal, I seek to defend the request as meeting the requirements of the regulation and, in the case that a fee waiver is still deemed to not be justified on its face, provide further information regarding public interest surrounding this request.

To start, US government agencies by and large consider credentialed media reporting on the activities of government as meeting the 'contribute significantly' and 'public interest' tests, as information gathered in the course of FOIA requests will most likely end up published in a widely read publication consumed by the public at large.

The information sought also meets the requirements for contributing significantly to public knowledge based on the specific criteria commonly identified by executive agencies. The recent departure of former Chairman Jon Wellinghoff from the commission, and his decision to accept at position at the law firm Stoel Rives, has drawn

not only media attention but also questions from elected officials about the nature of his dealings with the law firm before he departed.

For instance, Senator Jon Barrasso, Republican-Wyoming, in a November 7 letter raised questions about whether former Chairman Wellinghoff properly recused himself during the period after he had confirmed that he would take the position at Stoel Rives but before he left the commission.

In this case, seeking correspondence between commissioners serving on the Federal Energy Regulatory Commission, along with staff members at FERC, concerning the law firm Stoel Rives both identifies operations and activities of the government – in this case, any communications between key commissioners and staff and the law firm as well as discussion about the issue -- and cannot be located in the public domain. Such information would also contribute "to the understanding of the public-at-large" and enhance public understanding of the issue, particularly given that the information sought is correspondence and not yet in the public domain.

I look forward to your response regarding this appeal. If you have any questions, please feel free to contact me at the number below.

Sincerely,

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ORIGINAL

RE: Freedom of Information Act Appeal (FOIA No. FY14-17)

Dear Mr. Morenoff:

February 17, 2014

On November 12th 2013, my clients Klamath-Siskiyou Wildlands Center, Rogue Riverkeeper, Landowners United, Oregon Coast Alliance, Cascadia Wildlands, and Mr. Bob Barker ("Requesters") submitted a Freedom of Information Act request pursuant to 5 U.S.C. § 552 et. seq. for the following document: "The "updated stakeholder list" referenced in Williams Pacific Connector's filing with FERC dated September 30, 2013."

On November 26th 2013, FERC forwarded this FOIA request to the applicant, Williams Pacific Connector Gas Pipeline, L.P., to "solicit[] your comments on whether [the requested information's] release is required under FOIA." FERC neither disclosed to the Requesters whether Pacific Connector provided comments on this FOIA request, nor provided the substance of those comments, if any, to Requesters. FERC has not disclosed to Requesters whether objections to disclosure were made, or the content of those objections, if any. 18 C.F.R. § 388.112(b)(2).¹

On December 16th 2013, FERC provided Requesters with notice that "to reply to your request, we need to consult with other components of the agency having substantial subject-matter interest," and therefore "extended the time limit to make an initial determination on your request." A response was expected no later than December 31st, 2013.

On December 24th 2013, FERC sent a letter to applicant Williams Pacific Connector and indicated that "in light of your response, we agree that the names and personal addresses of private citizens implicate a privacy interest and are protected from disclosure by FOIA Exemption 6. As such, the names, addresses, and other identifying data of private citizens will be redacted prior to release of the documents."

On January 7th 2014, FERC responded to Requesters' FOIA request by providing a copy of the updated stakeholder list that redacted the names, addresses, and other identifying data of private citizens listed on the updated stakeholder list. FERC rejected the Requesters' justification for disclosure, alleging that statements about the purpose to which Requesters purported to put the

¹ All Requesters, including WELC, have been granted Intervenor status in FERC docket No. CP13-492.

requested information "are not sufficient to support a claim that the landowner's privacy interest is outweighed by the public interest in release." FERC also purported to distinguish *Columbia Riverkeeper, et al. v. FERC*, 650 F.Supp.2d 1121 (D.Or. 2009) from the present request, stating that "without a showing that the Commission has failed to meet its statutory obligations, your request for information would not shed light on the agency's performance of its statutory duties particularly in light of the public record in this proceeding."

Requesters Klamath-Siskiyou Wildlands Center, Rogue Riverkeeper, Landowners United, Oregon Coast Alliance, Cascadia Wildlands, and Mr. Bob Barker hereby appeal the decision of FERC for the reasons listed below.

I. FOIA Exemption 6.

FOIA requires FERC to disclose requested information unless the information falls within one of the nine narrowly construed exemptions from FOIA listed in 5 U.S.C. § 552(b). In this case, FERC has invoked FOIA's Exemption 6, which addresses "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). The government bears the burden of showing that the withheld information is a personnel, medical, or similar file that constitutes a clearly unwanted invasion of personal privacy. 5 U.S.C. § 552(a)(4)(B) ("the burden is on the agency to sustain its action"); see also *Multnomah County Medical Soc'y v. Scott*, 825 F.2d 1410, 1413 (9th Cir. 1987). "In the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure." *Local 598 United Ass'n. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Dep't of the Army*, 841 F.2d 1459, 1463 (9th Cir. 1988) (abrogated on other grounds) (emphasis added); see also *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982) ("under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act").

Exemption 6 applies to "detailed Government records on an individual which can be identified as applying to that individual." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). It "requires the Court to balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *United States Dep't of State v. Ray*, 502 U.S. 164, 175 (1991) (internal quotations omitted). Exemption 6 is designed to protect an individual's interest in avoiding disclosure of "personal matters." *DOJ v. Reporters Comm. for Free Press*, 489 U.S. 749, 762 (1989). The relevant public interest to be balanced against the private interests at stake is the core purpose of FOIA; "to open agency action to the light of public scrutiny." *Id.* at 772 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

Exemption 6 analysis incorporates the highest presumption of disclosure in FOIA. *Local 598*, 841 F.2d at 1463; see also *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (the presumption in favor of disclosure under Exemption 6 "is as strong as can be found anywhere under the Act"); *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982); *Kurzon v. HHS*, 649 F.2d 65, 67 (1st Cir. 1981) (the instance in which "the calculus unequivocally supports withholding [is] a rare case because Congress has weighted the balance so heavily in favor of disclosure").

Recent case law on point with the present request now under appeal counsels for full, unredacted disclosure of the requested information. In *Columbia Riverkeeper v. FERC*, the Oregon federal district court concluded that the names and addresses of landowners potentially affected by a proposed liquefied natural gas (LNG) pipeline could not be withheld under the FOIA's "personal information" provision. 650 F. Supp. 2d 1121 (D. Or. 2009); see 5 U.S.C. § 552(b)(6). In that case, FERC argued that the landowners had a privacy interest in non-disclosure, but the court concluded that disclosure did not implicate the landowners' privacy interest because they "took no action to get either on or off this list," and therefore the list did not reveal personal information. *Id.* at 1129. Further, the court agreed with the plaintiffs that disclosure of the list was in the public interest because disclosure would shed light on the FERC's activities. *Id.* at 1130. Likewise, in the present situation, the lists of affected landowners are not subject to an exemption under FOIA and must be disclosed.

The court in *Columbia Riverkeeper* made it plain that Exemption 6 does not apply to FOIA requests such as the instant request:

FERC has not carried its burden of proving the withheld materials are exempt from disclosure. The evidence does not support the existence of a "clearly unwarranted invasion of privacy" as that statutory term is interpreted in Supreme Court and Ninth Circuit jurisprudence. Nor has FERC carried its burden of proving that the information sought by plaintiffs would not shed light on FERC's performance of its statutory duties governing notice.

Columbia Riverkeeper, 650 F. Supp. 2d at 1130.

II. Analysis.

As explained more fully below, Exemption 6 does not apply in this matter because the data requested by Requesters is not located in "personnel," "medical files," or "similar files." Therefore, as a threshold issue, Exemption 6 is not implicated. However, even if FERC disagrees and concludes that the balancing of interests under Exemption 6 should be applied, the withheld information should still be made public because its release would not "constitute a clearly unwarranted invasion of personal privacy."

A. Similar Files.

When evaluating the withholding of information under Exemption 6, the first issue to be determined is the "threshold question [of] whether the requested documents are 'personnel and medical files and similar files' within the meaning of 5 U.S.C. § 552(b)(6)." *Dobronski v. Federal Communications Comm'n*, 17 F.3d 275, 277 (9th Cir. 1994). If the requested information does not fall within Exemption 6, it must be disclosed to the public. *Id.* The information sought herein is clearly not contained in a personnel or medical file, accordingly the question is whether it is from a "similar file."

The congressional reports issued in conjunction with FOIA's enactment indicate that Exemption 6 is to protect intimate or "highly personal" details. See, e.g., S. Rep. No. 813, 89th Cong., 1st

Sess. (1965) ("S.Rep.") at 9. It is intended to establish "a policy that will involve a balancing of interests between the protection of an *individual's private affairs* from unnecessary public scrutiny, and the preservation of the public's right to governmental information." *Id.* (emphasis added). The report continued:

The application of this policy should lend itself particularly to those Government agencies where persons are required to submit *vast amounts of personal data* usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

Id. (emphasis added); see also H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) ("H.Rep.") at 11 (affirming that Exemption 6 applies to "detailed Government records on an individual"). Exemption 6 applies to "*detailed Government records on an individual* which can be identified as applying to that individual." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982) (internal quotations omitted, emphasis added). It "requires the Court to balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *United States Dep't of State v. Ray*, 502 U.S. 164, 175 (1991) (internal quotations omitted). Exemption 6 is to protect an individual's interest in avoiding disclosure of "personal matters." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

Requesters recognize that courts have tended to interpret Exemption 6's use of the term "similar file" flexibly. See, e.g. *United States Dep't of State v. Washington Post Co.*, 456 U.S. at 600 ("[T]he phrase 'similar files' was to have a broad, rather than a narrow meaning."). However, as noted above, even within this "broad" application, the Supreme Court has consistently required that to implicate Exemption 6, information must be found in *detailed* Government records *on an individual*. *Id.* at 600-01 (holding that files containing the *details* of a passport application were similar files); see also, e.g. *Dept. of Air Force v. Rose*, 425 U.S. 352, 355, 376-77 (1976) (holding that *detailed* case summaries of cadet disciplinary proceedings were files similar to personnel files); *Dept. of State v. Ray*, 502 U.S. at 173 (holding that *detailed* post-repatriation interviews with unsuccessful Haitian asylum seekers were similar files).

Moreover, the Court of Appeals for the Ninth Circuit (in whose jurisdiction this case arises) has ruled that even an expansive interpretation of the exemption must remain tethered to its plain language and that to qualify as a "similar file" a document must contain "information similar to that found in a standard personnel file." *Church of Scientology of California v. U.S. Dept. of the Army*, 611 F.2d 738, 746 (9th Cir.1979). Similarly, D.C. Circuit recognizes that "Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships. Surely it was not intended to shield matters of such clear public concern as the names of those entering into contracts with the federal government." *Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980), *appl after rmnd*, 709 F.2d 95 (D.C.Cir. 1983), *aff'd in part, rev'd on other grounds*, 471 U.S. 159 (1985). The intimate nature involves subjects such as "'marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation, and so on' falls within the ambit of Exemption

6. By contrast . . . information connected with professional relationships does not qualify for the exemption.” *Id.* at 574 (emphasis added).

The data sought in this request are clearly not from “personnel and medical files” and the question of whether the information is “similar” to those categories of documents must be resolved in the negative. The information sought in the stakeholder/landowner lists is merely a collection of names and addresses whereas the other records are simply correspondence between a federal agency and the public regarding a matter of public importance. This information is in no way “private” or an “intimate detail[] of personal and family life,” thus it is not “similar” to the personnel or medical files expressly protected by Exemption 6. Certainly, nothing in the Pacific Connector/FERC correspondence regarding FOIA request number FOIA-2014-0017 could be construed to be personally private or intimate nor could the request for notice letters sought in category 4. Finally, it must be beyond dispute that nothing in the scope of request category 5 — documents providing or describing a legal basis or authority for FERC to communicate with Pacific Connector regarding Requesters’ November 12, 2013 FOIA request — could be remotely construed to be similar to a personnel or medical file.

Consequently, as a threshold matter, nothing sought in this FOIA appeal meets the preliminary standard to invoke FOIA’s Exemption 6; an issue that was completely ignored by FERC in its decision. For this reason alone, the withheld information must be released.

However, even if FERC concludes that Exemption 6 applies, there are no privacy interests sufficient to outweigh the public interest inherent in release of the requested information. The question of whether disclosure of the records would constitute a clearly unwarranted invasion of personal privacy requires a balancing of the public’s right to disclosure against the individual’s right to privacy. *Columbia Riverkeeper*, 650 F.Supp.2d at 1125. First, it must be ascertained whether a protectable privacy interest exists that would be threatened by disclosure. *Reporters Comm. for Free Press*, 489 U.S. at 76. If a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure. *Id.* In its January 7th 2014 letter, exempting the information from disclosure, FERC does not refer to, nor appear to have used, the balancing process discussed above.

B. Privacy Interest.

To understand this issue, it is necessary to identify the type of privacy interest involved. In this instance, it is privacy around the names and addresses of individuals already on a government and industry mailing list. In a case regarding a mailing list generated and used solely by a government agency, the Ninth Circuit found that the privacy interest of individuals already on the mailing list is minimal in light of the mailings already received by the individuals and the mailings already received by the individuals and the similar subject matter of the mailings likely to be received as a result of the disclosure. *Or. Natural Desert Ass’n v. Bibbes*, 83 F. 3d 1168 (9th Cir. 2006) (reversed on other grounds).

Recent case law directly on point supports the full, unredacted disclosure of the requested the stakeholder/landowner lists. In *Columbia Riverkeeper v. FERC*, the Oregon federal district court concluded that the names and addresses of landowners potentially affected by a proposed

pipeline could not be withheld under the FOIA's Exemption 6. 650 F. Supp. 2d 1121 (D. Or. 2009). In that case, FERC argued that the landowners had a privacy interest in non-disclosure, but the court concluded that disclosure did not implicate the landowners' privacy interest because they "took no action to get either on or off this list," and therefore the list did not reveal personal information. *Id.* at 1129. Further, the court agreed with the plaintiffs that disclosure of the list was in the public interest because disclosure would shed light on the FERC's activities. *Id.* at 1130. The court in *Columbia Riverkeeper* made it plain that Exemption 6 does not support withholding of information under FOIA requests in cases such as the instant request:

FERC has not carried its burden of proving the withheld materials are exempt from disclosure. The evidence does not support the existence of a "clearly unwarranted invasion of privacy" as that statutory term is interpreted in Supreme Court and Ninth Circuit jurisprudence. Nor has FERC carried its burden of proving that the information sought by plaintiffs would not shed light on FERC's performance of its statutory duties governing notice.

Columbia Riverkeeper, 650 F. Supp. 2d at 1130.

The three other key factors that the court found determinative in *Columbia Riverkeeper* apply equally to this case: 1) First, the court made a factual finding that FERC routinely releases lists similar to those sought in this request. *Id.* at 1126-27 ("FERC has failed to provide any evidence of a reason for treating the Palomar landowner list differently from the Ruby, NorthernStar and Oregon LNG landowner lists."); 2) Second, FERC provides the landowner lists to private corporations. Here, FERC and Pacific Connector have routinely shared multiple versions of the landowner lists at issue, something the *Columbia Riverkeeper* court found probative as to a lack of privacy interest. *Id.* at 1129, and; 3) There is little risk of harm or embarrassment to the landowners. *Id.* ("FERC has not identified any harm to the landowners resulting from disclosure."). *Id.* All of these *Columbia Riverkeeper* findings are equally true here and support release of the requested information.

Moreover, Requesters note that disclosure of the requested information would contribute to the public's understanding of the operations of FERC, and that Requesters need not demonstrate that FERC is failing to carry out its statutory obligations before the information is properly released. Instead, the "relevant public interest is the extent to which disclosure would contribute to the public's understanding of the activities and operations of the government." *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 776. Here, Requesters have sought the requested information for the very purpose of determining whether FERC and other federal agencies are complying with the law, namely the public participation elements of the following statutes and their implementing regulations: the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, 40 C.F.R. §§ 1500.2(d) (mandating that agencies "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."), 1506.6 (establishing particular public participation requirements); the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717f, 18 C.F.R. §§ 157.6(a)(5) ("Applications under section 7 of the Natural Gas Act must conform to the requirements of §§ 157.5 through 157.14."), 157.6(d) (Landowner notification), 153.3 (incorporating landowner notification requirement of 157.6(d) for natural gas export facility applications), 153.4 (incorporating the

procedures required by §§157.5, 157.6, 157.8, 157.9, 157.10, 157.11, and 157.12 for natural gas export facility applications), 380.9 (incorporating and implementing NEPA's public participation regulations); the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1604(d), (f)(4), (g)(3)(F)(iv), (m)(2), 36 C.F.R. § 219(4) (requirements for public participation) and; the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1739(e), 43 C.F.R. § 1610(2) (requirements for public participation). Requesters further intend to review FERC's enforcement of Pacific Connector's compliance with 18 C.F.R. §§ 157.6(d) (Landowner notification), 380.12(c)(10) (requiring an application under the NGA to contain "the names and mailing addresses of all affected landowners specified in §157.6(d) and certify that all affected landowners will be notified as required in §157.6(d)."). See, e.g., 40 C.F.R. § 1506.5(a) ("The agency shall independently evaluate the information submitted [by an applicant for use by an agency] and shall be responsible for its accuracy.").

As the court in *Columbia Riverkeeper* explained, "the reasons the documents are sought under FOIA" does not inform whether an invasion of privacy is warranted. 650 F. Supp. 2d at 1129, n.2. Neither FOIA nor the *Columbia Riverkeeper* court's interpretation of Exemption 6 require the requestor to submit evidence of FERC's violations of federal law (e.g., failure to provide public notice where such notice is required by law).

To be clear, Requesters inform you that they intend to compare the various iterations of the stakeholder/landowner lists against each other as well as the path of the proposed pipeline to evaluate the accuracy of the information used by FERC to discharge its legal obligations to ensure the accuracy of information provided in support of a natural gas export facility and to enforce the public's right to fully participate in the siting and permitting review for the Jordan Cove/Pacific Connector project. The *Columbia Riverkeeper* court found this type of public oversight — "double-check[ing]" — supported the public's access to stakeholder/landowner lists. *Id.* at 1130-31.

We note that ensuring the accuracy of the affected stakeholder/landowner list is clearly not a simple task. This is made clear by the need for Pacific Connector to provide FERC with "several updates" in an attempt to correct the lists. Indeed, FERC's own regulations recognize the difficulty inherent in the compiling of an accurate affected stakeholder/landowner list by requiring that "[w]ithin 30 days of the date the application [is] filed, applicant shall file an updated list of affected landowners, including information concerning notices that were returned as undeliverable." 18 C.F.R. §§ 157.6(d)(5). Accordingly, facilitating the public's oversight of FERC's ability to ensure the most accurate public notification process — and the associated enhancement of the public's participation — in the Jordan Cove/Pacific Connector project will foster the congressional intent underlying FOIA.

In the instant case, the mailing list at issue has been used by FERC and Pacific Connector, a private corporation, for sending out information to the affected landowners and stakeholders about the Pacific Connector project. That a private corporation is already contacting the parties named on the list, with or without a request from the recipient to be on or deleted from such a list, demonstrates that the named individuals have no privacy interest regarding their identifying information contained on the list. *Columbia Riverkeeper*, 650 F. Supp. 2d at 1127-1130 (concluding that because "the landowners took no action to get either on or off this list...[and]

their presences on the list was involuntary...,” there was no privacy interest implicated by disclosure).

Relatedly, the information contained in the stakeholder/landowner lists can already be derived via resources in the public domain. For example, it is a simple — if time consuming — matter to use information from the Jordan Cove pipeline map to locate the route and the affected property via online resources. *E.g.*, <http://www.ormap.net/index.cfm?opt=maplist>. That lot information can then be checked against county tax lot records to identify the name and addresses of the relevant property owners. *See, e.g.*, for Coos County Oregon: <http://www.co.coos.or.us/Departments/Assessors/AccountSearch.aspx>.

For these reasons, the requested information is already in the public domain and there is therefore no privacy interest reasonably attached to it. When there is no expectation of privacy, there can be no unwarranted invasion of personal privacy under Exemption 6. It is axiomatic that “there is no liability for giving publicity to facts about [a person’s] life that are matters of public record. . . . On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public and there is an invasion of privacy when it is made so.” RESTATEMENT (SECOND) OF TORTS § 652D, pp. 385-386 (1977).

In sum, FERC has not set forth convincing reasons for assigning a strong privacy interest to the names and addresses of individuals already on a mailing list used by FERC and Pacific Connector.

C. Public Interest.

The only relevant public interest in the FOIA balancing analysis 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 v. Or. Natural Desert Ass’n*, 519 U.S. 355, 355-56 (1997) (quoting *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)).

The Ninth Circuit has affirmed that “there is a significant public interest in knowing with whom the government has chosen to communicate.” *Or. Natural Desert Ass’n v. Bibles*, 83 F.3d at 1171. The mailing list that Requesters seek provides precisely this type of information: allowing the public to see the list that FERC and the Applicant rely on for its communications with “stakeholders” about this project. Disclosure of the mailing list in its entirety furthers the public interest by providing oversight of FERC’s process, ensuring no stakeholders are left out, and ensuring no disparate communication with stakeholders.

Requesters note that disclosure of the requested information would contribute to the public’s understanding of the operations of FERC, and that Requesters need not demonstrate that FERC is failing to carry out its statutory obligations before the information is properly released as FERC suggested in its January 7th 2014 letter. Instead, the “relevant public interest is the extent to which disclosure would contribute to the public’s understanding of the activities and operations of the government.” *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 776. Here, Requesters are submitting this information request for the very

purpose of determining whether FERC is complying with the law. As the court in *Columbia Riverkeeper* explained, “the reasons the documents are sought under FOIA” does not inform whether an invasion of privacy is warranted. 650 F. Supp. 2d at 1129, n.2. Neither FOIA nor the *Columbia Riverkeeper* court’s interpretation of Exemption 6 require the requestor to submit evidence of FERC’s violations of federal law (*i.e.*, failure to provide public notice where notice is required by law).

D. Balancing.


The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on federal agencies. As noted by the Supreme Court, “disclosure, not secrecy, is the dominant objective of the Act.” *Rose*, 425 U.S. at 361. Exemption 6 protects only against disclosure which amounts to a “clearly unwarranted invasion of personal privacy” which connotes a strong presumption in favor of disclosure. *Local 598*, 841 F.2d at 1463.

To deny a request under Exemption 6, then, FERC must determine that Requesters’ request would cause a clearly unwarranted invasion of personal privacy. As discussed above, the personal privacy interest affected by this disclosure is low, as the “personal” information is of a type already in the public sphere and all affected already receive mailings from FERC and Pacific Connector. Indeed, it is more than a bit ironic that FERC is denying Requesters the same list that is used by the private companies who are proposing to build the pipeline. Again, if access to the stakeholder mailing list would truly create an “invasion of personal privacy,” then this invasion has already been affected by Pacific Connector. The privacy interests at stake in this instance are thus minimal.

In contrast, there is significant public interest in accessing the list to provide oversight as to whom and how FERC is communicating with and considers stakeholders in this process. Even if the disclosure did result in a small “invasion of privacy,” this would not be clearly unwarranted because it would result in the realization of the public interest of FOIA: public oversight of federal agencies.

Because FERC has provided no argument to the contrary, and simply applied Exemption 6 with no analysis or balancing, FERC’s redaction of the requested information is untenable. We request that FERC immediately disclose the requested “updated stakeholder list” to Requesters without redaction.

Sincerely,



Susan Jane M. Brown, Staff Attorney
Western Environmental Law Center
Ph: 503-914-1323
Cell: 503-680-5513
brown@westernlaw.org
www.westernlaw.org

SECRET

DEC 24 2013

1131 Summerset Bay Drive
Cross Hill, SC 29332

Mr. David L. Morenoff
Acting General Counsel
Federal Emergency Regulatory Commission
888 First Street NE
Washington, DC 20426

December 18, 2013

Ref: FOIA Request

Dear Mr. Morenoff,

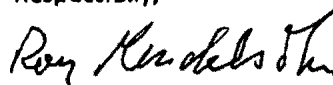
I acknowledge receipt of your letter of December 17th, 2013 denying my FOIA request for documents 20131031-0181 and 0182. I hereby formally appeal this determination. It is ludicrous to assert that disclosure of this information "could reasonably be expected to endanger the life or physical safety of any individual". Please advise precisely whose life or physical safety could be endangered and by what process this could occur. The three policy purposes you quote, if adopted indiscriminately, would render the FOIA useless.

You further state that an alternative to the information I am seeking is in two documents 20131018-0211 and 0212. You state that to access this information I need to submit another FOIA request. This is bureaucracy gone mad. However, I will not be so easily discouraged and will submit an FOIA request. Copies of all this correspondence will be forwarded to my Congressman, Jeff Duncan, seeking his support.

It is clear to any disinterested observer that the CEI designation is merely a device to keep the FERC machinations out of the public eye and not to safeguard the integrity of our energy infrastructure.

I look forward to you releasing Documents 20131031-0181 and 0182 without further delay.

Respectfully,



Roy Mendelsohn

Copies to: Charles E. Beamon, Associate General Counsel
Mr. Leonard M. Tao, Director.
Mr. John Wellinghoff, Chairman

The Honorable Jeff Duncan

DEC 24 2013



Mr. David L. Morenoff
Acting General Counsel
Federal Emergency Regulatory Commission
888 First Street NE
Washington, DC 20426

December 18, 2013

Ref: FOIA Request

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I look forward to you releasing Documents 20131031-0181 and 0182 without further delay.

Respectfully,

A handwritten signature in black ink that reads "Roy Mendelsohn".

Roy Mendelsohn

Copies to: Charles E. Beamon, Associate General Counsel
Mr. Leonard M. Tao, Director.
Mr. John Wellinghoff, Chairman

The Honorable Jeff Duncan

THE GORDON LAW FIRM

113 East Noble Avenue

P.O. Box 734*

Williston, Florida 32696

(352)-528-0111

*mailing address

January 12th, 2014

David Morenoff, Esq.
Acting General Counsel
Federal Energy Regulatory Commission
Room 10A-01
888 First Street, NE
Washington, DC 20426

VIA Email: david.morenoff@ferc.gov

Re: Appeal- Sabal Trail Proposed Methane Gas Pipeline/ Freedom of Information Act
Request Dated January 2, 2014 Request # FOIA-2014-28

Dear Mr. Morenoff,

I am in receipt of FERC's response to my expedited FOIA request dated January 10, 2014. I must object to FERC'S application of FOIA exemption 6 to the names and mailing addresses for the individuals affected by this gas pipeline. It is my opinion that there is no privacy interest in the mere name and mailing address of an individual, particularly where, as here, Sabal Trail and Spectra energy has already used them numerous times to send unsolicited letters, invitations, and demands to survey. If Sabal Trail and Spectra energy are not guilty of invasion of privacy, why isn't the public need to know and educate equally if not more important? The public right to know who is affected, to become educated, and to understand what is at stake ought not to be left to a private energy corporation that stands to make millions of dollars by getting this project approved with the least amount of resistance from landowners. FERC'S refusal to release these names and mailing addresses ensures that Sabal Trail and Spectra Energy are the only ones with the ability to contact these individuals (which they have done numerous times) and "educate them" as to this particular pipeline project.

In the Act generally, and *particularly under Exemption (6)*, there is a strong presumption in favor of disclosure." Local 598 v. Department of Army Corps of Engineers, 841 F.2d 1459, 1463 (9th.

Cir. 1988) (emphasis added). In that case, the Ninth Circuit reviewed the context of applicable Exemption 6 case law:

The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on federal agencies. As the district court recognized, 'disclosure, not secrecy, is the dominant objective of the Act.' Department of the Air Force v. Rose, 425 U.S. 352, 361, 96 S.Ct. 1592, 1599, 48 L.Ed.2d 11 (1976). 'As a final and overriding guideline courts should always keep in mind the basic policy of the FOIA to encourage the maximum feasible public access to government information....' Nationwide Bldg. Maintenance, Inc. v. Sampson, 559 F.2d 704, 715 (D.C.Cir.1977). As a consequence, the listed exemptions to the normal disclosure rule are to be construed narrowly. See Rose, 425 U.S. at 361, 96 S.Ct. at 1599. *This is particularly true of Exemption (6). Exemption (6) protects only against disclosure which amounts to a 'clearly unwarranted invasion of personal privacy.' That strong language 'instructs us to 'tilt the balance [of disclosure interests against privacy interests] in favor of disclosure.'*"

Id. (emphasis added), citing Washington Post Co. v. Department of Health and Human Servs., 690 F.2d 252, 261 (D.C.Cir.1982) (quoting Ditlow v. Shultz, 517 F.2d 166, 169 (D.C. Cir.1975)).

I am of the opinion that there is too much secrecy and stealth attached to this project. I am also of the opinion that FERC, a public agency, cannot protect Sabal Trail and Spectra Energy's proprietary interest in the landowner lists (there is no true privacy interest). All of the information in the landowner lists is public record; Sabal Trail's detailed pipeline map is not. (The maps they disseminate look like a bad Florida diner placemat- you cannot really tell where the pipeline is by street, city or landowner.) FERC, by denying this information to the public, is delaying public education on the pipeline and its builder and operator, Spectra Energy. It's bad enough that Sabal Trail and Spectra Energy get to perform their own environmental impact tests by paying a private company. Your refusal to release the landowner lists has effectively made them in charge of public education as well. I will await your reply.

Very truly yours,

B. Gordon

Beth Gordon, Esq,
President, SpectraBusters.org

FOIA APPEAL

David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington DC 20426

APR 16 2014

April 10, 2014

Re: FOIA Request No. 2014-03-024

Dear Appeals Authority:

On January 18, 2014 I requested emails containing responsive to a keyword search for "smathers."

On April 10, 2014 I received the second and final release of records in response to this request. In this release, the content of the responsive records was highly redacted citing exemption (b)(5).

I appeal all redactions made. Please release the requested records in full.

As you know, the standard for whether or not something is privileged is significantly higher than a desire not to disclose the information, and 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 redacted information as the official agency position for that request.

While reviewing the records, the context in which the redactions appear seem to indicate that much of the redacted content is indeed official agency position and not deliberative material. Exemption (b)(5) exempts "those documents, and only those documents that are normally privileged in the civil discovery context."¹ Further, in order to exclude records from release under exemption (b)(5), the disclosure of these records must be "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the

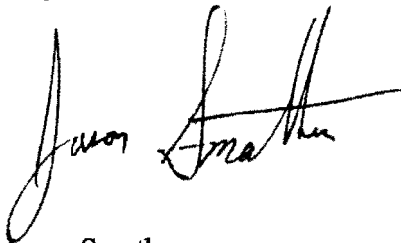
¹ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987); see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in FOIA Post (posted 10/15/01) (highlighting importance of protecting privileged information)

agency.”² The context of these redactions indicate that this is not the case, despite the release letter making such a claim.

For the reasons herein and all other reasons deemed appropriate by the appeals authority, I hereby appeal.

This request is for personal, non-commercial purposes. Please note that I make FOIA requests in various capacities and from multiple locations. The contact information, including email address and mailing address, is for this request only. Please do not update or change my contact information on any other request. For this request only, please correspond via email using jason.smathers@gmail.com, the mailing address PO Box 781, Topock, AZ 86436, and/or via fax number 206-888-2742.

Regards,



Jason Smathers
PO Box 781
Topock, AZ 86436
Jason.smathers@gmail.com

CC: Charles A Beamon
Associate General Counsel
General and Administrative Law
Federal Energy Regulatory Commission
888 First Street, NE
Washington DC 20426

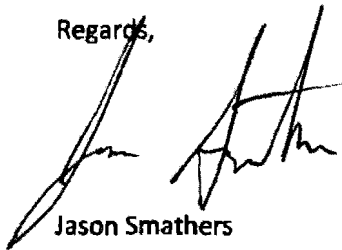
² *Morley v. Cent. Intelligence Agency*, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (quoting *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

FOIA APPEAL ADDENDUM

RE: FY13-46

Please note I also appeal the withholding in full the attachments to the responsive emails.

Regards,

A handwritten signature in black ink, appearing to read 'Jason Smathers', is written over the printed name. The signature is stylized with a large, sweeping initial 'J'.

Jason Smathers

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

APR 10 2014

Re: Second and Final Response
Letter, FOIA No. FY14-36

VIA EMAIL AND REGULAR MAIL

Mr. Jason Smathers
P.O. Box 781
Topock, AZ 86436
Jason.smathers@gmail.com

Dear Mr. Smathers:

This is a response to your correspondence received January 23, 2014, in which you requested information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a) (2012), and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2013). Specifically, you requested copies of "any emails in the [FERC] FOIA Office that contain the word Smathers," primarily from January 1, 2009 to the present.

On March 13, 2014, the Commission issued its first partial response letter releasing nineteen (19) documents. The letter also stated that in light of the volume of information requested and the amount of Commission staff time required to process any responsive documents, additional determinations addressing the remaining documents would follow on a rolling basis.¹ At this time the Commission is releasing twenty (20) documents to you. The documents are comprised of email correspondence between

¹ 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 preserve the government's right to carefully review material while promoting FOIA's disclosure goals); see also U.S. Dep't 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.)

FERC staff. Portions of the documents have been redacted pursuant to FOIA Exemption 5.²

FOIA Exemption 5 incorporates various privileges, including the deliberative process privilege, which is at issue here. 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 redacted sections of these emails are precisely the type of information FOIA Exemption 5 was created to protect. The redacted portions contain conversations among Commission staff that are deliberative and exempt from disclosure under FOIA Exemption 5. Not only does release risk chilling future staff discussion, release here could cause public confusion by disclosing analysis that ultimately did not form part of the final agency analysis released to the public. Therefore, the twenty (20) documents are being released in redacted form pursuant to FOIA Exemption 5. This completes our processing of your request.

As provided by the FOIA and 18 C.F.R. Section 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."

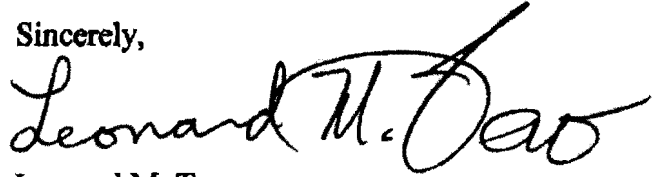
² *See* 5 U.S.C. 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.")

FOIA No. FY14-36

- 3 -

Please 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 a large, sweeping "L" and a stylized "Tao".

Leonard M. Tao
Director
Office of External Affairs

Enclosure



Jason Smathers <jason.smathers@gmail.com>

FOIA Request: Search for "Smathers" in Federal Energy Regulatory Commission FOIA Office Emails

message

Jason Smathers <jason.smathers@gmail.com>
To: fola-cell@ferc.gov

Sat, Jan 18, 2014 at 12:34 AM

Federal Energy Regulatory Commission 888 First Street, NE Washington, DC 20426

Dear FOIA Officer:

This is a Freedom of Information Act Request.

I request a copy of any emails in the Federal Energy Regulatory Commission FOIA Office that contain the word Smathers. This means emails with that word anywhere in the email.

The scope of this request is emails retrieved from an electronic search or searches of computers or email computer systems used by the FOIA Office.

I am primarily interested in emails during the time period January 20, 2009 to the present, but if a non-arduous electronic search will only retrieve records from a lesser/shorter period, that will be sufficient for purposes of this request. You may restrict the search to the email of those individuals who handle FOIA requests and who coordinate or manage the FOIA program.

Please release all segregable portions. Please apply the foreseeable harm test. Please apply the presumption of openness in the Presidential Memorandum.

I prefer to receive the responsive records on a CD-ROM or by email or other online file transfer method if practicable.

This request is for personal, non-commercial purposes. Please note that I make FOIA requests in various capacities and from multiple locations. The contact information, including email address and mailing address, is for this request only. Please do not update or change my contact information on any other request. For this request only, please correspond via email using jason.smathers@gmail.com and the mailing address PO Box 781, Topock, AZ 86436.

Regards,
Jason Smathers

FOIA APPEAL

David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington DC 20426

APR 16 2014

April 10, 2014

Re: FOIA Request No. 2014-03-024

Dear Appeals Authority:

On January 18, 2014 I requested emails containing responsive to a keyword search for "smathers."

On April 10, 2014 I received the second and final release of records in response to this request. In this release, the content of the responsive records was highly redacted citing exemption (b)(5).

I appeal all redactions made. Please release the requested records in full.

As you know, the standard for whether or not something is privileged is significantly higher than a desire not to disclose the information, and 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 redacted information as the official agency position for that request.

While reviewing the records, the context in which the redactions appear seem to indicate that much of the redacted content is indeed official agency position and not deliberative material. Exemption (b)(5) exempts "those documents, and only those documents that are normally privileged in the civil discovery context."¹ Further, in order to exclude records from release under exemption (b)(5), the disclosure of these records must be "so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the

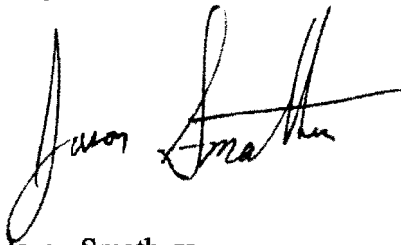
¹ NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975); see FTC v. Grolier Inc., 462 U.S. 19, 26 (1983); Martin v. Office of Special Counsel, 819 F.2d 1181, 1184 (D.C. Cir. 1987); see also Attorney General's Memorandum for Heads of All Federal Departments and Agencies Regarding the Freedom of Information Act (Oct. 12, 2001), reprinted in FOIA Post (posted 10/15/01) (highlighting importance of protecting privileged information)

agency."² The context of these redactions indicate that this is not the case, despite the release letter making such a claim.

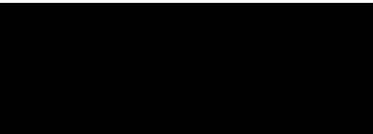
For the reasons herein and all other reasons deemed appropriate by the appeals authority, I hereby appeal.

This request is for personal, non-commercial purposes. Please note that I make FOIA requests in various capacities and from multiple locations. The contact information, including email address and mailing address, is for this request only. Please do not update or change my contact information on any other request. For this request only, please correspond via email using [REDACTED] the [REDACTED] and/or via fax number [REDACTED]

Regards,



Jason Smathers



CC: Charles A Beamon
Associate General Counsel
General and Administrative Law
Federal Energy Regulatory Commission
888 First Street, NE
Washington DC 20426

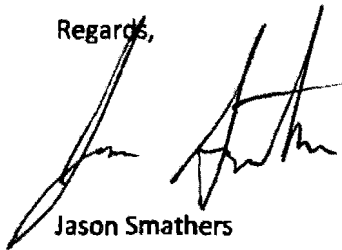
² Morley v. Cent. Intelligence Agency, 508 F.3d 1108, 1126 (D.C. Cir. 2007) (quoting Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

FOIA APPEAL ADDENDUM

RE: FY13-46

Please note I also appeal the withholding in full the attachments to the responsive emails.

Regards,

A handwritten signature in black ink, appearing to read 'Jason Smathers', is written over the printed name. The signature is stylized with a large, sweeping 'J' and a distinct 'S'.

Jason Smathers

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

APR 10 2014

Re: Second and Final Response
Letter, FOIA No. FY14-36

VIA EMAIL AND REGULAR MAIL

Mr. Jason Smathers


Dear Mr. Smathers:

This is a response to your correspondence received January 23, 2014, in which you requested information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a) (2012), and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2013). Specifically, you requested copies of "any emails in the [FERC] FOIA Office that contain the word Smathers," primarily from January 1, 2009 to the present.

On March 13, 2014, the Commission issued its first partial response letter releasing nineteen (19) documents. The letter also stated that in light of the volume of information requested and the amount of Commission staff time required to process any responsive documents, additional determinations addressing the remaining documents would follow on a rolling basis.¹ At this time the Commission is releasing twenty (20) documents to you. The documents are comprised of email correspondence between

¹ 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 preserve the government's right to carefully review material while promoting FOIA's disclosure goals); see also U.S. Dep't 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.)

FERC staff. Portions of the documents have been redacted pursuant to FOIA Exemption 5.²

FOIA Exemption 5 incorporates various privileges, including the deliberative process privilege, which is at issue here. 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 redacted sections of these emails are precisely the type of information FOIA Exemption 5 was created to protect. The redacted portions contain conversations among Commission staff that are deliberative and exempt from disclosure under FOIA Exemption 5. Not only does release risk chilling future staff discussion, release here could cause public confusion by disclosing analysis that ultimately did not form part of the final agency analysis released to the public. Therefore, the twenty (20) documents are being released in redacted form pursuant to FOIA Exemption 5. This completes our processing of your request.

As provided by the FOIA and 18 C.F.R. Section 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."

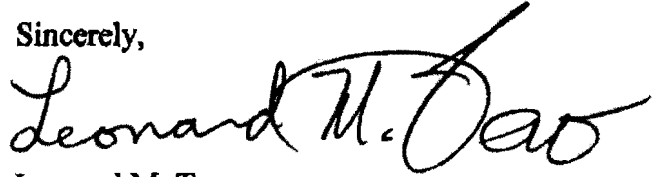
² *See* 5 U.S.C. 552(b)(5) (protects from disclosure "intra-agency memoranda or letters that would not be available by law to a party other than an agency in litigation with the agency.")

FOIA No. FY14-36

- 3 -

Please 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 a large, stylized initial "L" and "T".

Leonard M. Tao
Director
Office of External Affairs

Enclosure



Jason Smathers <jason.smathers@gmail.com>

FOIA Request: Search for "Smathers" in Federal Energy Regulatory Commission FOIA Office Emails

message

Jason Smathers <[REDACTED]>
To: fola-cell@ferc.gov

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I prefer to receive the responsive records on a CD-ROM or by email or other online file transfer method if practicable.

This request is for personal, non-commercial purposes. Please note that I make FOIA requests in various capacities and from multiple locations. The contact information, including email address and mailing address, is for this request only. Please do not update or change my contact information on any other request. For this request only, please correspond via email using [REDACTED] and the mailing address [REDACTED]
[REDACTED]

Regards,
Jason Smathers

DOW JONES

Craig Linder
Assistant General Counsel
craig.linder@dowjones.com
(212) 416-3088

March 31, 2014

VIA CERTIFIED MAIL

David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

APR 14 2014

**Re: *Freedom of Information Act Appeal*
*Request No. FY14-42 First Partial Response***

Dear Mr. Morenoff:

I am counsel to Dow Jones & Company, the publisher of *The Wall Street Journal*. This letter constitutes the appeal of *Journal* reporter Rebecca Smith from the Federal Energy Regulatory Commission's partial denial of a request that Ms. Smith made pursuant to the Freedom of Information Act, 5 U.S.C. § 552 et seq. FERC's denial of Ms. Smith's request is unsupported by FOIA or the relevant case law, and I urge you to promptly release the materials she seeks in full.

On January 31, 2014, Ms. Smith submitted a FOIA request seeking access to, among other things, emails between former FERC Chairman Jon Wellinghoff "and others at the Commission concerning grid security and protections." (Ms. Smith's FOIA request is attached as Exhibit A.)

On March 4, 2014, FERC issued a first partial response to Ms. Smith's request. In its partial response, FERC stated that it had identified and withheld 35 emails between Mr. Wellinghoff and commission staff concerning grid security and protections. FERC withheld these materials under the deliberative process privilege recognized in Exemption 5.¹ (FERC's letter to Ms. Smith is attached as Exhibit B.)

FERC did not explain which deliberative process the 35 withheld emails relate, nor did it explain what harm may result from disclosure of these records. It is also unclear whether FERC conducted the segregability analysis required by FOIA. Accordingly, FERC has failed to meet its burden under FOIA and should produce the 35 withheld emails without delay.

¹ 5 U.S.C. § 552(b)(5)

L FERC has not satisfied its burden of demonstrating that the 35 withheld emails are exempt from disclosure under Exemption 5.

To qualify for FOIA's deliberative process privilege, an agency must *demonstrate* that the withheld materials are both "pre-decisional" and "deliberative;" it does not suffice to simply *declare* that they are.² A document is "pre-decisional" if it was "generated before the adoption of an agency policy" and "deliberative" if it reflects the "give-and-take of the consultative process."³ The deliberative process privilege does not protect an "agency's final opinions, statements, or policy and interpretations definitively adopted by the agency, and any documents having 'the force and effect of law.'"⁴ The privilege also does not protect material that is "purely factual."⁵

FERC has failed to demonstrate that the 35 withheld emails are protected by the deliberative process privilege. Although FERC need not point to a specific final agency decision to invoke Exemption 5, the burden is on the commission must establish "what deliberative process is involved, and the role played by the documents in issue in the course of that process."⁶ In this case, FERC has not done anything of the sort.

Instead, the portion of the commission's first partial response denying Ms. Smith's request for the 35 emails simply says that the emails "contain staff opinions and analyses that are deliberative." FERC's first partial response does not specify any deliberative process pursuant to which the emails are being withheld, nor does it state what role (if any) the emails played in that process.

FERC's decision to withhold all 35 emails also errs by treating as equal the emails Mr. Wellinghoff sent to commission staff with those that commission staff sent to Mr. Wellinghoff. For the purposes of Exemption 5, materials that flow from a superior to a subordinate employee are far less likely to be considered "predecisional" than materials that flow in the opposite direction.⁷ Accordingly, it is likely that at least some of the emails from Mr. Wellinghoff to his subordinates must be released to Ms. Smith.

² *Judicial Watch Inc. v. Food & Drug Admin.*, 449 F.3d 141, 151 (D.C. Cir. 2006).

³ *Judicial Watch*, 449 F.3d at 151 (internal quotations omitted).

⁴ *Nat'l Wildlife Fed'n v. U.S. Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir. 1988), quoting *Nat'l Labor Relations Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975).

⁵ *In re Sealed Case*, 121 F.3d 729, 737 (D.C. Cir. 1997).

⁶ *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980).

⁷ *Muttitt v. Dep't of State*, 926 F.Supp.2d 284, 308 (D.D.C. March 4, 2013).

David L. Morenoff

March 31, 2014

Page 3 of 4

Finally, FERC's first partial response fails to state the harm that will result from disclosure of the emails, even though an agency invoking Exemption 5 is required to "show, by specific and detailed proof, that disclosure would defeat, rather than further, the purposes of FOIA."⁸ Accordingly, FERC has failed to provide the detailed justification that FOIA requires.⁹

E. FERC must produce any 'reasonably segregable' portions of the withheld emails.

The fact that FERC withheld the 35 responsive emails in their entirety strongly suggests that the commission failed to conduct the segregability analysis required by FOIA.¹⁰ Like all agencies subject to FOIA, FERC "may not automatically withhold the full document as categorically exemption without disclosing any segregable portions."¹¹ Even if some portion of the withheld emails "contain staff analyses, opinions, and recommendations,"¹² FERC must produce any portion of those emails that are not both "pre-decisional" and "deliberative" unless doing so would be "impossible."¹³

Even assuming that the 35 withheld emails contain some protectable deliberative information, portions of those records are also quintessentially factual, and those portions must be released to Ms. Smith. For instance, the 35 withheld emails at minimum undoubtedly contain the names of the senders and recipients of the emails, the time and date at which they were sent, and subject lines, all of which is purely factual and must be released. Any portions of the emails that are backward-looking examinations of the safety and security of the electric grid are similarly outside the protection of Exemption 5 and must be released.

Importantly, any portions of the emails that are assessments of the safety and security of the electric grid are primarily "objective analyses of . . . performance under existing policy" and therefore not deliberative or subject to Exemption 5.¹⁴ Any portions of the withheld emails that are such objective analyses must also be released to Ms. Smith.

⁸ *Mead Data Cent. Inc. v. U.S. Dep't of Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977).

⁹ *Mead Data Cent.*, 566 F.2d at 251.

¹⁰ 5 U.S.C. § 552(b) ("Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the options which are exempt under this subsection.")

¹¹ *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)

¹² *Public Citizen Inc. v. Office of Management & Budget*, 598 F.3d 865, 876 (D.C. Cir. 2010).

¹³ *Nat'l Labor Relations Bd. v. Jackson Hosp. Corp.*, 257 F.R.D. 302, 309 (D.D.C. 2009).

¹⁴ *Vaughn v. Rosen*, 523 F.2d 1136, 1145 (D.C. Cir. 1975).

David L. Morenoff

March 31, 2014

Page 4 of 4

Dow Jones requests that FERC complete a full review of the record of this matter and all responsive documents to ensure that all documents that are responsive to Ms. Smith's request are identified and made available to her in their full unredacted form, as FOIA requires. I look forward to receiving your response within twenty working days, as the law requires.

This letter is not a full recitation of the facts and issues related to this matter and is written without prejudice to Dow Jones's claims or defenses, all of which are expressly reserved.

Sincerely,



Craig Linder

RCMPL

EXHIBIT A



FOIA 2014-40
Accepted January 31, 2014
Track 3
Due Date March 3, 2014

Wall Street Journal FOIA Request

Smith, Rebecca <Rebecca.Smith@wsj.com>
To: FOIA CEN <foia-cen@ferc.gov>
Cc: "Smith, Rebecca" <Rebecca.Smith@wsj.com>

Fri, Jan 31, 2014 at 2:34 PM

Dear Ms. Johnson,

Please consider this email a formal request, under the Freedom of Information Act, 5 U.S.C. § 552 et seq., for the following information:

- 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.
- A list of the largest electrical transmission substations in the U.S.
- A list of security measures that utilities should consider implementing to make their systems better protected against physical attacks. I believe the list is dated May 13, 2013 and was prepared at the request of former Chairman Jon Wellinghoff.
- Emails between Mr. Wellinghoff and others at the Commission concerning grid security and protections, beginning in January 2013 and continuing to the present day.
- Any FERC reports or analyses on grid attacks, especially concerning the April 18, 2013 attack on PG&E Corp's Metcalf substation in San Jose, California.

This information is being sought for use in news stories appearing in *The Wall Street Journal* and for other means of public dissemination. I request that documents be provided for free, as in the public interest. If it is not possible to provide them for free, please let me know if the cost will exceed \$50.

I would be happy to work with you to streamline this request or fine tune it so that it means less labor on your end. I would be pleased to receive the information in electronic form, or have it emailed to me.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information. I will expect a response within 10 days.

Thanks so much for your time and attention.

Regards,

Rebecca

FOIA-2014-42
Accepted January 31, 2014
Track 3
Due Date March 3, 2014

Rebecca Smith

Staff Reporter

The Wall Street Journal

201 California Street, Suite 1100

San Francisco, California 94111

(415) 765-8212 office

(415) 385-7224 cell

From: Toya Johnson [mailto:toya.johnson@ferc.gov] On Behalf Of FOIA CEI

Sent: Tuesday, January 28, 2014 9:08 AM

To: Smith, Rebecca

Cc: FOIA CEI

Subject: Re: please to send FERC FOIA request

Ms. Smith

The Federal Energy Regulatory Commission received an email from you that indicates that you are submitting a Freedom of Information Act request. However, the actual request is not included or attached to your email.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEI Service Center by email at foia@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toya Johnson

Office of External Affairs

FOIA Public Liaison

(202) 502-8389

Toll Free: 1-866-208-3372

FOIA-2014-41
Approved January 21, 2014
Term 1
Due Date March 3, 2014

NOTE: This email message and any attachments are for the sole use of the intended recipients and may contain information that is classified as privileged, CEI or otherwise protected from disclosure. Any unauthorized review, use, disclosure or distribution is strictly prohibited. If you are not the intended recipient, please contact the sender by reply email and delete the original message and attachments from your computer and other electronic devices.

On Mon, Jan 27, 2014 at 6:11 PM, Smith, Rebecca <[REDACTED]> wrote:

Dear Ms. Johnson,

Please consider this email a formal request, under the Freedom of Information Act Request, for

Toya Johnson, FOIA Public Liaison
Office of External Affairs

Telephone: 202-502-6088 begin_of_the_skype_highlighting 202-502-6088 FREE
end_of_the_skype_highlighting
FAX: 202-208-2108
Email: foia@ojtda.gov

Address:
888 First Street, NE
Washington, DC 20426

Rebecca Smith

Staff Reporter

The Wall Street Journal

201 California Street, Suite 1100
San Francisco, California 94111

(415) 765-8212 office

(415) 385-7224 cell

FOIA-2014-42

Accepted January 31, 2014

Trace 1

Due Date March 3, 2014

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEI Service Center by email at foia@ice.dhs.gov or by phone at 202 502-8068.

Sincerely,

Toyla Johnson

Special Agent in Charge

Office of External Affairs

FOIA Public Liaison

(202) 502-8389

Toll Free: 1-866-208-3372



NOTICE: This email message and any attachments are for the sole use of the intended recipients and may contain information that is classified as privileged, CEI or otherwise protected from disclosure. Any unauthorized review, use, disclosure or distribution is strictly prohibited. If you are not the intended recipient, please contact the sender by reply email and delete the original message and attachments from your computer and other electronic devices.

EXHIBIT B

Federal Energy Regulatory Commission
Washington, DC 20426

NAH - 4 234

Re: FOIA No. FY14-42
First Partial Response

VIA EMAIL AND REGULAR MAIL

Rebecca Smith
Staff Reporter
The Wall Street Journal
201 California Street, Suite 1100
San Francisco, California 94111
Rebecca.Smith@wsj.com

Dear Ms. Smith:

On January 31, 2014, you 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 (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2013). Specifically, you requested:

- (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. [You] believe the list was dated May 13, 2013 and was prepared at the request of former Chairman Jon Wellinghoff;
- (4) Emails between Mr. Wellinghoff and others at the Commission concerning grid security and protections, beginning in January 2013 and continuing to the present day;
- (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.

A search of the Commission's files has identified a large number of documents that may be responsive to your request. Given the volume of information requested and the amount of Commission staff time required to collect the information, we are making an initial release of documents with additional determinations addressing the remaining documents to follow on a rolling basis. At this time, Commission staff has determined

FOIA No. FY14-42

that there are 35 emails between former FERC Chairman Wellinghoff and Commission staff concerning grid security and protections. All of the emails are being withheld under FOIA Exemption 5.

FOIA Exemption 5 incorporates various privileges, including the deliberative process privilege which is at issue here. See 5 U.S.C. § 552(b)(5). 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").

In this instance, 35 internal emails between Mr. Wellinghoff and FERC staff are being withheld in their entirety under FOIA Exemption 5 because they contain staff opinions and analyses that are deliberative.

Commission staff will continue to review the balance of the responsive documents and determinations regarding their release will be made on a rolling basis.¹ We anticipate our next response will issue within twenty 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 Toiya Johnson of my staff at (202) 502-8004.

Ordinarily, any appeal from a FOIA determination must be filed within 45 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 is willing to hold your appeal rights in abeyance pending a final determination. This would allow you to file a single appeal at the conclusion of our processing of your request. We anticipate making a final

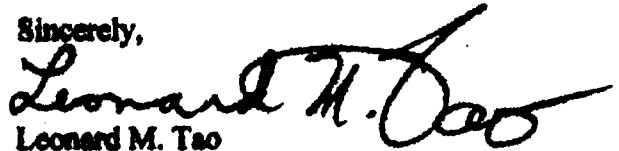
¹ See *Hinton v. Fed Bureau of Investigations*, 527 F. Supp. 223, 225 (E.D. Penn. 1981) (noting rolling responses preserve the government's ability to carefully review material while promoting disclosure); U.S. Dept. of Justice, *FOIA Post*, "OIP Guidance: The importance of Good Communication with FOIA requesters," (posted 2010).

FOIA No. FY14-42

determination in this matter in approximately forty business days or twenty business days after our next expected response.

If you decide to appeal, this 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." Please also send a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

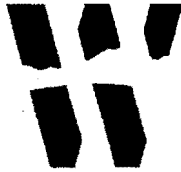
Sincerely,

A handwritten signature in dark ink, appearing to read "Leonard M. Tao", with a stylized flourish at the end.

Leonard M. Tao

Director

Office of External Affairs



JUN 09 2014

Northwest
Eugene, Oregon

Northern Rockies
Helena, Montana

Southwest
Taos, New Mexico

Southern Rockies
Durango, Colorado

Defending the West

www.westernlaw.org

Western Environmental Law Center

Mr. David L. Morenoff, Acting General Counsel
Charles A. Beamon, Associate General Counsel, General and Administrative Law
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC. 20426

RE: Freedom of Information Act Appeal (FOIA No. FY14-44)

Dear Mr. Morenoff:

June 1, 2014

On February 7th 2014, my clients Klamath-Siskiyou Wildlands Center, Rogue Riverkeeper, Landowners United, Oregon Coast Alliance, Cascadia Wildlands, and Mr. Bob Barker ("Requesters") submitted a Freedom of Information Act request pursuant to 5 U.S.C. § 552 *et seq.* for the following documents:

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 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 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.

On March 7th 2014, FERC forwarded this FOIA request to the applicant, Williams Pacific Connector Gas Pipeline, L.P., to "solicit[] your comments on whether [the requested information's] release is required under FOIA." FERC neither disclosed to the Requesters whether Pacific Connector provided comments on this FOIA request, nor provided the substance of those comments, if any, to Requesters as requested in Requested Item #3. FERC has not disclosed to Requesters whether objections to disclosure were made, or the content of those objections, if any. 18 C.F.R. § 388.112(b)(2).¹

On March 5th 2014, FERC provided Requesters with notice that "to reply to your request, we need to consult with other components of the agency having substantial subject-matter interest," and therefore "extended the time limit to make an initial determination on your request." A response was expected no later than March 24th 2014.

On April 10th 2014, FERC sent a letter to applicant Williams Pacific Connector and indicated that "in light of your response, we agree that the names and personal addresses of private citizens implicate a privacy interest and are protected from disclosure by FOIA Exemption 6. As such, the names, addresses, and other identifying data of private citizens will be redacted prior to release of the documents."

On April 21st 2014, FERC responded to Requesters' FOIA request by providing a copy of the updated stakeholder list that redacted the names, addresses, and other identifying data of private citizens listed on the updated stakeholder list. FERC rejected the Requesters' justification for disclosure, erroneously stating that "it is well established that the names and personal home addresses of private landowners are protected from release under FOIA Exemption 6." FERC also purported to distinguish *Columbia Riverkeeper, et al. v. FERC*, 650 F.Supp.2d 1121 (D.Or. 2009) from the present request, stating that the holding in *Columbia Riverkeeper* "was not applicable because there was ample evidence of notice in the record."

Importantly, the communications from FERC in response to this FOIA request do not address Requested Items #2 – #6: FERC's partial disclosure of redacted information only pertains to Requested Item #1.

Requesters Klamath-Siskiyou Wildlands Center, Rogue Riverkeeper, Landowners United, Oregon Coast Alliance, Cascadia Wildlands, and Mr. Bob Barker hereby appeal the decision of FERC for the reasons listed below.

¹ All Requesters have been granted Intervenor status in FERC docket No. CP13-492.

I. Requested Items #2 – #6.

In its “response” to Requesters FOIA request, FERC provided information responsive only to Requested Item #1: it provided no information of any kind in response to Requested Items #2 – #6. As the United States District Court for the District of Columbia recently observed,

The Supreme Court has explained that the FOIA is “a means for citizens to know ‘what their Government is up to.’ This phrase should not be dismissed as a convenient formalism. It defines a structural necessity in a real democracy.” *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004) (citation and internal quotation marks omitted). “The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.” *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978); see also *SEC v. Am. Int’l Grp.*, 712 F.3d 1, 3 (D.C.Cir.2013) (“The public has a fundamental interest in ‘keeping a watchful eye on the workings of public agencies.’” (quoting *Wash. Legal Found. v. U.S. Sentencing Comm’n*, 89 F.3d 897, 905 (D.C.Cir.1996))). As a result, the FOIA requires federal agencies to release all nonexempt records responsive to a request. See 5 U.S.C. § 552(a)(3)(A).

Gilman v. U.S. Dep’t of Homeland Sec., CV 09-0468 (BAH), 2014 WL 984309 (D.D.C. Mar. 14, 2014). In this case, FERC has provided no response, including no indication that the Requested Items are exempt from disclosure under FOIA, to Requesters’ demand for several documents.

Whenever an agency invokes a statutory exemption, FOIA “expressly places the burden ‘on the agency to sustain its action’” *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755 (1989) (quoting 5 U.S.C. § 552(a)(4)(B)); see also *Multnomah County Medical Soc’y v. Scott*, 825 F.2d 1410, 1413 (9th Cir. 1987) (the government bears the burden of showing that withheld information satisfies the legal standard for secrecy). “Placing the burden of proof upon the agency puts the task of justifying the withholding on the only party able to explain it.” *U.S. Dept. of Justice v. Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989). FERC has failed to carry its burden under FOIA with respect to Requested Items #2 – #6. These documents therefore should be disclosed in their entirety. 5 U.S.C. § 552.

II. Requested Item #1.

A. FOIA Exemption 6.

FOIA requires FERC to disclose requested information unless the information falls within one of the nine narrowly construed exemptions from FOIA listed in 5 U.S.C. § 552(b). In this case, FERC has invoked FOIA’s Exemption 6 with respect to disclosure of Requested Item #1, which FERC alleges addresses “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).

As noted above, the government always bears the burden of showing that the withheld information is a personnel, medical, or similar file that constitutes a clearly unwanted invasion of

personal privacy. 5 U.S.C. §552(a)(4)(B) (“the burden is on the agency to sustain its action”); *see also Multnomah County Medical Soc’y v. Scott*, 825 F.2d at 1413. “In the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure.” *Local 598 United Ass’n. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Dep’t of the Army*, 841 F.2d 1459, 1463 (9th Cir. 1988) (abrogated on other grounds) (emphasis added); *see also Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982) (“under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act”).

Exemption 6 applies to “detailed Government records on an individual which can be identified as applying to that individual.” *United States Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). It “requires the Court to balance the individual’s right of privacy against the basic policy of opening agency action to the light of public scrutiny.” *United States Dep’t of State v. Ray*, 502 U.S. 164, 175 (1991) (internal quotations omitted). Exemption 6 is designed to protect an individual’s interest in avoiding disclosure of “personal matters.” *DOJ v. Reporters Comm. for Free Press*, 489 U.S. 749, 762 (1989). The relevant public interest to be balanced against the private interests at stake is the core purpose of FOIA; “to open agency action to the light of public scrutiny.” *Id.* at 772 (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

Exemption 6 analysis incorporates the highest presumption of disclosure in FOIA. *Local 598*, 841 F.2d at 1463; *see also Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (the presumption in favor of disclosure under Exemption 6 “is as strong as can be found anywhere under the Act”); *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982); *Kurzon v. HHS*, 649 F.2d 65, 67 (1st Cir. 1981) (the instance in which “the calculus unequivocally supports withholding [is] a rare case because Congress has weighted the balance so heavily in favor of disclosure”).

Recent case law on point with the present request now under appeal counsels for full, unredacted disclosure of the requested information. In *Columbia Riverkeeper v. FERC*, the Oregon federal district court concluded that the names and addresses of landowners potentially affected by a proposed liquefied natural gas (LNG) pipeline could not be withheld under the FOIA’s “personal information” provision. 650 F. Supp. 2d 1121 (D. Or. 2009); *see* 5 U.S.C. § 552(b)(6). In that case, FERC argued that the landowners had a privacy interest in non-disclosure, but the court concluded that disclosure did not implicate the landowners’ privacy interest because they “took no action to get either on or off this list,” and therefore the list did not reveal personal information. *Id.* at 1129. Further, the court agreed with the plaintiffs that disclosure of the list was in the public interest because disclosure would shed light on the FERC’s activities. *Id.* at 1130. Likewise, in the present situation, the lists of affected landowners are not subject to an exemption under FOIA and must be disclosed.

The court in *Columbia Riverkeeper* made it plain that Exemption 6 does not apply to FOIA requests such as the instant request:

FERC has not carried its burden of proving the withheld materials are exempt from disclosure. The evidence does not support the existence of a “clearly unwarranted invasion of privacy” as that statutory term is interpreted in Supreme Court and Ninth

Circuit jurisprudence. Nor has FERC carried its burden of proving that the information sought by plaintiffs would not shed light on FERC's performance of its statutory duties governing notice.

Columbia Riverkeeper, 650 F. Supp. 2d at 1130.

B. Analysis.

As explained more fully below, Exemption 6 does not apply in this matter because the data requested by Requesters is not located in "personnel," "medical files," or "similar files." Therefore, as a threshold issue, Exemption 6 is not implicated. However, even if FERC disagrees and concludes that the balancing of interests under Exemption 6 should be applied, the withheld information should still be made public because its release would not "constitute a clearly unwarranted invasion of personal privacy." To be clear, Requesters are seeking the requested information 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 a natural gas export facility and pipeline, and to enforce the public's right to fully participate in the siting and permitting review for the Jordan Cove/Pacific Connector project.

1. Similar Files.

When evaluating the withholding of information under Exemption 6, the first issue to be determined is the "threshold question [of] whether the requested documents are 'personnel and medical files and similar files' within the meaning of 5 U.S.C. § 552(b)(6)." *Dobronski v. Federal Communications Comm'n*, 17 F.3d 275, 277 (9th Cir. 1994). If the requested information does not fall within Exemption 6, it must be disclosed to the public. *Id.* The information sought herein is clearly not contained in a personnel or medical file, accordingly the question is whether it is from a "similar file."

The congressional reports issued in conjunction with FOIA's enactment indicate that Exemption 6 is to protect intimate or "highly personal" details. *See, e.g.*, S. Rep. No. 813, 89th Cong., 1st Sess. (1965) ("S.Rep.") at 9. It is intended to establish "a policy that will involve a balancing of interests between the protection of an *individual's private affairs* from unnecessary public scrutiny, and the preservation of the public's right to governmental information." *Id.* (emphasis added). The report continued:

The application of this policy should lend itself particularly to those Government agencies where persons are required to submit *vast amounts of personal data* usually for limited purposes. For example, health, welfare, and selective service records are highly personal to the person involved, yet facts concerning the award of a pension or benefit should be disclosed to the public.

Id. (emphasis added); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) ("H.Rep.") at 11 (affirming that Exemption 6 applies to "detailed Government records on an individual"). Exemption 6 applies to "*detailed Government records on an individual* which can be identified as applying to that individual." *United States Dep't of State v. Washington Post Co.*, 456 U.S.

595, 602 (1982) (internal quotations omitted, emphasis added). It “requires the Court to balance the individual’s right of privacy against the basic policy of opening agency action to the light of public scrutiny.” *United States Dep’t of State v. Ray*, 502 U.S. 164, 175 (1991) (internal quotations omitted). Exemption 6 is to protect an individual’s interest in avoiding disclosure of “personal matters.” *United States Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

Requesters recognize that courts have tended to interpret Exemption 6’s use of the term “similar file” flexibly. *See, e.g. United States Dep’t of State v. Washington Post Co.*, 456 U.S. at 600 (“[T]he phrase ‘similar files’ was to have a broad, rather than a narrow meaning”). However, as noted above, even within this “broad” application, the Supreme Court has consistently required that to implicate Exemption 6, information must be found in *detailed* Government records *on an individual*. *Id.* at 600-01 (holding that files containing the *details* of a passport application were similar files); *see also, e.g. Dept. of Air Force v. Rose*, 425 U.S. 352, 355, 376-77 (1976) (holding that *detailed* case summaries of cadet disciplinary proceedings were files similar to personnel files); *Dept. of State v. Ray*, 502 U.S. at 173 (holding that *detailed* post-repatriation interviews with unsuccessful Haitian asylum seekers were similar files).

Moreover, the Court of Appeals for the Ninth Circuit (in whose jurisdiction this case arises) has ruled that even an expansive interpretation of the exemption must remain tethered to its plain language and that to qualify as a “similar file” a document must contain “information similar to that found in a standard personnel file.” *Church of Scientology of California v. U.S. Dept. of the Army*, 611 F.2d 738, 746 (9th Cir.1979).

Similarly, D.C. Circuit recognizes that “Exemption 6 was developed to protect intimate details of personal and family life, not business judgments and relationships. Surely it was not intended to shield matters of such clear public concern as the names of those entering into contracts with the federal government.” *Sims v. CIA*, 642 F.2d 562, 575 (D.C. Cir. 1980), *appl after rmnd*, 709 F.2d 95 (D.C.Cir. 1983), *aff’d in part, rev’d on other grounds*, 471 U.S. 159 (1985). The intimate nature involves subjects such as “marital status, legitimacy of children, identity of fathers of children, medical condition, welfare payments, alcoholic consumption, family fights, reputation, and so on’ falls within the ambit of Exemption 6. *By contrast . . . information connected with professional relationships does not qualify for the exemption.*” *Id.* at 574 (emphasis added).

The data sought in this request are clearly not from “personnel and medical files” and the question of whether the information is “similar” to those categories of documents must be resolved in the negative. The information sought in the stakeholder/landowner lists is merely a collection of names and addresses. This information is in no way “private” or an “intimate detail[] of personal and family life,” thus it is not “similar” to the personnel or medical files expressly protected by Exemption 6. Certainly, nothing in the Pacific Connector/FERC correspondence regarding FOIA request number FOIA-2014-0017 could be construed to be personally private or intimate.

Consequently, as a threshold matter, nothing sought in this FOIA appeal² meets the preliminary standard to invoke FOIA's Exemption 6; an issue that was completely ignored by FERC in its decision. For this reason alone, the withheld information must be released.

However, even if FERC concludes that Exemption 6 applies, there are no privacy interests sufficient to outweigh the public interest inherent in release of the requested information. The question of whether disclosure of the records would constitute a clearly unwarranted invasion of personal privacy requires a balancing of the public's right to disclosure against the individual's right to privacy. *Columbia Riverkeeper*, 650 F.Supp.2d at 1125.

2. Privacy Interest.

First, it must be ascertained whether a protectable privacy interest exists that would be threatened by disclosure. *Reporters Comm. for Free Press*, 489 U.S. at 76. If a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure. *Id.* In its April 21st 2014 letter, exempting the Requested Item #1 from disclosure, FERC does not refer to, nor appear to have used, the balancing process discussed above.³

To understand this issue, it is necessary to identify the type of privacy interest involved. In this instance, it is privacy around the names and addresses of individuals already on a government and industry mailing list. In a case regarding a mailing list generated and used solely by a government agency, the Ninth Circuit found that the privacy interest of individuals already on the mailing list is minimal in light of the mailings already received by the individuals and the mailings already received by the individuals and the similar subject matter of the mailings likely to be received as a result of the disclosure. *Or. Natural Desert Ass'n v. Bibbes*, 83 F. 3d 1168 (9th Cir. 2006) (reversed on other grounds).

Recent case law directly on point supports the full, unredacted disclosure of the requested the stakeholder/landowner lists. In *Columbia Riverkeeper v. FERC*, the Oregon federal district court concluded that the names and addresses of landowners potentially affected by a proposed pipeline could not be withheld under the FOIA's Exemption 6. 650 F. Supp. 2d 1121 (D. Or. 2009). In that case, FERC argued that the landowners had a privacy interest in non-disclosure, but the court concluded that disclosure did not implicate the landowners' privacy interest because they "took no action to get either on or off this list," and therefore the list did not reveal personal information. *Id.* at 1129. Further, the court agreed with the plaintiffs that disclosure of the list was in the public interest because disclosure would shed light on the FERC's activities. *Id.* at 1130. The court in *Columbia Riverkeeper* made it plain that Exemption 6 does not support withholding of information under FOIA requests in cases such as the instant request:

² Although FERC did not address any basis for withholding disclosure of Requested Items #2 - #6, it would be unreasonable to consider "private" the notice letters sought in Requested Item #4. Moreover, it must be beyond dispute that nothing in the scope of Requested Item #5 — documents providing or describing a legal basis or authority for FERC to communicate with Pacific Connector regarding Requesters' November 12, 2013 FOIA request — could be remotely construed to be similar to a personnel or medical file.

³ In fact, FERC's April 21st 2014 letter does not even mention any privacy interest on the part of the listed stakeholders as justification for withholding the requested information; instead, FERC's April 21st 2014 letter only addresses the public interest in disclosure.

FERC has not carried its burden of proving the withheld materials are exempt from disclosure. The evidence does not support the existence of a “clearly unwarranted invasion of privacy” as that statutory term is interpreted in Supreme Court and Ninth Circuit jurisprudence. Nor has FERC carried its burden of proving that the information sought by plaintiffs would not shed light on FERC’s performance of its statutory duties governing notice.

Columbia Riverkeeper, 650 F. Supp. 2d at 1130.

The three other key factors that the court found determinative in *Columbia Riverkeeper* apply equally to this case: 1) First, the court made a factual finding that FERC routinely releases lists similar to those sought in this request. *Id.* at 1126-27 (“FERC has failed to provide any evidence of a reason for treating the Palomar landowner list differently from the Ruby, NorthernStar and Oregon LNG landowner lists.”); 2) Second, FERC provides the landowner lists to private corporations. Here, FERC and Pacific Connector have routinely shared multiple versions of the landowner lists at issue, something the *Columbia Riverkeeper* court found probative as to a lack of privacy interest. *Id.* at 1129, and; 3) There is little risk of harm or embarrassment to the landowners. *Id.* (“FERC has not identified any harm to the landowners resulting from disclosure.”). *Id.* All of these *Columbia Riverkeeper* findings are equally true here and support release of the requested information.

Moreover, Requesters note that disclosure of the requested information would contribute to the public’s understanding of the operations of FERC, and that Requesters need not demonstrate that FERC is failing to carry out its statutory obligations before the information is properly released. Instead, the “relevant public interest is the extent to which disclosure would contribute to the public’s understanding of the activities and operations of the government.” *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 776. Here, Requesters have sought the requested information for the very purpose of determining whether FERC and other federal agencies are complying with the law, namely the public participation elements of the following statutes and their implementing regulations: the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, 40 C.F.R. §§ 1500.2(d) (mandating that agencies “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.”), 1506.6 (establishing particular public participation requirements); the Natural Gas Act of 1938 (“NGA”), 15 U.S.C. § 717f, 18 C.F.R. §§ 157.6(a)(5) (“Applications under section 7 of the Natural Gas Act must conform to the requirements of §§ 157.5 through 157.14.”), 157.6(d) (Landowner notification), 153.3 (incorporating landowner notification requirement of 157.6(d) for natural gas export facility applications), 153.4 (incorporating the procedures required by §§ 157.5, 157.6, 157.8, 157.9, 157.10, 157.11, and 157.12 for natural gas export facility applications), 380.9 (incorporating and implementing NEPA’s public participation regulations); the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1604(d), (f)(4), (g)(3)(F)(iv), (m)(2), 36 C.F.R. § 219(4) (requirements for public participation) and; the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1739(e), 43 C.F.R. § 1610(2) (requirements for public participation). Requesters further intend to review FERC’s enforcement of Pacific Connector’s compliance with 18 C.F.R. §§ 157.6(d) (Landowner notification), 380.12(c)(10) (requiring an application under the NGA to contain “the names and mailing

addresses of all affected landowners specified in § 157.6(d) and certify that all affected landowners will be notified as required in § 157.6(d).”). See, e.g., 40 C.F.R. § 1506.5(a) (“The agency shall independently evaluate the information submitted [by an applicant for use by an agency] and shall be responsible for its accuracy”).

As the court in *Columbia Riverkeeper* explained, “the reasons the documents are sought under FOIA” does not inform whether an invasion of privacy is warranted. 650 F. Supp. 2d at 1129, n.2. Neither FOIA nor the *Columbia Riverkeeper* court’s interpretation of Exemption 6 require the requestor to submit evidence of FERC’s violations of federal law (e.g., failure to provide public notice where such notice is required by law).

In its letter to Requesters indicating that it would only release a redacted copy of the stakeholder list, FERC stated that “it is well established that the names and personal home addresses of private landowners are protected from release under FOIA Exemption 6.” In fact, the case law is split on this question, and as the United States District Court for the District of Columbia recently held, “the sum of these cases establish that where the requester has articulated a legitimate public interest in the information, courts have ordered disclosure of names and addresses, even if such information is associated with financial information, views held by the landowner, or would risk unwanted contact.” *Gilman v. U.S. Dep’t of Homeland Sec.*, CV 09-0468 (BAH), 2014 WL 984309, *10 (D.D.C. Mar. 14, 2014) (releasing the names and addresses of private landowners in the right-of-way of the Mexico-Texas border fence); *but see contra*, *Odland v. FERC*, CV 13-141, 2014 WL 1244773 (D.D.C. 2014).⁴ Indeed, “when the disclosed information would “shed light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to, disclosure is appropriate, even if the Court has recognized a significant privacy interest. In other words, even when a significant privacy interest is at stake, Exemption 6 require[s] a balance tilted emphatically in favor of disclosure.” *Id.* (internal quotations and citations omitted) (citing *Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994); *Stern v. F.B.I.*, 737 F.2d 84, 91 (D.C. Cir. 1984); *News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007) (“The federal courts, including this one, have therefore generally concluded that an agency’s burden under Exemption 6 of showing that disclosure ‘would constitute a clearly unwarranted invasion of personal privacy’ is an onerous one”).

In the present case, the requested information is not associated with financial information or the personal views on the proposed project, and there is no risk of unwanted contact, which places this request squarely within the case law compelling disclosure. *id.*; see also, *Columbia Riverkeeper*, 650 F.Supp.2d at 1126-1130.

To be clear, Requesters inform you that they intend to compare the various iterations of the stakeholder/landowner lists against each other as well as the path of the proposed pipeline to evaluate the accuracy of the information used by FERC to discharge its legal obligations to ensure the accuracy of information provided in support of a natural gas export facility and to enforce the public’s right to fully participate in the siting and permitting review for the Jordan Cove/Pacific Connector project. The *Columbia Riverkeeper* court found this type of public

⁴ *Odland*’s inapplicability is discussed below.

oversight — “double-check[ing]” — supported the public’s access to stakeholder/landowner lists. *Id.* at 1130-31.

We note that ensuring the accuracy of the affected stakeholder/landowner list is not a simple task. This is made clear by the need for Pacific Connector to provide FERC with “several updates” in an attempt to correct the lists. Indeed, FERC’s own regulations recognize the difficulty inherent in the compiling of an accurate affected stakeholder/landowner list by requiring that “[w]ithin 30 days of the date the application [is] filed, applicant shall file an updated list of affected landowners, including information concerning notices that were returned as undeliverable.” 18 C.F.R. §§ 157.6(d)(5). Accordingly, facilitating the public’s oversight of FERC’s ability to ensure the most accurate public notification process — and the associated enhancement of the public’s participation — in the Jordan Cove/Pacific Connector project will foster the congressional intent underlying FOIA.

In the instant case, the mailing list at issue has been used by FERC and Pacific Connector, a private corporation, for sending out information to the affected landowners and stakeholders about the Pacific Connector project. That a private corporation is already contacting the parties named on the list, with or without a request from the recipient to be on or deleted from such a list, demonstrates that the named individuals have no privacy interest regarding their identifying information contained on the list. *Columbia Riverkeeper*, 650 F. Supp. 2d at 1127-1130 (concluding that because “the landowners took no action to get either on or off this list...[and] their presences on the list was involuntary...,” there was no privacy interest implicated by disclosure).

Relatedly, the information contained in the stakeholder/landowner lists can already be derived via resources in the public domain. For example, it is a simple — if time consuming — matter to use information from the Jordan Cove pipeline map to locate the route and the affected property via online resources. *E.g.*, <http://www.ormap.net/index.cfm?opt=maplist>. That lot information can then be checked against county tax lot records to identify the name and addresses of the relevant property owners. *See, e.g.*, for Coos County Oregon: <http://www.co.coos.or.us/Departments/Assessors/AccountSearch.aspx>.

For these reasons, the requested information is already in the public domain and there is therefore no privacy interest reasonably attached to it. When there is no expectation of privacy, there can be no unwarranted invasion of personal privacy under Exemption 6. It is axiomatic that “there is no liability for giving publicity to facts about [a person’s] life that are matters of public record. . . . On the other hand, if the record is one not open to public inspection, as in the case of income tax returns, it is not public and there is an invasion of privacy when it is made so.” RESTATEMENT (SECOND) OF TORTS § 652D, pp. 385-386 (1977).

In sum, FERC has not set forth convincing reasons for assigning a strong privacy interest to the names and addresses of individuals already on a mailing list used by FERC and Pacific Connector.

3. Public Interest.

The only relevant public interest in the FOIA balancing analysis 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 v. Or. Natural Desert Ass’n*, 519 U.S. 355, 355-56 (1997) (quoting *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). In this case, Requesters are seeking the requested information 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 a natural gas export facility and pipeline, and to enforce the public’s right to fully participate in the siting and permitting review for the Jordan Cove/Pacific Connector project.

The Ninth Circuit has affirmed that “there is a significant public interest in knowing with whom the government has chosen to communicate.” *Or. Natural Desert Ass’n v. Bibles*, 83 F.3d at 1171. The mailing list that Requesters seek provides precisely this type of information: allowing the public to see the list that FERC and the Applicant rely on for its communications with “stakeholders” about this project. Disclosure of the mailing list in its entirety furthers the public interest by providing oversight of FERC’s process, ensuring no stakeholders are left out, and ensuring no disparate communication with stakeholders.

For example, disclosing the names and addresses on the list will help the public understand the route of the Pacific Connector pipeline, including the public – and private – resources that are involved with the project. Without route and land ownership information, the public cannot fully understand the pros and cons of the Pacific Connector pipeline. See, e.g., *Gilman v. U.S. Dep’t of Homeland Sec.*, CV 09-0468 (BAH), 2014 WL 984309, *8 (revealing the identities of landowners along path of a border wall’s planned construction route may shed light on, *inter alia*, the impacts on local communities, and thus agency’s implementation of its legal authority). Similarly, disclosing the stakeholder list will allow the public to “double check” whether and how FERC – and its contractors – is engaging the public in the development and environmental review of the project, by allowing Requesters to seek information from those on the stakeholder list about how they were – or were not – contacted by FERC and its contractors. *Id.* at * 7 (noting that the public benefit under FOIA can be “significant” because when requested information can “be used derivatively in order to ‘shed light on government conduct’ on “a topic of considerable public interest”). Indeed, as Requesters include individuals who are themselves private landowners within the pipeline right-of-way, and thus should be on the stakeholder list, unredacted disclosure of stakeholder names and addresses will allow Requesters to reach out to their neighbors, compare the nature and extent of contact with FERC and its contractors, and provide additional information that may not have been provided by project proponents.

In addition, based on Requesters’ experience to date with FERC and the project’s proponents, it is possible – indeed, likely – that some landowners are being unduly and unlawfully pressured by Jordan Cove/Pacific Connector to grant access to their property for natural resource surveys and to consider offers of payment under the threat of eminent domain, when in fact the law does not require landowners to grant access prior to FERC’s issuance of Certificate of Public Necessity and Convenience *and* the issuance of numerous other local, state, and federal permits. Requesters believe that project proponents are leveraging their exclusive access to the stakeholder list to

unfairly target and threaten private landowners, and seek to level the playing field by providing access to unbiased information about the rights of private landowners and the public process currently underway to assess the ecological and socioeconomic impacts of the proposed project. *Gilman*, 2014 WL 984309, at * 8 (holding that “there is great public benefit” in the public release of information regarding “the practices of private contractors” working with an agency that may have disparate impact on communities along a projects route).

In its April 21st 2014 denial letter to Requesters, FERC only makes bare assertions as to the public interest weighing against disclosure. The letter states:

As noted in a recent decision in *Odland v. FERC*, CV 13-141, 2014 WL 1244773 (D.D.C. 2014), *Columbia Riverkeeper* was not applicable because there was ample evidence of notice in the record. *Id.* The Plaintiffs, like in *Columbia 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.*

FERC overplays its hand in citing to *Odland*, which is factually distinguishable from the present FOIA request. In *Odland*, the court explained that *Columbia Riverkeeper* was inapplicable because:

The record already contains ample public document[ation] showing that FERC and Millennium provided notice of the project through local newspapers, open house meetings, and mailings” and through the distribution of “brochures and fliers.” Pls. Surreply at 19–20. Instead, Plaintiffs contend that they need landowner names to determine whether “FERC’s notification procedures were effective.” *Id.* In other words, Plaintiffs do not seek the landowner names and addresses in order to “shed light” on whether FERC sent notice; instead, Plaintiffs seek to determine whether notice was received. Whether notice was received is irrelevant to FERC’s conduct and thus is not a matter of public interest. Because Plaintiffs have not shown that releasing the landowners’ names and addresses would reveal anything about the workings of FERC, there is no public interest in disclosure.

Odland, 2014 WL 1244773, *11 (D.D.C. Mar. 27, 2014). Here, FERC has not demonstrated that there is “ample public documentation” in the record showing how FERC and Jordan Cove/Pacific Connector have provided notice to potentially affected landowners, nor are Requesters seeking the requested information to determine whether “FERC’s notification procedures were effective.” Instead, as described above, Requesters are seeking the requested information 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 a natural gas export facility and pipeline, and to enforce the public’s right to fully participate in the siting and permitting review for the Jordan Cove/Pacific Connector project. The *Columbia Riverkeeper* court, and others such as the *Gilman* court, found this type of public oversight —

“double-check[ing]” — supported the public’s access to stakeholder/landowner lists. *Columbia Riverkeeper* at 1130-31; *Gilman*, 2014 WL 984309 at *6.

Requesters note that disclosure of the requested information would contribute to the public’s understanding of the operations of FERC, and that Requesters need not demonstrate that FERC is failing to carry out its statutory obligations before the information is properly released. Instead, the “relevant public interest is the extent to which disclosure would contribute to the public’s understanding of the activities and operations of the government.” *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 776. Here, Requesters are submitting this information request for the very purpose of determining whether, and how, FERC is complying with numerous environmental and other laws. That said, as the court in *Columbia Riverkeeper* explained, “the reasons the documents are sought under FOIA” does not inform whether an invasion of privacy is warranted. 650 F. Supp. 2d at 1129, n.2. Neither FOIA nor the *Columbia Riverkeeper* court’s interpretation of Exemption 6 require the requestor to submit evidence of FERC’s violations of federal law (i.e., failure to provide public notice where notice is required by law). It is enough to show that release of the information will illuminate the operations or activities of a federal agency.

4. Balancing.

The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on federal agencies. As noted by the Supreme Court, “disclosure, not secrecy, is the dominant objective of the Act.” *Rose*, 425 U.S. at 361. Exemption 6 protects only against disclosure which amounts to a “clearly unwarranted invasion of personal privacy” which connotes a strong presumption in favor of disclosure. *Local 598*, 841 F.2d at 1463.

To deny a request under Exemption 6, then, FERC must determine that Requesters’ request would cause a clearly unwarranted invasion of personal privacy. As discussed above, the personal privacy interest affected by this disclosure is low, as the “personal” information is of a type already in the public sphere, has been released in the past (including when the proposed project was an import facility), and all individuals affected already allegedly receive mailings from FERC and Pacific Connector. Indeed, it is more than a bit ironic that FERC is denying Requesters the same list that is used by the private companies who are proposing to build the pipeline. Again, if access to the stakeholder mailing list would truly create an “invasion of personal privacy,” then this invasion has already been affected by Pacific Connector. The privacy interests at stake in this instance are thus minimal, and FERC has not made even a perfunctory attempt to demonstrate that disclosure of the requested information would result in a clearly unwarranted invasion of personal privacy.

“The legislative history is clear that Exemption 6 was directed at threats to privacy interests *more palpable than mere possibilities*.” *Rose*, 425 U.S. at 381 n. 19 (emphasis added). An agency must show that disclosure “*would* constitute,” as opposed to “could reasonably be expected to constitute” a “*clearly unwarranted*,” as opposed to simply “unwarranted,” invasion of personal privacy. *United States Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. at 756 (comparing enhanced withholding standard under Exemption 6 to lower threshold allowed by Exemption 7(C) (law enforcement/personal privacy), emphasis added). “The phrase ‘clearly

unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." *Rose*, 425 U.S. at 372, *quoting* S.Rep. at 9 (emphasis added). The phrase "clearly unwarranted" is the major restraining feature of Exemption 6 which controls the ability of an agency to withhold information. *Rose*, 425 U.S. at 378-79 & n. 16. Congress retained this language despite strong pressure from the executive branch to relax the "heavy burden" it imposes on agencies seeking to apply the exemption. *Id.* As the *Rose* court explained, "the terms objected to were nevertheless retained, as a 'proper balance,' to keep the scope of the exemption ...within bounds." *Id.* at n. 16 (internal citations omitted).

The case law is uniform that the phrase "clearly unwarranted" in Exemption 6 "instructs the court to tilt the balance in favor of disclosure." *See, e.g., Getman v. NLRB.*, 450 F.2d 670,674 (D.C. Cir. 1971) (Exemption 6 does not bar disclosure of names and addresses of employees eligible to vote in union representation elections because it would not reveal "intimate details" of a "highly personal" nature); *Van Bourg, Allen, Weinburg & Roger v. NLRB*, 728 F.2d 1270, 1274 (9th Cir. 1984) (same). As the *Rose* court concluded, in the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure, and that "strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *Rose*, 425 U.S. at 361; *see also News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d at 1198 ("The federal courts, including this one, have therefore generally concluded that an agency's burden under Exemption 6 of showing that disclosure 'would constitute a clearly unwarranted invasion of personal privacy' is an onerous one").

Even if there may exist some small invasion of privacy, the court must balance that invasion versus the public interest. "The public interest to be weighed against the privacy interest in this balancing test is the extent to which disclosure would serve the 'core purposes of the FOIA by contribut[ing] significantly to public understanding of the operations or activities of the government." *Gilman*, 2014 WL 984309 at *7 (internal citations omitted). In *Gilman*, the DC District Court explained in an analogous context that disclosure of a list of landowners was appropriate, and that the federal government had failed "to consider the extent to which the release of the landowners' names in the aggregate will further public understanding." *Id.* After reviewing applicable Supreme Court and other authority, the court concluded that

A survey of these cases shows that, on balance, when the disclosed information would "'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to,' " *Dep't of Def.*, 510 U.S. at 497, 114 S.Ct. 1006 (citations omitted), disclosure is appropriate, even if the Court has recognized a significant privacy interest. In other words, even when a significant privacy interest is at stake, Exemption 6 "require[s] a balance tilted emphatically in favor of disclosure." *Stern*, 737 F.2d at 91; *see also News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007) ("The federal courts, including this one, have therefore generally concluded that an agency's burden under Exemption 6 of showing that disclosure 'would constitute a clearly unwarranted invasion of personal privacy' is an onerous one").

In considering disclosure of names and addresses of private citizens when such information is associated with citizens' financial information, such as receipt of government benefits, or the value of property and acreage, courts have scrutinized the precise public interest in the information. Upon articulation by a requester of a legitimate public interest in disclosure of names and addresses, courts have required disclosure.

Gilman, 2014 WL 984309 at *8 ("The sum of these cases establish that where the requester has articulated a legitimate public interest in the information, courts have ordered disclosure of names and addresses, even if such information is associated with financial information, views held by the landowner, or would risk unwanted contact," *id.* at *10).

Because the Act and case law counsel disclosure, there is significant public interest in accessing the list to provide oversight as to whom and how FERC is communicating with and considers stakeholders in this process. Even if the disclosure did result in a small "invasion of privacy," this would not be clearly unwarranted because it would result in the realization of the public interest of FOIA: public oversight of federal agencies.

III. Conclusion.

Because FERC has provided no argument to the contrary, and simply applied Exemption 6 with no analysis or balancing, FERC's redaction of the requested information is untenable. We request that FERC immediately disclose the requested "updated stakeholder list" to Requesters without redaction. Moreover, because FERC has utterly failed to address disclosure of Requested Items #2 – #6, that information must be disclosed as well.

Sincerely,



Susan Jane M. Brown, Staff Attorney
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Ronald S. Rosenfeld, M.D. [REDACTED]

March 28, 2014

David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: **Freedom of Information Act Appeal: FOIA No. FY14-45**

Dear Attorney Morenoff:

By letter dated 27 March 2014, Accession No. 20140130-5363 was released to me in a partially redacted form, with Downeast counsel claiming that part of the filing consists of proprietary trade secret and confidential commercial information developed by CH-IV, and that disclosure of this information would cause substantial harm to the competitive position of CH-IV.

After examining the released portion of that filing, I believe there is still considerable information that does not deserve redaction.

In addition to the many redactions in the released document, **all** of the appendices were redacted. I have listed below a few of the particulars which suggest to me that a substantial portion of the redactions are not warranted.

- Appendix F is said to contain drawings of trestle and platform elevation and tank elevations. These structures will be clearly visible to the public, and redaction makes no sense.
- Appendix G is said to contain a copy of the facility plot plan. This is information that has been previously released. It is difficult to understand how release of an updated plan would cause substantial harm to the competitive position of CH-IV.
- In the released document, information about the Vapor Fence Specification, Inspection and Maintenance has been redacted. Again, this is important information which the public has a right to see, in order to independently assess whether this important component of the project is feasible, and what the impact will be on the surrounding communities. These vapor fences are an integral part of the project, and we have a right to ensure before a permit is granted, that, if the project is built, these will be properly maintained.
- In the unredacted portion of the released document, there is a statement that Downeast modeled worst case "horizontal releases". Since trajectories are at a maximum range with a release angle of 45°, it is not clear from the unredacted data why a horizontal release pattern was chosen, nor is it clear why release of the logic and data concerning this choice would be harmful to the competitive position of CH-IV.

I therefore request that an independent evaluation be made by persons not connected with CH-IV or Downeast LNG, in order to assure that only information which would clearly "cause substantial harm to the competitive position of CH-IV" is redacted.

DOWNEAST DOT PHMSA DATA REQUEST

1. *Based on the P&ID it does not appear that the design spill table provided included all components requested. The components to be included are those listed on the FERC failure rate table, i.e., pipe, valve, gasket, expansion joint, truck transfer arm and hose, ship transfer arm, process vessels, heat exchangers, etc. Provide a complete tabulations for the project in either Excel (*.XL*) or character/comma separated values (*.CSV) format of all LNG plant components, including all piping (2-inches or greater in diameter), equipment, and containers for hazardous and flammable fluids. Include all relevant design spill information, including supportive information, such as Hazard Modeling Report, PFDs, H&MBs, P&IDs, plot plans, unit plot plans, elevation drawings, tank drawings, pump curves, etc. The tables should include:*
 - a. *Line segment or component number to identify potential design spill;*
 - b. *Hazardous and flammable fluid service (LNG, NG, propane, ethane, MR, NGL, condensate, hydrogen sulfide, etc.);*
 - c. *Unit plot plan drawing number reference(s) for each component;*
 - d. *Beginning point location (e.g., exchanger out flange);*
 - e. *Ending point location (e.g., pump suction nozzle);*
 - f. *P&ID drawing number reference(s) for each component;*
 - g. *Piping line designation or equipment tag number on P&ID;*
 - h. *Pipe diameter or pipe size, volume of container, or size of equipment;*
 - i. *Length of piping (meters); or number of components (each);*
 - j. *Failure Type or mode based on the Failure Rate Table;*
 - k. *Corresponding Nominal Failure Rates per meter or unit based on the Failure Rate Table;*
 - l. *Calculated Failure Rate based on length or number of units and failure rates per meter or unit listed in the Failure Rate Table;*
 - m. *Failure Rate Comparison of calculated failure rate to the threshold failure rate criterion of 3×10^{-5} failures per year;*
 - n. *Process or storage conditions (e.g., fluid phase (liquid or vapor); pressure (psig); temperature ($^{\circ}$ F); flow rate, (lb/hr); composition of mixed refrigerants); and*
 - o. *Calculated design spill flow rate based on failure modes listed in the Failure Rate Table.*

Downeast Response:

The Piping and Equipment Database that was filed with DOT/FERC on September 27, 2013 included the following methodology:

- All liquid process piping was included in the spreadsheet using the failures described in the Failure Rate Table. Liquid lines were identified as the largest total vapor mass flow rate for spills and Bounding Scenarios,

- [REDACTED]

- All ship transfer arms for LNG carrier loading at the dock were included in the spreadsheet using the failures described in the Failure Rate Table. [REDACTED]

- [REDACTED]

- [REDACTED]

- All liquid process valves were included in the spreadsheet using the failures described in the Failure Rate Table. [REDACTED]

- [REDACTED]

- The Project includes no expansion joints.

- The Project includes no LNG trucking or associated arms/hoses.

- Failures of gaskets for LNG service were included in the database, [REDACTED]

- [REDACTED]

- All liquid process vessels were included in the spreadsheet using the failures described in the Failure Rate Table. [REDACTED]

- [REDACTED]

- [REDACTED]

The following documentation is included:

- The updated Piping and Equipment Inventory Database is included in Appendix A to this response.
- A copy of the facility Process Flow Diagrams (PFDs) are included in Appendix B to this response.
- A copy of the facility Heat and Material Balances (H&MBs) are included in Appendix C to this response.
- A copy of the facility Process and Instrumentation Diagrams (P&IDs) are included in Appendix D to this response.
- A copy of the vendor information for the LP pumps, HP pumps, and vaporizers are included in Appendix E to this response.
- A copy of the trestle and platform elevation and tank elevation drawings are included in Appendix F to this response. [REDACTED]
- A copy of the facility plot plan is included in Appendix G to this response.

Previous Vapor Dispersion Modeling Reports:

Since the project was originally filed in 2007, vapor dispersion results have been presented to FERC in multiple iterations. The following list provides a discussion of the modeling performed by Downeast LNG which included the Bounding Scenarios previously modeled by Downeast: Thermal Radiation and Vapor Dispersion Calculations for Downeast LNG, Exponent Vapor Dispersion Exclusion Analysis and CH-IV Assumptions Report, Downeast LNG – Answers to Information Requests, and Supplemental DEIS Response and Vapor Dispersion Modeling Assumptions for the Marine Unloading Line. These reports are described further below:

Downeast LNG – Answers to Information Requests – filed with FERC on November 13, 2012 (20121113-5487)

On September 11, 2012, FERC requested Downeast to perform additional FLACS modeling runs. The response detailed the results of the additional runs requested by FERC and demonstrated that all vapor dispersion releases met the siting requirements of 49 CFR Part 193.

Supplemental DEIS Response and Vapor Dispersion Modeling Assumptions for the Marine Unloading Line – filed with FERC on May 20, 2013 (20130523-5131)

In the Supplemental DEIS, FERC staff conservatively assumed that the results from a release located at the dock would have the same results as a release located anywhere along the unloading line – which did not include any site specific geometries. As the 1/3 diameter release was the largest liquid spill and provided the highest vapor mass flow rate, this single spill scenario satisfied the requirements for both conveyance and jetting and flashing. The report demonstrated that the worst-case 1/3 diameter release, which could occur anywhere along the transfer line met the siting requirements of 49 CFR Part 193.

2. *The design spill table provided assumes a time-in-use percentage of less than 100% for many of the components. Provide a revised design spill table that assumes a time-in-use percentage of 100% for all components. The time-in-use percentage shall be 100% for each component unless documentation is provided with details indicating the component is isolated, instrumented, maintained, purged, etc., when not in use. The operator's operating and maintenance procedures shall address components utilizing a time-of-use percentage less than 100%. Documentation of time-in-use percentage will be subject to annual inspections reports required by PHMSA.*

Downeast Response:

For all components in the Piping and Equipment Database, the maximum allowable time of use was conservatively assumed to be 100%. This is reflected in the Piping and Equipment Database included in Appendix A to this response.

4. *Has pump run-out been considered and/or included in the analysis of single accidental leakage sources?*

Downeast Response:

Pump run-out occurs when there is a large bore rupture of piping (i.e. guillotine failure) and the pump cannot maintain flow at operating conditions. This large bore rupture will cause the system to rapidly depressurize as the pump operates on its pump curve towards run-out conditions at a lower than operating pressure.

When there is a smaller rupture of piping and there is sufficient flow and back pressure in the system to sustain flow, the system will not completely depressurize and may maintain operating conditions – pump run-out will not occur. Leaks from small ruptures will be governed by the orifice equation which defines the amount of a substance that can fit through a given hole size at a given pressure.

Table 1 details the hole sizes required by the current Piping and Equipment Inventory Database as compared to the hole sizes previously modeled by Downeast:

Table 1 Design Spill Comparison

Plant Location	Greatest Current Hole Size (Per Piping and Inventory Database)	Hole Size Previously Modeled by Downeast LNG / FERC SDEIS
Process Area	6" Diameter Release	6" Diameter Release
Vaporizer Area	2" Diameter Release	3" Diameter Release
Transfer Area	12" Diameter Release	12" Diameter Release

Table 2 illustrates the available process flow rates, the design spills associated with the current guidance for determining hole sizes detailed in the Piping and Equipment Inventory Database, and the design spills previously modeled by Downeast.

Table 2 Design Spill Comparison

Plant Location	Available Process Flow Rate (lb/hr)	Design Spill Flow Rate per Piping and Equipment Database (lb/hr)	Design Spill Previously Modeled by Downeast (lb/hr)
Process Area (6" break of recirculation line)	110,327 lb/hr	110,327 lb/hr	1,715,108 lb/hr (216.1 kg/s)

Plant Location	Available Process Flow Rate (lb/hr)	Design Spill Flow Rate per Piping and Equipment Database (lb/hr)	Design Spill Previously Modeled by Downeast (lb/hr)
Vaporizer Area (2" hole in HP sendout piping)	1,210,026 lb/hr	116,963 lb/hr	306,354 lb/hr (38.6 kg/s)
Transfer Area (12" hole in unloading line)	13,620,696 lb/hr	6,850,000 lb/hr	6,850,000 lb/hr (863 kg/s)

As shown in Table 2 above, the design spills modeled by Downeast are equal or significantly larger than the design spills required under the current criteria. The design spill previously modeled in the process area is 15.5 times larger than the current design spill requirement and the design spill modeled in the vaporizer area is 2.6 times larger than the current design spill requirement.

Therefore, pump run-out conditions have been considered but not included in the calculations because (a) the pumps are able to sustain flow at the current hole sizes and therefore the lines would not depressurize leading to pump run-out and (b) the design spills previously modeled by Downeast are equal or significantly greater than the current design spills based on the current guidance.

5. *Provide a response to the FERC conditions in the Supplemental DEIS reflecting a revised Impoundment Basin design which has the capacity to accommodate the maximum pump run-out flow.*

Downeast Response:

As stated in the March 2013 FERC Supplemental DEIS for the Process Area Impoundment Basin:

"The Process Area Impoundment Basin would serve the curbed area around the LNG storage tanks and the in-tank pumps. In this area, the greatest flow capacity from a single transfer pipe would be from the in-tank pump withdrawal header. Although each tank has space for three pumps, Downeast proposes to install only two pumps in this application, leaving the third pump column for future expansion. After the 2009 draft EIS was issued, Downeast revised the Process Area Impoundment Basin to have dimensions of 24-feet-wide by 24-feet-long by 22-feet-deep. The sump would have a volume of 94,793 gallons to contain a header spill with the two in-tank pumps running $[(4,600 \text{ gpm rated flow}) \times (2 \text{ in-tank pumps}) \times (10 \text{ minutes}) = 92,000 \text{ gallons}]$. The Process Area Impoundment Basin would also be able to contain the 8,300 gallon HP Pump Drum, which is largest process vessel serving the impoundment. However, using the pump rated flow neglects the potential maximum pump run-out flow rate of the in-tank pumps, which would produce a volume of 115,000 gallons $[(5,750 \text{ gpm maximum flow}) \times (2 \text{ in-tank pumps}) \times (10 \text{ minutes})]$. As shown in table 4.12.5-1, the impoundment would need to be increased by more than 20,200 gallons to capture the full sizing spill, which could have an impact on the facility siting analysis."

Downeast will revise the Process Area Impoundment Basin to have dimensions of 24 feet wide by 24 feet long by 27 feet deep. These revised dimensions will provide a capacity of approximately 116,337 gallons which will be able to contain a volume of 115,000 gallons from the potential maximum pump run-out flow rate of the in-tank pumps.

As stated in the FERC Supplemental DEIS for the Vaporizer Area Impoundment Basin:

"The Vaporizer Area Impoundment Basin would be located to the west of the vaporizers and would serve all four of the SCVs. After the 2009 draft EIS was issued, Downeast revised the Vaporizer Area Impoundment Basin to have dimensions of 20-feet-wide by 20-feet-long by 22-feet-deep. The sump would have a volume of 65,828 gallons. There would be no process vessels which would drain to the Vaporizer Area Impoundment Basin. As stated above, we recommend the use of the greatest flow capacity from a single transfer pipe for 10 minutes for sizing impoundments. In this case, this would be the failure of the 16-inch-diameter vaporizer inlet line using the pump run-out flow rate and all four proposed pumps (including the backup pump that would be installed). This sizing spill yields a volume of 75,040 gallons $[(1,876 \text{ gpm maximum pump run-out flow}) \times (4 \text{ pumps}) \times (10 \text{ minutes})]$.

rate) x (4 high-pressure pumps) x (10 minutes)]. As shown in table 4.12.5-1, the impoundment would need to be increased by more than 9,200 gallons to capture the full sizing spill, which could have an impact on the facility siting analysis."

Downeast will revise the Vaporizer Area Impoundment Basin to have dimensions of 20 feet wide by 20 feet long by 26 feet deep. These revised dimensions will provide a capacity of approximately 77,797 gallons which will be able to contain a volume of 75,040 gallons from the potential maximum pump run-out flow rate from all four proposed high pressure sendout pumps.

Downeast notes that these revised impoundment basin dimensions will not change the LNGFIRE3 thermal radiation calculations described in the Supplemental DEIS as the length and width of the impoundment basins remain the same.



FERCMAIL

FOIA-2014-45
Accepted: February 10, 2014
Track 1

Fee waiver requested

EXPEDITED TREATMENT RESPONSE DATE: February 20, 2014

STATUTORY DUE DATE: March 11, 2014

ron@rosenfeldonline.com - Electronic FOIA Request Form

Webform@ferc.gov <webform@ferc.gov>
To: sterling.poteat@ferc.gov, foia-ceii@ferc.gov

Mon, Feb 10, 2014 at 7:36 AM

Title:

First Name: Ronald

Last Name: Rosenfeld

Organization: Individual

Street Address: [REDACTED]

Street Address2: [REDACTED]

City: [REDACTED]

State: [REDACTED]

Zip Code: [REDACTED]

Phone: [REDACTED]

Fax:

Email: [REDACTED]

Request Type: FOIA

Your Request: Receive the material in electronic form (if possible)

Reasonably describe the records you are seeking: eLibrary accession no. 20140130-5363 "Supplemental Information of Downeast LNG, Inc. under Docket Nos. CP07-52 et al" This filer has claimed that the entire contents of this document are considered "commercially-sensitive, business confidential and proprietary information." However, by not releasing information concerning the spills and calculations, the public is deprived of the ability to independently verify the safety of this facility. Please release those parts of the document that are NOT clearly commercially sensitive.

Intake Method: Web

Requested Delivery Method: Electronic Copy

Reason for Expedited: An urgency to inform the public concerning actual or alleged Federal government activity (this option available only for requesters primarily engaged in disseminating information)

Submitter Expedited Justification: The time frame of FERC's review of this application is unknown. But it is mandatory that the public be afforded an opportunity to comment BEFORE this review is complete, so that FERC, and the public have the benefit of this review.

I certify that the above statement(s) concerning expediting processing are true and correct to the best of my knowledge and belief: Yes

Payment of Fees: Request Fee Waiver

Fee Waiver Justification: Public disclosure of, and review of, the safety parameters of this project is clearly in the public interest, and generally required by law. The abuse of the confidential classification by the project proponent should not be a reason for FERC to impose fees on the public.

Date Received: 02-10-2014 07:36:47 AM EDT

E-LIBRARY INDEX SHEET – FOIA-2014-45

Submittal	01/30/2014	CP07-53-000	Supplemental	Applicant
20140130-5363	01/30/2014	CP07-52-000	Information of	Correspondence /
<u>Document Components</u>			Downeast LNG, Inc.	Supplemental/Additional
			under Docket Nos.	Information
			CP07-52 et al.	
			Availability: Privileged	

Federal Energy Regulatory Commission
Washington, D.C. 20426

MAR 27 2014

Re: FOIA No. FY14-45

ELECTRONIC AND REGULAR MAIL

Mr. Ronald Rosenfeld



Dear Mr. Rosenfeld:

This letter responds to your request dated February 10, 2014, filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2013) and the Federal Energy Regulatory Commission's (Commission or FERC) regulations, specifically 18 C.F.R. § 388.108 (2013). Specifically, you requested a copy of Accession No. 20140130-5363, Supplemental Information of Downeast LNG, Inc. (Downeast) related to the Pipeline and Hazardous Materials Safety Administration's (PHMSA) determination regarding the design spill criteria acceptable for the Downeast LNG Project under Docket Nos. CP07-52 et al.

Pursuant to 18 C.F.R. 388.112(d), the Commission afforded Downeast an opportunity to comment on the possible release of the non-public information that you requested. By letter dated February 21, 2014, Counsel for Downeast raised specific objections to the release of portions of the requested material. Downeast asserted that part of the filing consists of proprietary trade secret and confidential commercial information developed by CH•IV International, LLC (CH•IV) that is protected from disclosure under FOIA Exemption 4. 5 U.S.C. § 552(b)(4). Downeast stated that disclosure of this information would cause substantial harm to the competitive position of CH•IV, who developed the data on behalf of Downeast. Downeast also suggested that certain portions be released with redactions.

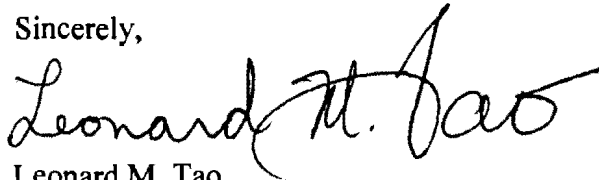
After carefully reviewing your request and the response thereto, I have determined to release the requested document in redacted form with confidential commercial information redacted pursuant to FOIA Exemption 4. To qualify for FOIA Exemption 4 protection, the information must be (1) commercial or financial, (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).

Here, portions of the document are considered proprietary and contain confidential commercial information. The release of those portions of the document could cause substantial harm to the competitive position of CH•IV. Other portions of the responsive material, however, consist of information that otherwise exists in the public record including similar questions that the Commission has sent out on behalf of PHMSA. That information is not eligible for protection under FOIA Exemption 4 and is being released to you.

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." Please send a courtesy 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 more prominent and the last name "Tao" written in a stylized, connected manner.

Leonard M. Tao
Director
Office of External Affairs

Enclosure

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

Federal Energy Regulatory Commission
Washington, D.C. 20426

MAR 20 2014

Re: FOIA No. FY14-45
Notice of Intent to Release

ELECTRONIC AND REGULAR MAIL

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

Dear Ms. Perez:

Pursuant to the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 C.F.R. § 388.112(e) (2013), you are hereby notified that the Commission is intending to release in part material requested by Mr. Ronald Rosenfeld pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012). Specifically, Mr. Rosenfeld seeks a copy of Accession No. 20140130-5363, Supplemental Information of Downeast LNG, Inc. (Downeast) related to the Pipeline and Hazardous Materials Safety Administration's (PHMSA) determination regarding the design spill criteria acceptable for the Downeast LNG Project under Docket Nos. CP07-52 *et al.*

On February 21, 2014, in response to a notice sent by the Commission pursuant to 18 C.F.R. § 388.112(d), you raised specific objections, on behalf of Downeast to the release of portions of the requested material. You assert that part of the filing consists of proprietary trade secret and confidential commercial information developed by CH•IV International, LLC (CH•IV) that is protected from disclosure under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). You state that disclosure of this information would cause substantial harm to the competitive position of CH•IV, who developed the data on behalf of Downeast. You also suggested that certain portions be released with redactions.

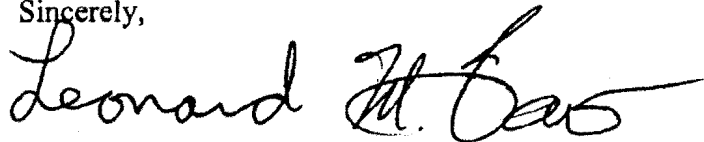
Upon our review and in light of your response, we agree in part that portions of the requested document are exempt under FOIA Exemption 4. To qualify for FOIA Exemption 4 protection, the information must be (1) commercial or financial, (2) obtained from a person, and (3) privileged and confidential. 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).

Here, portions of the document are considered proprietary and contain confidential commercial information. The release of those portions of the document could cause substantial harm to the competitive position of CH•IV. Other portions of the responsive material, however, consist of information that otherwise exists in the public record including similar questions that the Commission has sent out on behalf of the Department of Transportation's Pipeline and Hazardous Material Safety Administration (PHMSA). That information is not eligible for protection under FOIA Exemption 4 and can be released.

Accordingly, your request for privileged treatment is denied in part. The portions of that document we intend to release to the requester with proposed redactions are enclosed for your information, and will be made publicly available no sooner than five (5) calendar days from the date of this letter. *See* 18 C.F.R. § 388.112(e).

Sincerely,



Leonard M. Tao
Director
Office of External Affairs

Enclosure: (1)

cc: Mr. Ronald Rosenfeld (w/o enclosure)



FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

March 10, 2014

Re: Extension of Time,
FOIA No. FY14-45

VIA EMAIL AND REGULAR MAIL

Mr. Ron Rosenfeld



Dear Mr. Rosenfeld:

This letter is in reference to your Freedom of Information Act, 5 U.S.C. § 552 (2012), request filed with the Federal Energy Regulatory Commission (Commission) on February 10, 2014. We have determined that to reply to your request, we need to consult with other components of the agency having substantial subject-matter interest therein. See 18 C.F.R. § 388.110(b)(1) and (b)(4)(iii) (2013).

Therefore, in accordance with the provisions in Section 388.110(b) of the Commission's Rules of Practice and Procedure, we are notifying you that we have extended the time limit to make an initial determination on your request. We expect to be able to send you an initial determination on your request by March 25, 2014.

Cordially,

A handwritten signature in black ink that reads "Kimberly D. Bose".

Kimberly D. Bose
Secretary

cc: Leonard M. Tao
Director
Office of External Affairs
Federal Energy Regulatory Commission
Washington, DC 20426

Ronald S. Rosenfeld, M.D.

P.O. Box 208
281 Birch Point Road
Perry, ME 04667

March 10, 2014

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A
Washington, DC 20426

RE: Extension of Time,
FOIA-2014-45


Dear Ms. Bose:

After I filed this FOIA request, the Federal Energy Regulatory Commission (FERC) established a date for release of the Final EIS of May 15, 2014 and a final permitting decision deadline of Aug 13, 2014.¹ In the absence of the requested information, it is not possible for members of the public, such as me, to comment on the methodology, calculations and results of this new assessment of safety data for this proposed import terminal.

The developer released previous calculation results, which demonstrated that the facility did not meet applicable standards. To claim that these new calculations should be considered "commercially-sensitive, business confidential and proprietary information", thereby preventing public review in a timely fashion, is an abuse of that classification by the developer, for the purpose of preventing public review.

Since you are delaying action on my request while you "consult with other components of the agency having substantial subject-matter interest therein",² I ask that your consultation with these components also include a request to act favorably on various comments and motions made in the docket to delay the FEIS and Permitting Decision Dates by the amount of time between the filing of this confidential information, and its release to the public for review and comment.³⁻⁵

Sincerely,



Ronald S. Rosenfeld, M.D.

CC: Toya Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liason

¹ Issuance 20140212-3019

² Email and attached PDF letter of March 10, 2014 Re: Extension of Time, FOIA No. FY14-45

³ Submittal 20140218-5026

⁴ Submittal 20140220-5012

⁵ Submittal 20140228-5204

Federal Energy Regulatory Commission
Washington, D.C. 20426

FEB 19 2014

Re: FOIA No. FY14-45
Expedited Treatment Response

Mr. Ronald Rosenfeld



Dear Mr. Rosenfeld:

By correspondence received on February 10, 2014, you 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 (2013). Specifically, you sought a copy of the document filed under eLibrary Accession No. 20140130-5363, "Supplemental Information of Downeast LNG, Inc."

You asked the Commission to give your request expedited treatment pursuant to 18 C.F.R. § 388.108(d)(1), which provides that a FOIA requester may seek expedited processing on the basis of a compelling need. In order to demonstrate a compelling need, the requester must show that: (1) failure to obtain the records on an expedited basis can reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or (2) in the case of a requester primarily engaged in the dissemination of information (generally the media), there is an urgency to inform the public concerning Federal Government activity. In addition, under 18 C.F.R. § 388.108(d)(2), the request for expedited treatment must be supported with detailed credible documentation, including a statement certified to be true and correct to the requester's best knowledge and belief.

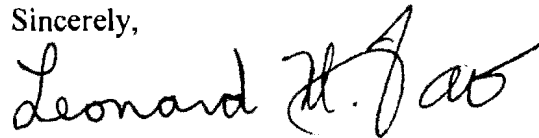
Upon review, your FOIA request fails to make the requisite showing supporting a need for expedited processing. Nothing within this statement (or the request as a whole) speaks to an expected imminent threat to the life or physical safety of an individual. Also, you have not asserted that you are a member of the media primarily engaged in the dissemination of information to the public. *See ACLU v. DOJ*, No. C 04-4447 PJH, 2005 U.S. Dist. Lexis 3763, at *41 (N.D. Cal. March 11, 2005) (explaining that while a main function of the ACLU is the dissemination of information, that is not its primary function). Accordingly, your request for expedited processing must be denied.

FOIA No. FY14-45

Nevertheless, while we cannot give your request priority over other requests, the Commission will endeavor to process it as promptly as possible within the appropriate regulatory time frame. *See* 18 C.F.R. § 388.108(c)(1); *see also* 18 C.F.R. § 388.110(b).

As provided by the Freedom of Information Act 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. This 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." Please 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

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

FEB 12 2014

Re: Submitter's Rights Letter,
FOIA No. FY14-45

VIA ELECTRONIC MAILING

Lisa Tonery
Attorney
Fulbright & Jaworski L.L.P.
666 Fifth Avenue
New York, NY 10103
Lisa.tonery@nortonrosefulbright.com

Dean Girdis
President
Downeast Pipeline, LLC
PO Box 865
Calais, NY 04619-0865
dgirdis@downeastlng.com

Dear Ms. Tonery and Mr. Girdis:

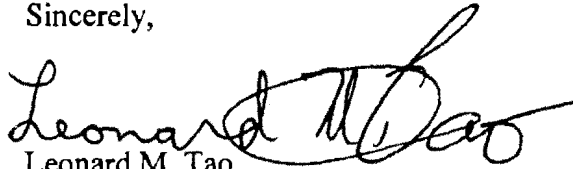
Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission) regulations, 18 C.F.R. § 388.112(d) (2013), you are hereby notified that Mr. Ron Rosenfeld, filed the enclosed request to obtain material regarding Downeast LNG, Inc. found in Docket Nos. CP07-53 and CP07-52 in the Commission's eLibrary database.

Because Downeast LNG has asserted a "privileged" interest in the information requested, we are soliciting your comments on whether its release is required under the FOIA. Your written comments are due within five (5) business days from the date of this letter and should clearly explain whether you oppose the release of this document, or portions thereof, and the rationale for your position.

The Commission will not be persuaded by conclusory statements as to why the information deserves protection. The Commission may construe a non-response as evidence that the submitter does not object to releasing the document. The Commission encourages filers to consider negotiating with the requester to provide the information directly to the requester, where appropriate. Please notify the Commission if you elect to provide the information directly to Mr. Rosenfeld.

Downeast comments, if any, may be mailed to the undersigned at the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Your comments may also be mailed electronically to the email address provided below or facsimiled to (202) 208-2106. If you have any questions regarding this matter, please contact Ms. Toyia Johnson of my staff by phone at (202) 502-6088 or e-mail to foia-ceii@ferc.gov.

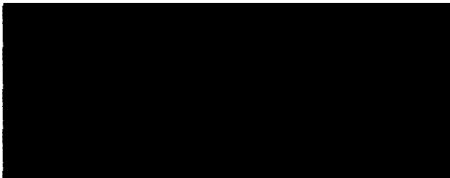
Sincerely,

A handwritten signature in black ink, appearing to read "Leonard M. Tao", written over a horizontal line.

Leonard M. Tao
Director
Office of External Affairs

Enclosure

cc: Mr. Ron Rosenfeld



Archived: Tuesday, April 01, 2014 7:27:59 AM

From: toyia.johnson@ferc.gov

Sent: Friday, March 28, 2014 11:15:03 AM

To: Ron Rosenfeld

Cc: Perez, Tania; Tonery, Lisa; dgirdis@downeastlng.com; FOIA CEII

Subject: CLARIFICATION: DETERMINATION LETTER - FOIA-2014-45 Ronald Rosenfeld -

Importance: Normal

Attachments:

image001.gif ; image003.gif ; image002.gif ; image004.gif ;

Mr. Rosenfeld

Please be advised that portions of the "Supplemental Information of Downeast LNG, Inc." (accession number 20140130-5363) were redacted pursuant to exemption 4. The remainder of this document is also being withheld pursuant to exemption 4.

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." Please send a courtesy copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toyia Johnson

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
Toll Free: 1-866-208-3372



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On Thu, Mar 27, 2014 at 8:40 PM, Ron Rosenfeld <[REDACTED]> wrote:

Dear Toyia Johnson,

Thank you for acting on my FOIA request 2014-45. However, only a portion of the (redacted) document was released. In particular, none of the appendices (redacted or otherwise) were included in the Enclosure, even though they are part of the filing requested.

Can this oversight be taken care of administratively and expeditiously? Or do I have to file a written appeal.

Sincerely,

Ronald S Rosenfeld

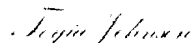
From: toyia.johnson@ferc.gov [mailto:toyia.johnson@ferc.gov] **On Behalf Of** FOIA CEII
Sent: Thursday, March 27, 2014 6:12 PM
To: Ron Rosenfeld
Cc: FOIA CEII; Perez, Tania; Tonery, Lisa; dgirdis@downeasting.com
Subject: DETERMINATION LETTER - FOIA-2014-45 Ronald Rosenfeld - 3-27-14

Mr. Rosenfeld

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) FOIA-2014-45. A copy of this letter has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,



Toyia Johnson

Federal Energy Regulatory Commission

Office of External Affairs

FOIA Public Liaison

(202) 502-8389

Toll Free: 1-866-208-3372



CC:

Tania Perez

tania.perez@nortonrosefulbright.com

Lisa Tonery (email only)

lisa.tonery@nortonrosefulbright.com

dgirdis@downeastlng.com (email only)

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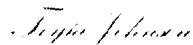
Archived: Tuesday, April 01, 2014 7:27:58 AM
From: toyia.johnson@ferc.gov
Sent: Tuesday, March 11, 2014 6:21:56 PM
To: Ron Rosenfeld
Cc: FOIA CEII
Subject: CONFIRMATION OF RECEIPT - FOIA-2014-45 Ronald Rosenfeld
Importance: Normal
Attachments:
image004.gif ;image001.gif ;image003.gif ;image002.gif ;

Mr. Rosenfeld

The Federal Energy Regulatory Commission received your email regarding FOIA-2014-45.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,



Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
Toll Free: 1-866-208-3372



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On Mon, Mar 10, 2014 at 10:20 PM, Ron Rosenfeld [REDACTED] > wrote:

Ms. Johnson,

Attached find my response to the Extension Letter. Thank you for considering the points I make in it.

Ronald S. Rosenfeld

From: toyia.johnson@ferc.gov [mailto:toyia.johnson@ferc.gov] **On Behalf Of** FOIA CEII
Sent: Monday, March 10, 2014 4:39 PM
To: [REDACTED]
Cc: FOIA CEII
Subject: EXTENSION LETTER - FOIA-2014-45 Ronald Rosenfeld 3-10-14

Mr. Rosenfeld

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) FOIA-2014-45. A copy of this letter has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toyia Johnson

Toyia Johnson

Federal Energy Regulatory Commission

Office of External Affairs

FOIA Public Liaison

(202) 502-8389

Toll Free: 1-866-208-3372



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and delete the original message and attachments from your computer and other electronic devices.



This email is free from viruses and malware because avast! Antivirus protection is active.

Archived: Tuesday, April 01, 2014 7:27:59 AM
From: Ron Rosenfeld
Sent: Thursday, March 27, 2014 8:40:00 PM
To: 'FOIA CEII'
Cc: 'Perez, Tania'; 'Tonery, Lisa'; 'dgirdis@downeastlng.com'
Bcc: Robert Godfrey
Subject: RE: DETERMINATION LETTER - FOIA-2014-45 Ronald Rosenfeld - 3-27-14
Importance: Normal

Dear Toyia Johnson,

Thank you for acting on my FOIA request 2014-45. However, only a portion of the (redacted) document was released. In particular, none of the appendices (redacted or otherwise) were included in the Enclosure, even though they are part of the filing requested.

Can this oversight be taken care of administratively and expeditiously? Or do I have to file a written appeal.

Sincerely,

Ronald S Rosenfeld

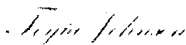
From: toyia.johnson@ferc.gov [mailto:toyia.johnson@ferc.gov] **On Behalf Of** FOIA CEII
Sent: Thursday, March 27, 2014 6:12 PM
To: Ron Rosenfeld
Cc: FOIA CEII; Perez, Tania; Tonery, Lisa; dgirdis@downeastlng.com
Subject: DETERMINATION LETTER - FOIA-2014-45 Ronald Rosenfeld - 3-27-14

Mr. Rosenfeld

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) FOIA-2014-45. A copy of this letter has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,



Toyia Johnson

Federal Energy Regulatory Commission

Office of External Affairs

FOIA Public Liaison

(202) 502-8389

Toll Free: 1-866-208-3372



CC:

Tania Perez

tania.perez@nortonrosefulbright.com

Lisa Tonery (email only)

lisa.tonery@nortonrosefulbright.com

dgirdis@downeastlng.com (email only)

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Archived: Tuesday, April 01, 2014 7:27:59 AM

From: toyia.johnson@ferc.gov

Sent: Thursday, March 27, 2014 6:12:10 PM

To: Ron Rosenfeld

Cc: FOIA CEII; Perez, Tania; Tonery, Lisa; dgirdis@downeastlng.com

Subject: DETERMINATION LETTER - FOIA-2014-45 Ronald Rosenfeld - 3-27-14

Importance: Normal

Attachments:

DETERMINATION LETTER - FOIA-2014-45 Ronald Rosenfeld 3-27-14.pdf; ENCLOSURE - FY14-45 redacted document.pdf; FOIA-2014-45 Ron Rosenfeld.pdf;

Mr. Rosenfeld

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) FOIA-2014-45. A copy of this letter has also been mailed to you via the U.S. Postal Service.

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Sincerely,

Toyia Johnson

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
Toll Free: 1-866-208-3372



CC: Tania Perez
tania.perez@nortonrosefulbright.com

Lisa Tonery (email only)
lisa.tonery@nortonrosefulbright.com

dgirdis@downeastlng.com (email only)

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Archived: Tuesday, April 01, 2014 7:27:58 AM

From: toyia.johnson@ferc.gov

Sent: Wednesday, February 19, 2014 11:23:17 AM

To: [REDACTED]

Cc: FOIA CEII

Subject: EXPEDITED TREATMENT RESPONSE - FOIA-2014-45 - Ronald Rosenfeld - 2-19-14

Importance: Normal

Attachments:

EXPEDITED TREATMENT RESPONSE - FOIA-2014-45 Ronald Rosenfeld - 2-19-14.pdf ;

Mr. Rosenfeld

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) request number **FOIA-2014-45**. A copy of this letter has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toyia Johnson

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
Toll Free: 1-866-208-3372



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Archived: Tuesday, April 01, 2014 7:27:58 AM

From: Ron Rosenfeld


Sent: Monday, March 10, 2014 10:20:00 PM

To: 'FOIA CEII'; 'toyia.johnson@ferc.gov'

Subject: RE: EXTENSION LETTER - FOIA-2014-45 Ronald Rosenfeld 3-10-14

Importance: Normal

Attachments:

Mar 2014 comment on delay of FOIA action.pdf 

Ms. Johnson,

Attached find my response to the Extension Letter. Thank you for considering the points I make in it.
Ronald S. Rosenfeld

From: toyia.johnson@ferc.gov [mailto:toyia.johnson@ferc.gov] **On Behalf Of** FOIA CEII

Sent: Monday, March 10, 2014 4:39 PM

To: 

Cc: FOIA CEII

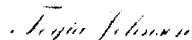
Subject: EXTENSION LETTER - FOIA-2014-45 Ronald Rosenfeld 3-10-14

Mr. Rosenfeld

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) FOIA-2014-45. A copy of this letter has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,



Toyia Johnson

Federal Energy Regulatory Commission

Office of External Affairs

FOIA Public Liaison

(202) 502-8389

Toll Free: 1-866-208-3372



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Archived: Tuesday, April 01, 2014 7:27:58 AM
From: toyia.johnson@ferc.gov
Sent: Monday, March 10, 2014 4:39:12 PM
To: [REDACTED]
Cc: FOIA CEII
Subject: EXTENSION LETTER - FOIA-2014-45 Ronald Rosenfeld 3-10-14
Importance: Normal
Attachments:
EXTENSION LETTER - FOIA-2014-45 Ron Rosenfeld - 3-10-14.pdf;

Mr. Rosenfeld

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) FOIA-2014-45. A copy of this letter has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toyia Johnson

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
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Archived: Tuesday, April 01, 2014 7:27:58 AM
From: foia-ceii@ferc.gov
Sent: Monday, February 10, 2014 11:04:26 AM
To: [REDACTED]
Cc: foia-ceii@ferc.gov
Subject: FOIA Acceptance Letter
Importance: Normal

Ronald Rosenfeld

The Federal Energy Regulatory Commission received your Freedom of Information Request (FOIA). This request has been assigned reference number FOIA-2014-0045

A response regarding expedited treatment will be provided within ten calendar days or by 2/20/2014. If expedited treatment is not granted, every effort will be made to respond to your FOIA request within twenty business days or by 3/11/2014.

If you have any questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202-502-6088.

Sincerely,

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
Toll Free: 1-866-208-3372

Archived: Tuesday, April 01, 2014 7:27:58 AM
From: toyia.johnson@ferc.gov
Sent: Wednesday, February 12, 2014 7:18:42 PM
To: Tonery, Lisa; dgirdis@downeastlng.com
Cc: FOIA CEII; ron@rosenfeldonline.com; Perez, Tania
Subject: NOTICE OF FOIA REQUEST -OPPORTUNITY TO COMMENT - FOIA-2014-45 Ronald Rosenfeld 1-12-14
Importance: Normal
Attachments:
NOTICE OF FREEDOM OF INFORMATION ACT REQUEST - OPPORTUNITY TO COMMENT - FOIA-2014-45 Ronald Rosenfeld - 2-12-14.pdf;FOIA-2014-45 Ron Rosenfeld.pdf;

Lisa Tonery
Dean Girdis

The Federal Energy Regulatory Commission (FERC) received a Freedom of Information Act (FOIA) request to seeking to obtain information that you or your client have submitted at FERC. Please find attached a letter and a copy of the FOIA request. A copy of this information has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toyia Johnson

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
Toll Free: 1-866-208-3372



CC: Ronald Rosenfield
[REDACTED]

Tania Perez (email only)
tania.perez@nortonrosefulbright.com

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Archived: Tuesday, April 01, 2014 7:27:59 AM
From: toyia.johnson@ferc.gov
Sent: Thursday, March 20, 2014 4:42:56 PM
To: Perez, Tania
Cc: FOIA CEII; Tonery, Lisa; dgirdis@downeastlng.com; Ron Rosenfeld
Subject: NOTICE OF INTENT TO RELEASE - FOIA-2014-45 Ronald Rosenfeld - 3-20-14
Importance: Normal
Attachments:
NOTICE OF INTENT TO RELEASE - FOIA-2014-45 Ronald Rosenfeld - 3-20-14.pdf ;

Ms. Perez

Please find attached a letter from the Federal Energy Regulatory Commission (FERC) regarding Freedom of Information Act (FOIA) **FOIA-2014-45**. A copy of this letter has also been mailed to you via the U.S. Postal Service.

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEII Service Center by email at foia-ceii@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toyia Johnson

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
(202) 502-8389
Toll Free: 1-866-208-3372



CC: Ronald Rosenfeld (w/o enclosures)
[REDACTED]

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The Street

copy

July 7, 2014

David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Freedom of Information Act Appeal

Dear Mr. Morenoff:

On April 2, 2014, Mr. Dan Freed, one of our reporters, requested documents from the Federal Energy Regulatory Commission ("F.E.R.C." or "Agency") under the Freedom of Information Act ("FOIA"). His request was assigned the following identification number: FY14-62. On May 16, 2014, he received a response to his request in a letter signed by Leonard Tao, Director of Office of External Affairs. This letter is an appeal the denial of his request. A copy of his original FOIA request and the Agency's determination, which is the subject of this appeal, is enclosed for your convenience.

We make this appeal pursuant to 5 U.S.C. § 552(a)(6), 36 C.F.R. § 200.11, and 7 C.F.R. § 1.8(a), concerning the Agency's refusal to disclose a particular documents within its control. The Agency's refusal to disclose this document violates the federal Freedom of Information Act (FOIA or Act), 5 U.S.C. § 552et seq., as amended.

INTRODUCTION

Our reporters original request was for electronic copies of FERC records containing the name Blythe, the search identified 15,000 documents, which we realize is extensive and are willing to narrow the search, however, the Agency specifically identified a 70-page staff memo that is of particular interest to us. This 70-page staff memo ("Memo") concerns allegation of unlawful market activity by JP Morgan. Unfortunately, the Agency has refused to disclose this document. The Agency relies on FOIA exemptions 4 (5 U.S.C. § 552(b)(4)) and 7 (5 U.S.C. § 552(b)(7)), to deny the release of Memo.

We do not agree that the Memo is exempt from disclosure and we ask that you reverse the denial of the release of Memo and waive all associated fees. We further request that if any portions of the requested documents are withheld, you should describe the deleted material in detail and

specify the statutory basis for the denial as well as your reasons for believing that the alleged statutory justification applies in this instance. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Additionally, we ask that those portions of the documents which may indeed be properly exempted from disclosure, by Exemptions 4 and 7, be released pursuant to your powers of discretionary release under 36 C.F.R. § 200.11(b), and 7 C.F.R. § 1.17(b). Further, if portion or portions of the Memo may be properly exempt from disclosure, we ask that you release areas that are not exempted under the "segregable portions" clause of the Act, which states that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt. . . ." 5 U.S.C. § 552(b).

FOIA EXEMPTION 4

The Agency claims that the Memo, which it obtained during an investigation of JP Morgan by the Commission's Office of Enforcement for allegations of unlawful market activity is exempted under FOIA Exemption 4, 5.U.S.C. § 552(b)(4). We respectfully disagree.

First, for a Memo to be exempted under Exemption 4 of FOIA, it must meet three requirements: (1) be commercial or financial in nature; (2) be obtained from a person; AND (3) be privileged or confidential. All three elements must be met. We contend that the Memo meets none of the elements required.

1. Commercial and Financial Nature

Courts usually apply the terms "commercial" and "financial" to information as it relates to business or trade. The fact that the Memo includes "proprietary information concerning the trading strategies" does not necessarily meet the standard for "commercial and financial". Basic financial theory does not conclusively make a document "commercial or financial" in nature. Courts have consistently construed the broad terms of "financial" and "commercial" under this Exemption as meaning a "commercial nature" or serves a "commercial function". Skybridge Spectrum Found. v. Fed. Comm'n's Comm'n, No. 10-01496, 2012 WL 336160 at *12 (D.D.C. 2012).

The court of Pub. Citizen Health Research Group, has clarified that in order for a document to be classified as "commercial and financial" the requester of the document must have a "commercial interest" in said document. Pub. Citizen Health Research Group v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983)(finding that the information requested was commercial information because those companies have a commercial interest in such information). We have no commercial interest in the Memo, and we only seek the document on the basis of research and for information that would be to the best interest of the public good.

2. Obtained from a Person

The Agency claims that Memo is being "withheld because it contains information that reflects FERC enforcement techniques and procedure that are confidential", under Exemption 7 of FOIA. See, Letter denying FOIA request, paragraph 6. It is clear that since the Agency is claiming this exemption, the Memo was either generated by the Agency or for the Agency, in which case the

Agency cannot meet the second element, "obtained from a person". "Person" has been defined by FOIA as not extending to agencies. Therefore, if the information is found to have been prepared by the Agency or generated for the Agency during its investigation, then the Memo was not obtained from a person and cannot be afforded Exemption 4. Pohlman, Inc. v. SBA, No. 4:03-01241, slip op. at 20 (E.D. Mo. Sept. 30, 2005).

3. Privileged or Confidential

The third element requires that the Memo be "privileged or confidential". We contend that this element has not been met by the Agency. The test established by National Parks is an objective one. National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974). Information is confidential if the information is likely to (1) impair the Government's ability to obtain necessary information in the future, or (2) causes substantial harm to the competitive position of the person from whom the information was obtained. However, for these prongs to apply, the Agency must show that the Memo was submitted voluntarily, as the court in Patterson has established that if information is not voluntarily submitted to an agency than it is not confidential. Patterson v. McLean Credit Union, 491 U.S. 164 (1989).

Additionally, in order for there to be "substantial harm" by the release of the Memo the Agency must show that the harm flows "from the affirmative use of proprietary information by competitors" and that it should not be taken to mean simply any injury to competitive position. Pub. Citizen Health Research Group v. FDA. Additionally, evidence of actual competitive and the likelihood of substantial competitive injury needs to be shown. CNA Financial Corp. v. Donovan, 830 F.2d 1132, 1152 (D.C. Cir. 1987). Furthermore, the courts have found that in making an 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. GC Micro Corp. v. Defense Logistics Agency, 33 F.3d 1109, 1113 (9th Cir. 1994). Finally, FOIA's strong presumption in favor of disclosure trumps the right to privacy. Martin Marietta Corp. v. Dalton, 974 F. Supp. 37, 41 (D.D.C. 1997).

For the forgoing reasons stated, we contend that the Memo does not meet the prima facie elements to be exempted under Exemption 4 of FOIA.

FOIA Exemption 7

The Agency stated that Memo is also withheld under FOIA Exemption 7, "records or information compiled for law enforcement purposes", 5 U.S.C. § 552(b)(7). Specifically, that the withholding of the Memo is covered under FOIA Exemption 7(E), and stating that the Agency is only required to demonstrate logically how the release of the requested information might create a risk of circumvention of the law. The Agency relies on Blackwell and claims that the Memo would reveal enforcement staff strategy and focus in addressing potential violations of law. Blackwell v. FBI, 646 F.3d. 37, 42 (C.D. Cir. 2011). However, the Agency must show that the document was compiled for law enforcement purposes and must pass a two-part rational nexus test.

First, the investigatory activity that gave rise to the document must relate to the enforcement of federal law or to the maintenance of national security. Pratt v. Webster, 673 F.2d. 408, 419-21 (D.C. Cir. 1982). The Agency is required to establish that it acted within its principal function of law enforcement, rather than merely engaging in general monitoring of private individual activities. Id. Second the agency must establish a nexus between that investigation or one of its law enforcement duties through "information sufficient to support at least 'a colorable claim' of its rationality". Id. It is our argument that the Agency fails to show "logically" how releasing the requested information would create a risk of circumventing the law without the explanation being too vague. PHE, Inc. v. Department of Justice, 983, F.2d 248, 252-253 (D.C. Cir. 1993).

In addition, the Agency claims that FERC enforcement techniques and procedures are confidential; however, courts have held that investigative techniques that are routine and generally known to the public do not apply for Exemption 7(E). Rosenfeld v. U.S. Department of Justice, 57 F.3d 803, 815 (D.D.C. 1989). The Agency must show that the Memo in fact shows techniques and routines that are not known to the public, in order to claim it confidential.

For the forgoing reasons stated, we contend that the Memo does not meet the elements required for Exemption 7 of FOIA.

Portion Release

It is our belief that the Memo, is subject to FOIA's mandatory release provisions. The Agency's suggestion that the FOIA allows the withholding of entire documents merely because a portion may be exempt from disclosure overlooks entirely the "segregable portions" clause of the Act. 5 U.S.C. § 552(b). Indeed, FOIA provides that if only portions of a requested file are exempted from release, the remainder must still be released. Therefore, should it be found that the Memo does meet the established exemptions, we request that we be provided with all non-exempt portions which are reasonably segregable, since the applicable section of the Code of Federal Regulations also includes the directive that:

In the event the records requested contain some portions which are exempt from mandatory disclosure and others which are not, the official responding to the request shall insure that all nonexempt portions are disclosed, and that all exempt portions are identified according to the specific exemption or exemptions which are applicable. 7 C.F.R. § 1.8(b), emphasis added.

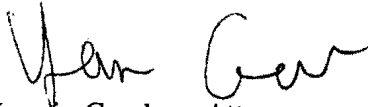
Finally, we assert that it would be in the public's best interest that the Memo be disclosed, and we respectfully request that the Agency release the Memo. 7 C.F.R. § 1.17(b). Release of materials is to be "considered in the public interest if the benefit to the public in releasing the document outweighs any harm likely to result from disclosure." Id.

CONCLUSION

It appears that the Agency has acted arbitrarily and capriciously by improperly denying the disclosure of the Memo.

In the event this appeal is denied, the Agency is required to provide a written response describing the reasons for the denial, names and titles of each person responsible for the denial, and the procedures required to invoke judicial assistance in this matter. 5 U.S.C. § 552(a)(6)(ii), 7 C.F.R. § 1.8(d). If this appeal is denied or the Agency's response is not forthcoming within a reasonable time frame, we reserve our rights under FOIA to seek judicial review, including the award of attorney's fees. We await your prompt reply.

Sincerely,


Yasmin Gamboa, Attorney

Enclosure (2)

Cc: Charles A. Beamon, Associate General Counsel, General and Administrative Law

Federal Energy Regulatory Commission
Washington, DC 20426

MAY 16 2014

Re: FOIA No. FY14-62
Rolling Response

VIA EMAIL AND REGULAR MAIL

Mr. Daniel Freed
TheStreet
14 Wall Street
Brooklyn, NY 10005

Dear Mr. Freed:

On April 2, 2014, pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and the Federal Energy Regulatory Commission's (FERC or Commission) FOIA regulations, 18 C.F.R. § 388.110 (2014), you sought electronic copies of all FERC records from 2011 – 2014 containing the name Blythe Masters.

Voluminous Documents

To date a search of the Commission's non-public files has identified approximately 15,000 documents responsive to your request. Staff is dedicating a designated amount of time each week to processing your FOIA request in Track Three (3) on a rolling basis.¹ It is anticipated that your request will take years to complete. I encourage you to contact the FOIA liaison, Toyia Johnson, to discuss ways of narrowing your request.

Among the 15,000 documents, staff has specifically identified an approximately 70-page staff memorandum (Memo) that contains the name Blythe Masters. The Memo

¹ Track Three requests are "complex and/or voluminous records requiring a significant search and/or review." See 18 C.F.R. § 388.108(b)(iii). See also *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 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.)

concerns allegations of unlawful market activity by JP Morgan. As explained below, the Memo is protected from disclosure pursuant to FOIA Exemptions 4 and 7.

FOIA Exemption 4

The Memo contains confidential detailed financial information that is protected from disclosure by FOIA Exemption 4, 5 U.S.C. § 552(b)(4). FOIA Exemption 4 covers "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*) ("To summarize, commercial or financial information is 'confidential' for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.")

In particular, the Memo contains proprietary information concerning the trading strategies of various individual employees of JP Morgan Chase that was obtained during an investigation of JP Morgan Chase by the Commission's Office of Enforcement. Release would likely impair the Commission's ability to obtain such information in the future. The purpose of Commission enforcement action is to prosecute or address wrongdoing without unnecessarily disclosing an entity's internal confidential financial information. The information also relates to confidential settlement negotiations. 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).

FOIA Exemption 7

FOIA Exemption 7 protects from public disclosure "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(7). 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." 5 U.S.C. § 552(b)(7)(E). The Memo that is being withheld contains information that consists of, or reflects, FERC enforcement techniques and procedures that are confidential and must remain so in order to preserve their effectiveness. As such, the Memo is covered by 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."). Disclosure of the Memo would reveal enforcement staff's strategy and focus in addressing potential violations of law and is being withheld.

As provided by 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. 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." Please 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 Tao", with a stylized flourish at the end.

Leonard Tao
Director
Office of External Affairs

Kimberly Bose, David Morenoff, and Charles Beamon
Secretary Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Regarding both a Freedom of Information Act Appeal of FERC FOIA #FY14-70 and a determination by the Commissioners whether the following is properly a FOIA issue or an Order 890 issue

Dear Ms. Bose and Gentlemen:

I filed a FOIA request which can be fairly summarized and reviewed through the attached file entitled "FOIA Denial." I am filing this as a public intervention and protest in this docket rather than as only an administrative appeal pending the Commissioners' determination whether they decide to abrogate their authority to more properly determine the appropriateness of MISO's privileged unreserved use filing. I see this as an Order 890 issue rather than as an FOIA exemption 4 issue but filed the FOIA request initially because it was easier for a private citizen.

FERC expended nearly 100 paragraphs (if I recall correctly) of electronic ink on unreserved use in the Order 890 series, yet has given the industry nearly a free pass on conforming to those paragraphs. By intervening and protesting, I hope the Commissioners re-assert the authority they spent so much time giving themselves in Order 890¹. Otherwise, this would be a prime opportunity for the Commissioners to rescind or alter those paragraphs.

The basic question is whether FERC contemplated that any entity would make its annual unreserved use filing as a privileged filing. If so, should this have been discussed during the course of Order 890 itself? I believe FERC did not contemplate or expect this, otherwise it would have been broached during Order 890. If FERC did expect this, I as a private citizen wonder why FERC did not suggest this as ripe for comment. Did any entity, and especially MISO, expect at the time of Order 890 that this annual compliance filing would be made as privileged. If so, why did no entity broach this subject for discussion? If it was not discussed and determined then, is it proper to make the filing privileged now, so many years later? Essentially, did subject entities, including MISO, waive their right to make a privileged filing later by failing to broach the subject in the course of the Order 890 proceedings? Is there an alternative way to make a public filing that would not implicate FOIA exemption 4 yet release sufficient information to the public? Finally, if MISO was correct in filing this information as privileged, did SPP in FERC Docket No. OA08-5-005 violate its own tariff or confidentiality provisions by releasing what otherwise should have been protected?

I do not have the answers to these queries but would prefer the Commissioners answer them, rather than employees of the Commission. I would expect this not to be even considered by the Commission since the docket itself is not open to notice. Therefore, some of the following arguments are meant to be used during the expected need for an administrative appeal. I hope this filing satisfies the 45 day requirement for appeal, pending Commission action.

¹ For instance, has FERC ever done an inventory of entities complying with the annual compliance filing requirement itself? My perusal of PJM's tariff indicates it has a penalty yet has never made the annual compliance filing. I could be wrong on both counts but think FERC should address.

- 1) I hope the Commission would reconsider the odd position of one RTO/ISO filing this information publicly (SPP) and another privileging it (MISO).
- 2) It looks like the exemption staff gave deference to MISO in its denial letter to me. The following is meant to undermine some of that deference to MISO specifically regarding its understanding of Order 890's unreserved use filing rules, rather than undermine exemption 4 and the *National Parks* standard.
 - a) As mentioned above, MISO did not raise this issue at the time of Order 890 so seemingly waived it.
 - b) MISO has failed to make the annual compliance filing in three years, as noted in footnote 9 of its filing in this docket dated May 30, 2014.
 - c) The May 30 filing itself further demonstrates that MISO should not be given any deference in its understanding and interpretation of the filing requirements clearly stated in the Order 890 series.
 - d) MISO had to make an errata filing in this same docket on April 21, 2014, where it corrected the unreserved use numbers. It released the name of either an offender or recipient of unreserved use charges (TVA), somewhat undermining its arguments. Furthermore, this sloppiness continues the pattern of not fully complying with Order 890, which causes me to struggle with giving deference to its unique decision to privilege this information (Other entities have complied with the filing requirements in a timely manner AND released the information).
- 3) Finally, I would argue that deference in making a favorable ruling should be afforded to me personally. I alluded to the Commission's seeming nonchalance regarding unreserved use and its giving of a (nearly) free pass. The only time it has not given a free pass was my decision to report an entity to the FERC hotline regarding failure to enforce its unreserved use provisions.² Therefore, the only time FERC has expressed interest in this issue that it spent so much time on discussing in Order 890 is when I personally reported it. In that case, I was correct and I believe in this case MISO should publicly file its annual unreserved use report.

If MISO is correct that its filing should remain privileged, I at least hope FERC takes this as an opportunity to revisit those paragraphs in Order 890 and whether they are still necessary. If so, it should do a better job enforcing the provisions and ensuring that all entities have the knowledge that they have the right to privilege this information, no matter how "innocuous."³

Please let me know whether the Commissioners will take up this issue.

Sincerely,

//s//

Eric S. Morris

² See FERC Docket No. IN13-2

³ See page 2 of MISO's April 28 letter (Midcontinent Independent System Operator, Inc. Supplemental Information on Annual Compliance Report Docket No. OA08-14-008) in this docket

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

JUN 09 2014

Re: FOIA No. FY14-70

VIA REGULAR MAIL

Mr. Eric Morris
1075 Arlington Ct
Indianapolis, IN 46280
ericmorris@hotmail.com

Dear Mr. Morris:

This is a response to your letter dated April 16, 2014, filed pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *amended by* OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, and the Federal Energy Regulatory Commission's (Commission) regulations, 18 C.F.R. § 388.108 (2014). You requested a copy of the "privileged information contained within MISO's unreserved use filing made April 15, 2014, in docket OA08-14-008." The document that you are requesting consists of Midcontinent Independent System Operator, Inc.'s (MISO) unreserved use penalties and disbursements filed in docket OA08-14-008 (unreserved use report).

Pursuant to 18 C.F.R. § 388.112(d), the Commission afforded MISO an opportunity to comment on the possible release of the non-public data you requested. By letter dated April 28, 2014, MISO informed Commission staff that it objected to the release of the information and asserted that the material should be withheld pursuant to FOIA Exemption 4.¹ You provided information regarding other entities, including SPP, who file unreserved use report information as public. You also provided information regarding SPP's confidentiality agreement and argued that it was "similar to MISO's language, yet SPP released the [unreserved use report] information."

After carefully reviewing your request, the additional information you provided and MISO's response, Commission staff has determined to withhold the data in its entirety pursuant to FOIA Exemption 4. 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 &*

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

FOIA No. FY14-70

- 2 -

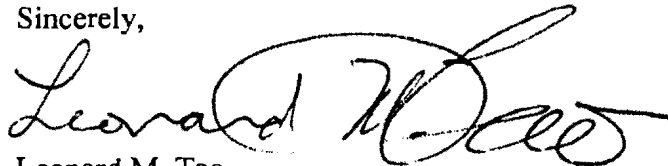
Conservation Ass'n v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974), commercial or financial information may be protected from release if it is "likely to have either of the following effects: (1) impair the Government's ability to obtain necessary information in the future; or (2) cause substantial harm to the competitive position of the person from whom the information was obtained."

The Commission acknowledges that other entities file unreserved use report information as public. However, in this instance, the Commission staff has determined to initially rely on MISO's representation that public dissemination of the requested data could likely damage MISO's customers' competitive position. The unreserved use report information contains MISO's customer settlement data. MISO has asserted that the unreserved use report allows "the calculation of each transmission customer's share of total reserved transmission capacity in the MSIO footprint [and also provides] the unreserved use penalties assessed to specific transmission customers." MISO contends that this type of information could be used by other "MISO market participants to discern trading patterns, and even trading strategies, adopted by other MISO market participants." MISO also noted that it maintains the confidentiality of this information.

Based on the asserted facts, release of the requested data might cause the type of competitive harm to MISO participants that the court in *National Parks* stated FOIA Exemption 4 was intended to prevent. See 498 F.2d at 770. Although SPP may take a different view, or is not opposed to disclosure, MISO's interest may nevertheless be compromised by disclosure. Therefore, the requested material is exempt from disclosure in its entirety under FOIA Exemption 4. For the reasons stated above the requested information will not be released.

As provided by the Freedom of Information Act 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. This appeal must be in writing, addressed to David Morenoff, Acting General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, and clearly marked "Freedom of Information Act Appeal." Please 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", with a large, stylized flourish at the end.

Leonard M. Tao
Director
Office of External Affairs

STEWART SOKOL & LARKIN LLC

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AUG 19 2014

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August 11, 2014

Mr. David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: Freedom of Information Act Appeal
FOIA No. FY14-76
Our File No. 1534.001

Dear Mr. Morenoff:

This letter is an appeal from the Final Response Letter dated June 27, 2014, relating to Mowat Construction Company's ("Mowat") Freedom of Information Act (FOIA) Request, No. FY14-76. Mowat's FOIA Request included 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.

The Final Response Letter concluded that each of these documents were protected under the Exemptions found in the FOIA, 5 U.S.C. § 552(b). Mowat disagrees that any

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of the above-listed documents are exempted under the FOIA. And, to the extent that there is protected information within those documents, that information should be redacted before disclosing the document. Mowat hereby makes its appeal to the Acting General Counsel of the Federal Energy Regulatory Commission (FERC).

In addition to appealing the decision of the Final Response Letter, this letter requests further explanation of the application of FOIA Exemptions stated in the Final Response Letter. In many instances, Mowat is unable to assert all of its grounds for appeal because the Final Response Letter lacks detail and citations.

I. SUMMARY OF FINAL RESPONSE LETTER

The following table summarizes the documents requested by Mowat and the exemptions cited by FERC for not disclosing those documents:

Document Number	§ 552(b) Exemption(s)
20060728-0114	3, 5, 7(F)
20080626-0077	3, 5, 7(F)
20111115-5118	4 (maybe 6)
20111212-5019	3, 5, 7(F)
20111215-5100	4 (maybe 6)
20120312-5054	3, 5, 7(F)
20120410-0325	3, 5, 7(F)
20120605-5095	4 (maybe 6)
20120611-5137	4 (maybe 6)
20130320-5125	3, 5, 7(F)
20130320-5126	3, 5, 7(F)
20130325-5027	3, 5, 7(F)
20130326-5120	3, 5, 7(F)

Mowat appeals the application of these exemptions as grounds for withholding any of the documents listed above. To the extent that those documents do contain sensitive material, that material should be redacted prior to disclosure of the document.

II. THE FREEDOM OF INFORMATION ACT FAVORS PUBLIC DISCLOSURE.

The Freedom of Information Act strongly favors disclosure of documents to the public. It is true that Congress included some limited exemptions for information that may not be disclosed. "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. These exemptions are explicitly made exclusive, and must be narrowly construed." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citations and quotations omitted).

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Mr. David L. Morenoff
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So little information has been provided to Mowat that, at this time, Mowat is unable to determine whether exemptions are being properly applied by FERC. "Of course the explanation of the exemption claim and the descriptions of withheld material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). To the extent that FERC continues to assert the application of these exemptions, Mowat requests clarification and additional evidence or justification.

III. FOIA EXEMPTION 3 DOES NOT APPLY TO THE REQUESTED DOCUMENTS.

The letter dated June 27, 2014 cites nine documents as being withheld pursuant to FOIA Exemption 3. Ostensibly, those documents were withheld pursuant to the Rolling Response Letter dated June 11, 2014. However, that June 11 Rolling Response Letter cites only four documents as being withheld under Exemption 3. FERC has never offered a justification for withholding the following documents under Exemption 3: 20060728-0114, 20080626-0077, 20111212-5019, 20120312-5054, 20120410-0325.

With respect to the four documents cited in the June 11, 2014 Rolling Response Letter, Exemption 3 does not apply because FERC has not made the requisite showing to withhold information under the National Historic Preservation Act of 1966 (NHPA). Under the NHPA, information may be withheld

- ... from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may—
- (1) cause a significant invasion of privacy;
- (2) risk harm to the historic resources; or
- (3) impede the use of a traditional religious site by practitioners.

16 U.S.C. § 470w-3. In this case, FERC merely asserts that information about the location, character, or ownership of a historic resource is exempt from disclosure. Under the plain language of the NHPA, more is required to withhold information from disclosure. FERC must demonstrate that disclosure of the requested documents would either (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners. Since FERC has not made such a showing, Exemption 3 does not protect any documents requested by Mowat.

IV. FOIA EXEMPTION 4 DOES NOT APPLY TO THE REQUESTED DOCUMENTS.

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FOIA Exemption 4 protects trade secrets and privileged or confidential commercial or financial information obtained from a person. When examining FOIA Exemption 4, the Supreme Court has cautioned that "Congress did not design the FOIA exemptions to be mandatory bars to disclosure." *Chrysler Corp. v. Brown*, 441 U.S. 281, 293 (1979). "Like all FOIA exemptions, exemption 4 is to be read narrowly in light of the dominant disclosure motif expressed in the statute." *Anderson v. Health & Human Services*, 907 F.2d 936, 943 (10th Cir. 1990) (quoting *Washington Post Co. v. United States Dept. of Health & Human Services*, 865 F.2d 320, 324 (D.C. Cir. 1989)).

Trade secrets are defined narrowly as "a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." *Id.* at 944. "That definition requires that there be a 'direct relationship' between the trade secret and the productive process." *Id.* Examples of protected trade secrets include recipes for soda pop flavors or formulas of a gasoline additive. The documents requested here do not fall within the narrow definition of trade secrets. Even if the documents involve some financial or energy usage information, that information is not the same as a recipe or a formula. Rather, the requested information contains, at most, data, which is not a trade secret.

FERC asserts that four of the requested documents are protected under Exemption 4 without any evidence that disclosure could harm Dorena Hydro, LLC or the government's ability to obtain such information in the future. Given the unique features and requirements for every federal project on dams, disclosure of general financial or energy production information is unlikely to give any of Dorena Hydro, LLC's competitors a material advantage. Redacting what information is truly sensitive and disclosing the rest of the document is the proper solution in light of FOIA's strong preference for disclosure.

V. FOIA EXEMPTION 5 DOES NOT APPLY TO THE REQUESTED DOCUMENTS.

FOIA Exemption 5, which protects the deliberative process privilege, does not apply to the requested documents. As a threshold matter, to qualify as "inter-agency or intra-agency memoranda," the memo must be created by an "agency." 5 U.S.C. § 552(b)(5). "[A]gency" is defined in the statute to mean "each authority of the Government." 5 U.S.C. § 551(1). It includes entities such as Executive Branch departments, military departments, Government corporations, Government-controlled corporations, and independent regulatory agencies. See 5 U.S.C. § 552(f).

In some cases, the "consultant corollary" applies when "the records submitted by outside consultants played essentially the same part in an agency's deliberative process as documents prepared by agency personnel." *Dep't of the Interior and Bureau of*

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Indian Affairs v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001). The consultant corollary is available where the consultant

does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Id. at 11. In other words, consultants may not have competing or independent financial interests in the subject matter of the consultation.

In this case, the documents produced by Dorena, Symbiotics, L.L.C., and Northwest Power Services Inc. cannot fall under Exemption 5. None of those entities are agencies, as defined by statute. And none of these entities meet the requirements for the consultant corollary. Each entity was working for the benefit of its own financial interests or on behalf of Dorena or Symbiotics, who each had a vested interest in the project.

To the extent that some of the requested documents appear to be intra-agency or inter-agency memos, Mowat requests redacted copies of those documents or, in the alternative, additional explanation or evidence to justify the application of FOIA Exemption 5.

VI. FOIA EXEMPTION 6 DOES NOT APPLY TO THE REQUESTED DOCUMENTS.

The Final Response Letter hinted at an application of Exemption 6, but provided no evidence or justification for the application of that exemption. Exemption 6 relates to personnel files, but does not provide a blanket protection for all of the information contained therein. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 371-72 (1976) ("nothing in the wording of Exemption 6 or its legislative history . . . support[s] the Agency's claim that Congress created a blanket exemption for personnel files"). Rather, this limited exemption only applies "where privacy was threatened, for 'clearly unwarranted' invasions of personal privacy." *Id.* The Ninth Circuit takes a particularly restrictive view of Exemption 6.

In the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure that must be indulged not only by the courts, but as well by the agency in its initial determination whether to disclose. Thus the agency's decision must be based upon legal authority that reasonably supports its position that the documents should be withheld. An agency may not refuse

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to disclose requested documents simply because no prior authority affirmatively requires disclosure under the circumstances.

United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus., Local 598 v. Dep't of the Army, Corps of Eng'rs, 841 F.2d 1459, 1463 (9th Cir. 1988).

Mowat's request for information is not an unwarranted invasion of personal privacy. There is no explanation of why the disclosure of resumes, biographies, or qualifications for individuals who worked on the project would be subject to the heightened requirement for protection under Exemption 6.

VII. FOIA EXEMPTION 7(F) DOES NOT APPLY THE REQUESTED DOCUMENTS.

FOIA Exemption 7 only applies to "records or information compiled for law enforcement purposes." In determining whether records were compiled for law enforcement purposes, courts "focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (citations and quotations omitted). The requested documents were not compiled for law enforcement purposes. Therefore, FOIA Exemption 7(F) simply does not apply.

The June 11, 2014 Rolling Response Letter only cites two documents as properly withheld under FOIA Exemption 7(F), 20111212-5019 and 20120312-5054. Mowat will obtain those two documents through the process described in 18 C.F.R. § 388.113. Exemption 7(F) does not apply to any of the other documents requested by Mowat. Therefore, the remaining documents should be disclosed.

VIII. WHERE DOCUMENTS CONTAIN SOME PRIVILEGED INFORMATION, THAT INFORMATION SHOULD BE REDACTED AND THE DOCUMENTS SHOULD BE DISCLOSED.

FOIA requires an Agency to err on the side of producing information, where possible. By the terms of the Act,

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption

STEWART SOKOL & LARKIN LLC

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under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552(b). To the extent that any reasonably segregable portion of any requested record is exempt, Mowat requests that FERC delete or redact those portions of the documents and that FERC produce the modified version.

Thank you for your attention to this matter. We look forward to receiving your response to this Freedom of Information Act Appeal.

Very truly yours,

STEWART SOKOL & LARKIN LLC



Tyler J. Storti

TJS:ljs

cc: Charles A. Beamon
Associate General Counsel
General and Administrative Law
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

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August 20, 2014

Mr. David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: Freedom of Information Act Appeal
FOIA No. FY14-78
Our File No. 3458.023

Dear Mr. Morenoff:

This letter is an appeal from the Response Letter dated July 7, 2014, relating to General Construction Company's ("GCC") Freedom of Information Act (FOIA) Request, No. FY14-78. GCC's FOIA Request included materials found at the following eLibrary Accession Numbers:

- 20050519-0213;
- 20050628-0167;
- 20051012-0171;
- 20060815-0256;
- 20060115-0531;
- 20070731-0009;
- 20080410-0068;
- 20090210-0157;
- 20090519-0144;
- 20120921-0308;
- 20121112-5274;
- 20140213-5032;
- 20140313-5045;
- 20130911-0010; and
- 20130911-4010 through 4048.

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The Response Letter concluded that each of these documents was protected under the Exemptions found in FOIA, 5 U.S.C. § 552(b). GCC disagrees that any of the above-listed documents are exempted under FOIA. And, to the extent that there is protected information within those documents, that information should be redacted before disclosing the document. GCC hereby makes its appeal to the Acting General Counsel of the Federal Energy Regulatory Commission (FERC).

In addition to appealing the decision of the Final Response Letter, this letter requests further explanation of the application of FOIA Exemptions stated in the Response Letter. In many instances, GCC is unable to assert all of its grounds for appeal because the Response Letter lacks detail and citations.

I. SUMMARY OF RESPONSE LETTER

The following table summarizes the documents requested by GCC and the exemptions cited by FERC for not disclosing those documents:

Document Number	§ 552(b) Exemption(s)
20050519-0213	5, 7(F)
20050628-0167	5, 7(F)
20051012-0171	5, 7(F)
20060815-0256	5, 7(F)
20060115-0531	Not Exempt – Will be Released in Full
20070731-0009	5, 7(F)
20080410-0068	5, 7(F)
20090210-0157	7(F)
20090519-0144	5, 7(F)
20120921-0308	5, 7(F)
20121112-5274	7(F)
20140213-5032	7(F)
20140313-5045	7(F)
20130911-0010	Not Exempt – Will be Released in Full
20130911-4010 through 20130911-4048	2 Docs Not Exempt – Will be Released Remaining Docs Exempt under 3

As noted, we understand that some of the requested documents were determined to be not exempt and will be reclassified in the near term. Nonetheless, GCC has not yet

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ATTORNEYS AT LAW

received any of those documents. With respect to the remaining documents, GCC appeals the applications of these exemptions as grounds for withholding any of the documents listed above. To the extent that those documents do contain sensitive material, that material should be redacted prior to disclosure of the document.

II. THE FREEDOM OF INFORMATION ACT FAVORS PUBLIC DISCLOSURE.

The Freedom of Information Act strongly favors disclosure of documents to the public. It is true that Congress included some limited exemptions for information that may not be disclosed. "But these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. These exemptions are explicitly made exclusive, and must be narrowly construed." *Dep't of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (citations and quotations omitted).

So little information has been provided to GCC that, at this time, GCC is unable to determine whether exemptions are being properly applied by FERC. "Of course the explanation of the exemption claim and the descriptions of withheld material need not be so detailed as to reveal that which the agency wishes to conceal, but they must be sufficiently specific to permit a reasoned judgment as to whether the material is actually exempt under FOIA." *Founding Church of Scientology of Washington, D.C., Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). To the extent that FERC continues to assert the application of these exemptions, GCC requests clarification and additional evidence or justification.

III. GCC RIGHTFULLY REQUESTED DOCUMENTS PROTECTED BY CEII.

The Response Letter notes that some of the requested documents contain Critical Energy Infrastructure Information (CEII). To the extent that those records may be obtained through other formal requests, GCC will obtain those documents through the process described in 18 C.F.R. § 388.113. For example, 20090210-0157 was labeled as exempt pursuant to Exemption 7(F), but the eLibrary Index Sheet contains a note explaining that the document "[w]ill be processed with CEII request." Please confirm that the requested CEII documents will be produced.

Jane Nelson, a paralegal in our office, spoke with a representative of FERC via telephone regarding the requested documents. That FERC representative told Ms. Nelson that two documents, 20060115-0531 and 20130911-0010 were no longer being held pursuant to any FOIA Exemptions. That FERC representative told Ms. Nelson that those two documents would be re-coded within the FERC computer system. Please confirm that those codes were changed and that GCC will obtain the requested documents.

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IV. FOIA EXEMPTION 3 DOES NOT APPLY TO THE REQUESTED DOCUMENTS.

FERC claims that the majority of the documents contained within 20130911-4010 through 20130911-4048 are exempt under Exemption 3. However, FERC has not made the requisite showing to withhold documents under the National Historic Preservation Act of 1966 (NHPA) or the Archaeological Resources Protection Act (ARPA).

Under the NHPA, information may be withheld

- ... from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may—
- (1) cause a significant invasion of privacy;
 - (2) risk harm to the historic resources; or
 - (3) impede the use of a traditional religious site by practitioners.

16 U.S.C. § 470w-3. In this case, FERC merely asserts that information about the location, character, or ownership of a historic resource is exempt from disclosure. Under the plain language of the NHPA, more is required to withhold information from disclosure. FERC must demonstrate that disclosure of the requested documents would either (1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners. Since FERC has not made such a showing, Exemption 3 does not protect any documents requested by GCC.

Under the ARPA,

- Information concerning the nature and location of any archaeological resource for which the excavation or removal requires a permit or other permission under this chapter or under any other provision of Federal law may not be made available to the public under subchapter II of chapter 5 of title 5 or under any other provision of law unless the Federal land manager concerned determines that such disclosure would—
- (1) further the purposes of this chapter or the Act of June 27, 1960 (16 U.S.C. 469–469c), and
 - (2) not create a risk of harm to such resources or to the site at which such resources are located.

16 U.S.C. § 470hh(a). In this case, FERC has not made any showing that the Federal land manager has determined that disclosure of the requested documents would either

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Page 5

(1) further the purposes of the ARPA or (2) create a risk of harm to the resources or to the site at which the resources are located.

Since FERC has not demonstrated that either the NHPA or the ARPA apply to the documents requested by GCC, all of the documents that are currently withheld under Exemption 3 should be disclosed.

V. FOIA EXEMPTION 5 DOES NOT APPLY TO THE REQUESTED DOCUMENTS.

FOIA Exemption 5, which protects the deliberative process privilege, does not apply to the requested documents. As a threshold matter, to qualify as "inter-agency or intra-agency memoranda," the memo must be created by an "agency." 5 U.S.C. § 552(b)(5). "[A]gency" is defined in the statute to mean "each authority of the Government." 5 U.S.C. § 551(1). It includes entities such as Executive Branch departments, military departments, Government corporations, Government-controlled corporations, and independent regulatory agencies. See 5 U.S.C. § 552(f).

In some cases, the "consultant corollary" applies when "the records submitted by outside consultants played essentially the same part in an agency's deliberative process as documents prepared by agency personnel." *Dep't of the Interior and Bureau of Indian Affairs v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001). The consultant corollary is available where the consultant

does not represent an interest of its own, or the interest of any other client, when it advises the agency that hires it. Its only obligations are to truth and its sense of what good judgment calls for, and in those respects the consultant functions just as an employee would be expected to do.

Id. at 11. In other words, consultants may not have competing or independent financial interests in the subject matter of the consultation.

In this case, there is no indication that any of the documents being withheld were prepared by an agency. To the extent that a memorandum was prepared by a non-agency (for example, a private company), that memorandum must be disclosed. To the extent that some of the requested documents appear to be intra-agency or inter-agency memos, GCC requests redacted copies of those documents or, in the alternative, additional explanation or evidence to justify the application of FOIA Exemption 5.

STEWART SOKOL & LARKIN LLC

ATTORNEYS AT LAW

VI. FOIA EXEMPTION 7(F) DOES NOT APPLY TO THE REQUESTED DOCUMENTS.

FOIA Exemption 7 only applies to "records or information compiled for law enforcement purposes." In determining whether records were compiled for law enforcement purposes, courts' "focus is on how and under what circumstances the requested files were compiled, and whether the files sought relate to anything that can fairly be characterized as an enforcement proceeding." *Jefferson v. Dep't of Justice*, 284 F.3d 172, 176-77 (D.C. Cir. 2002) (citations and quotations omitted). The requested documents were not compiled for law enforcement purposes. Therefore, FOIA Exemption 7(F) simply does not apply and the requested documents should be disclosed.

VII. WHERE DOCUMENTS CONTAIN SOME PRIVILEGED INFORMATION, THAT INFORMATION SHOULD BE REDACTED AND THE DOCUMENTS SHOULD BE DISCLOSED.

FOIA requires an Agency to err on the side of producing information, where possible. By the terms of the Act,

Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection. The amount of information deleted, and the exemption under which the deletion is made, shall be indicated on the released portion of the record, unless including that indication would harm an interest protected by the exemption in this subsection under which the deletion is made. If technically feasible, the amount of the information deleted, and the exemption under which the deletion is made, shall be indicated at the place in the record where such deletion is made.

5 U.S.C. § 552(b). To the extent that any reasonably segregable portion of any requested record is exempt, Mowat requests that FERC delete or redact those portions of the documents and that FERC produce the modified version.

Mr. David L. Morenoff
August 20, 2014
Page 7

Thank you for your attention to this matter. We look forward to receiving your response to this Freedom of Information Act Appeal.

Very truly yours,

STEWART SOKOL & LARKIN LLC



Tyler J. Storti

TJS:ljs

cc: Charles A. Beamon
Associate General Counsel
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Federal Energy Regulatory Commission
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STEWART SOKOL & LARKIN LLC
ATTORNEYS AT LAW

June 13, 2014

David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Freedom of Information Act Appeal

Dear Mr. David L. Morenoff,
I am in receipt of FOIA No. FY14-86 Response to Expedited Processing & Fee Wavier Request dated June 11, 2014.

I would like to add supplemental information to my Freedom of Information Expedited request for; electronic copies of the FERC approved detailed drawings and/or detailed documentation for MLV 324-2A assembly location that shows all approved crossovers related to Docket CP11-161 prior to the in-service date of November 1, 2013.

The Tennessee Gas Pipeline Company (TGP) drawing (TO-C324-E1-03-SK) dated October 29, 2013 was provided to the Army Corps of Engineers (ACOE) and the Pennsylvania Department of Environmental Protection (PADEP) to request modifications to permits CENAP-OR-R-2011-0032 and E52-231 respectively.

The Delaware Riverkeeper Network (DRN) filed notices of complaint with the Commission on May 28, 2014 and June 10, 2014, regarding conditions observed at the location of two noncompliant valves since TGP first reported one of them to the Commission in TGP's Weekly Status Report filed on October 31, 2013. The new drawing (TO-C324-E1-03-SK) preceded TGP's filing with the Commission reporting a valve stem inadvertently installed in wetland W040 and did not depict the MLV 324-2A on the detailed drawing. The Commission has failed to address DRN's complaints regarding impacts to W040 and the environment that included leaks and a ruptured valve attached to the southerly valve stem in W040. These conditions have been documented over a 6 month period while TGP was allowed to leave the noncompliant valves in place threatening harm to a Federally protected wetland and its receiving waters Vantine Brook, a HQ-CWF, MF and Class A trout stream that is a source of Milford's water supply. Therefore, I believe conditions contained in DRN's Notice of Complaints at the location of the noncompliant valves is an imminent threat to the environment and the water supply for the citizens who rely on this watershed for potable water.

TGP's drawing (TO-C324-E1-03-SK) depicts a direct connection of a "crossover" pipe with two valves between the 30" NEUP pipeline and the 24" 300 Line pipeline. I believe this connection between the two pipelines creates an imminent danger to nearby residents of Milford Township. Compressor horsepower (HP) at three facilities on the TGP NEUP Project upstream of the crossover pipeline has increased by 61% from 36,500 HP to 58,810 HP (Table 1.5.2-1 Environmental Assessment). The crossover pipeline connects directly to the 300 Line 24" pipeline that was installed nearly 60 years ago that lacks the safety designs incorporated in new pipeline construction. The compressed gas is directed

into the reduced 24" pipe that is connected to MLV 324-1A and TGP's metering facility. Both are enclosed in a fenced area, which FERC approved the variance to include the crossover pipeline and associated noncompliant valves on June 10, 2014. The compressed gas then travels into a 12" interconnect pipeline between the TGP metering and Columbia's Gas Pipeline Company (CGP) Milford compressor facility. CGP's 12" interconnect pipeline and compressor facility are currently in the application phase with FERC for replacement (Columbia Gas Eastside Expansion Project - Docket CP14-17-000 (PF 13-7)).

The new 30" NEUP pipeline carrying compressed gas from the newly upgraded compressor facilities is forced into the aging smaller diameter pipeline through TGP's metering facility to CGP's compressor facility and interconnect pipeline that are outdated compared to the new upgraded compressor facilities and pipeline facilities upstream. I believe allowing this direct connection between the larger 30" pipeline into a series of smaller diameter pipelines and above ground facilities leading to CGP's compressor built more than 50 years ago creates an imminent danger to nearby residents and is a public health hazard. So not only is there imminent harm being caused to a federally protected wetland W040 and its receiving waters, the Vantine Brook a HQ-CWF, MF Class A trout stream and a source of potable water to local residents through the fill and irreparable and repeated compaction of soils and lack of restoration and contamination of this wetland, but there are real public health concerns regarding the aging infrastructure and hook ups. On various occasions, local residents nearby have documented and smelled gas at this same facility including on January 12, 2014 and February 27, 2014. I believe the concerns I expressed in this letter needs immediate attention by FERC and the regulatory agencies to resolve issues with the crossover pipeline. I am requesting that the Commission rescind its decision to grant a variance issued June 10, 2014 until all issues of DRN's Complaints and this letter are addressed and resolved by the Commission.

I am again requesting an expedited FOIA request for electronic copies of the FERC approved detailed drawings and/or detailed documentation for the MLV 324-2A location that shows all approved crossovers related to Docket CP11-161 prior to the in-service date of November 1, 2013. I am requesting the attachment that was filed with the supplement information by Tennessee Gas Pipeline Company, June 4, 2014 under CP11-161 that was not provided to the service list.

I believe my request for electronic copies of the two documents above can be completed under the two hours of search time that the Commission provides at no cost, so no fees should be required from me.

Respectively submitted,

Joe Zenes



Cc: Sally Corrigan (PCCD)
Elaine Moyer (ACOE)
Maya van Rossum (DRN)
Matt Walker (Clean air Council)
Alex Dankanich (DOT PHMSA)
Charles A. Beamon (Associate General Counsel)

FREEDOM OF INFORMATION ACT APPEAL

August 15, 2014

Mr. David L. Morenoff
Acting General Counsel FERC
888 First Street, NE
Washington, DC 20426

BY ELECTRONIC MAIL: FOIA-CEII@ferc.gov

Re: Appeal of Initial Determination to Withhold Certain Information, FOIA FY14-93

Dear Mr. Morenoff,

We appeal FERC's denial of the above-captioned FOIA request by the Energy & Environment Legal Institute (EELI) and the Free Market Environmental Law Clinic (FMELC) ("appellants"), communicated in its letter dated August 4, 2014. Specifically, FERC withheld fifty-five (55) responsive records in their entirety on the grounds that these documents were legally exempt from disclosure pursuant to FOIA exemptions 4, 5 and 6, without adequate demonstration or justification. Additionally, we appeal FERC's redactions of six (6) documents, citing exemptions 5 and 6, again without adequate demonstration or justification.

We appeal for reasons detailed herein. With regard to fifty-four of the fifty-five documents withheld in full, FERC did not identify the agency decision each record was pre-decisional to so as to justify its withholding, nor did it explain why they were deliberative, and thus exempt under exemption 5. Nor did it explain in sufficient detail the one (1) record withheld under exemption 4 that FERC asserts includes trade secrets or otherwise privileged or confidential financial information. Similarly, FERC did not explain why any of the files are

considered personnel files or how they could compromise individual privacy under exemption 6, provide us any basis to assess to legitimacy of that withholding, or even give a number of documents that it is withholding pursuant to exemption 6, despite asserting that exemption 6 is part of its justification for withholding at least some portions of the fifty-five documents withheld in their entirety. It simply invokes exemptions as if this were sufficient to not release public records. The use of exemption 6 is particularly troubling given the seeming implausibility of discussion of a merger approval or fine of Constellation going in an employee's personnel file, and also posing the threat of clearly unwarranted violation of personal privacy of the sort that exemption 6 protects.

Under the law, FERC must demonstrate justification or otherwise provide sufficient reason for requesters to conclude that any documents not released or any information redacted from released documents is properly exempt from disclosure under FOIA. Instead FERC simply withheld most responsive records in full without justifying these withholdings beyond stating which exemptions they claim justify their withholdings and redactions and offering vague, non-specific, categorical explanations as to why the documents qualify. Furthermore, FERC did not specify which documents it is withholding pursuant to which of the cited exemptions. The sum result FERC's inadequate response is to leave requesters without meaningful information or means by which to make a reasoned conclusion about the legitimacy of these withholdings. Particularly since most of those partially released records were almost entirely redacted, this indicates that there has been insufficient consideration as to what ought to properly and lawfully

be released to the public. It defies credulity that there are no segregable portions of the released emails that ought to be released under the law.

Furthermore, the request at issue was for certain described *emails* in FERC's possession. While the Commission provided no information about the 55 withheld documents, which is improper in and of itself, FERC notes that factual information can be redacted if it is so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations. As such, FERC's withholdings in full are on their face presumptively impermissible as email records by their nature include factual information that cannot be withheld under exemption 5 and is clearly segregable, such as To, From, Time, Date, typically Subject, etc. There is no credible explanation that all such information could be withheld in its entirety under exemptions 4 or 6. This is not the first time we have encountered this facially improper tactic with FERC (see, for example, requests 13-078 and 2014-1), which FERC has ultimately abandoned — properly — if only after imposing delay and expense of requiring that we sue — which given the serial nature of this practice is by this time highly improper.. FERC should end this unlawful practice and immediately release all factual information contained in these emails.

I. Jurisdictional Statement

The underlying FOIA request was properly filed under 5 U.S.C. § 552. In response, the Commission released six heavily redacted documents and withheld fifty-five (55) documents in their entirety pursuant to FOIA exemptions 4, 5 and 6. Furthermore, the Commission provided no substantive description or explanation of the withheld documents and provided no substantive

explanation of the heavy redactions to the few documents released. Pursuant to 18 C.F.R. § 388.110, you have jurisdiction because “A person whose request for records, request for fee waiver or reduction, or request for expedited processing is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination.” 18 C.F.R. § 388.110 (a)(1). Further, all procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as a “Freedom of Information Act Appeal” and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed within 45 days of the date of FERC’s August 5, 2014, 2014 denial. C.F.R. § 388.110.

II. Proceedings Below

This appeal involves one FOIA request, sent by electronic mail on June 23, 2014 to FERC at FOIA-CEII@ferc.gov, seeking all emails (bold in original):

1) sent or received by either Jon Wellinohoff, 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) in either the Subject field or their body, “approve”, “merge” (which also includes “merger”), “consent”, and/or “settle” (which also includes “settled” and “settlement”).

Responsive records will be dated over the five-month period January 1, 2012 through May 31, 2012.

FERC assigned the number FY14-93 to the request.

On August 5, 2014, FERC provided six (6) heavily redacted documents with little justification for these redactions, and withheld fifty-five (55) documents in their entirety, stating that, “Six (6) documents are being released in redacted form pursuant to FOIA Exemptions 5 and 6....The remaining fifty-five (55) documents are being withheld in full pursuant to FOIA exemptions 4, 5 and 6.” (Determination Letter, Pg. 1).

FERC provided no explanation of the redactions to the six released documents, beyond claiming exemptions 5 and 6 in a generic sense as the source of the legitimacy of the numerous, near complete redactions. Nor does FERC provide sufficient explanation for the fifty-five (55) documents withheld in their entirety. FERC’s only explanation is boilerplate language explaining each of the exemptions, not cited for specific documents but for groups of documents, and making sweeping, non-specific claims that the documents in question “contains detailed and confidential and proprietary information concerning the settlement with Constellation Energy Commodities Group, Inc.” pursuant to exemption 4, “internal staff emails protected from release under FOIA exemption 5,” and that there “are names of lower-level employees” that are withheld under exemption 6. (*Id.*, Pg. 2-3). There is no substantive information about the nature of the documents being withheld, what they are discussing, or why the exemptions cited would rightly apply to such documents. The only further information included is the number of documents of the fifty-five (55) entirely withheld documents applied to each exemption, and even that is lacking in detail. FERC claims that one (1) document is being withheld pursuant to exemption 4, trade secrets, and fifty-four (54) withheld pursuant to exemption 5, deliberative. (*Id.*, Pg. 2) However, FERC also clearly claimed that documents are being withheld pursuant to exemption

6, personnel privacy, although it makes no mention of which documents are being withheld pursuant to exemption 6 as well as either exemptions 4 and 5. (*Id.*, Pg. 1)¹

Furthermore, FERC makes no attempt to explain any balancing test it may have conducted that is required in invoking, and justifying, exemption 6, as required by law. Furthermore, since FERC has been very unclear about which documents or redactions are being withheld under exemption 6, there is also no way to tell if any of the purported privacy interests are lessened by the fact that they are made by, or on behalf of, candidates for public office, such as Mr. Bay who is not only a FERC Commissioner, but slated to be its Chairman come April, 2015.

III. Standards of Review: All Doubts Must be Resolved in Favor of Disclosure

FERC's production is in violation of the black letter law that an agency cannot rely on "boilerplate" privilege claims, or simply recite that the withholding or redactions of a document meets statutory standards without tailoring "the explanation to" each "specific document," and with a "contextual description" of how those standards apply to "the specific facts" of each document. *King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987) ("[c]ategorical description [s] of redacted material coupled with categorical indication of anticipated consequences of disclosure" was "clearly inadequate."); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) ("generalized" or conclusory exemption claims are insufficient);

¹ This may be a simple mistake, as there is some discussion of exemption 6 on page 3 of the Determination Letter which discusses redactions to the six (6) produced documents. However, page 1 of the Determination Letter specifically cites exemption 6 as being related to the fifty-five (55) documents being withheld in their entirety, although none are specifically numbered in the way documents withheld pursuant to exemptions 4 and 5 are specified. This, at the very least, demonstrates the need for FERC to live up to its obligations to individually explain each withholding.

Wiener v. FBI, 943 F.2d 972, 977–79 (9th Cir. 1991) (“boilerplate” explanations without an effort to “tailor the explanation to the specific document withheld” were insufficient). *See also Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999) (agency’s Vaughn Index must apply statutory standards for exemption “to the specific facts of the documents at hand,” giving a “contextual description” of “the documents subject to redaction” and “the specific redactions made to the various documents.”); *ACLU v. Office of the Director of Nat. Intelligence*, No. 10-449, 2011 WL 5563520, *6 (S.D.N.Y. Nov. 15, 2011) (improper for an agency to submit a Vaughn Index “proffering conclusory and nearly identical justifications for” withholding each document); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009) (agency must “‘disclose as much information as possible’ in its Vaughn Index,” and not merely “parrot” or “recite the statutory standards”). But that is exactly what FERC has done here and the presumption toward disclosure requires that FERC’s withholdings either be sufficiently justified, or alternatively, released to the public.

FERC must provide requesters sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” (*Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979)), and should “describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. DoJ*, 830 F.2d at 223-24. It is also well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general

philosophy of full agency disclosure” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in the underlying request to FERC to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions involving FOIA.” Similarly, FERC’s withholdings are not consistent with statements by the President and Attorney General, *inter alia*, that **“The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today”** (President Barack Obama, January 21,

2009), and **“Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged.** Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.” (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

FERC’s withholding of fifty-five (55) documents was in error, as was their extensive and unjustified redactions to the six (6) documents produced, for reasons already stated, and discussed in greater detail below. FERC’s denial should thus be reversed, the withheld responsive records made available, and all improperly redacted documents be released in an unredacted form, or else with only legitimate redactions, labeled with the appropriate exemption and a clearly articulated explanation as to why each redaction is justified.

IV. Arguments and Support

A. FERC improperly withheld records in full without explaining why it could not produce the records in redacted form, despite its demonstrated ability to redact and produce similar information when it wishes to do so.

Similar to previous productions, FERC’s withholding emails in their entirety pursuant to exemption 5 is facially unlawful. Unfortunately, FERC decided to withhold fifty-four (54) emails, in full, although the law is very clear even before the ostentatious claims of this being “the most transparent administration, ever”, and serial administration vows to err on the side of disclosure as never before: all factual information must be released unless it is simply impractical to segregate it, including, e.g., To, From, Date, and Subject information. Withholding emails in

full is also a facially impermissible practice given the simplicity of redacting such records' exempt information. FERC does not provide any individualized justification for withholding the fully withheld documents, which must be emails given the request language, in their entirety. Under 5 U.S.C. § 552(b), any "reasonably segregable" information must be disclosed—that is, information that can be separated from the rest of a document—even if the document is otherwise exempt from disclosure, unless the exempt and non-exempt portions are "inextricably intertwined with exempt portions." *Trans-Pacific Policing v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C.Cir.1999) (court has "an affirmative duty to consider the segregability issue sua sponte."); *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977). An agency must provide a "detailed justification," not just "conclusory statements" to demonstrate that it has released all reasonably segregable information. *Mead Data*, 566 F.2d at 261. "The government must show with reasonable specificity why a document cannot be further segregated." *Marshall v. F.B.I.*, 802 F.Supp.2d 125, 135 (D.D.C. 2011); see *Quinon v. FBI*, 806 F.3d 1222, 1227 (D.C. Cir. 1996) ("reasonable specificity" required). FERC has done nothing of the sort.

The truth of this is furthermore demonstrated by the fact that FERC has demonstrated its ability to do this not just in previous productions to us but in this same production with regards to the 6 documents it did produce in part. Numerous emails are redacted of everything but To, From, Date, and Subject information. FERC therefore must, at the very least, produce the documents without redacting such clearly segregable, factual information, as it has already done for several documents already released in response to the FOIA request at issue.

B. FERC Improperly Withheld Information as Deliberative, Without Showing it is Directly Related to Actual Policy Formulation of the Kind Contemplated by Exemption 5

Furthermore, requesters lack sufficient information to know if the remainder of the information contained therein is rightly segregable, as FERC improperly relies on a boilerplate justification for withholding of fifty-four (54) responsive record, emails, in full, and numerous redactions to the six (6) produced documents that are not labeled, discussed, or justified in any substantive way, beyond asserting that the documents “consist of internal staff emails protected from release under FOIA exemption 5.” (Determination Letter, Pg. 3). This is wholly inadequate. FERC’s rationale for withholding this information sheds no light whatsoever on the information it is withholding, and thus fails to meet FERC’s burden of showing that the material is privileged. *See King v. United States Dep’t of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009); *Wiener v. FBI*, 943 F.2d 972, 977–79 (9th Cir. 1991); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999).

Some internal staff emails concerning the Constellation settlement may indeed be deliberative, but a broad assertion that virtually every email that discusses the settlement are both predecisional and deliberative, in their entirety, is not plausible. Even if it is in fact true that every section of each email is both predecisional and deliberative, and thus properly withheldp under exemption 5, FERC has manifestly failed to demonstrate this fact. Instead, they have merely alleged that the information withheld is protected under exemption 5 and thus has not fulfilled its duty under the law. As the Southern District of New York found in *Fox News*

Network, LLC v. U.S. Dept. of Treasury, 911 F.Supp.2d 261, 279 (S.D.N.Y. 2012), “[t]o be deliberative, a document must actually be ‘related to the process by which policies are formulated.’ *Grand Cent. P’ship*, 166 F.3d at 482. ... ***[The agency] must actually identify and explain the role that a given document has played in the decisionmaking process. See, e.g., Coastal States Gas Corp. v. Dep’t of Energy***, 617 F.2d 854, 868 (D.C.Cir.1980) (‘agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process’).” (*emphasis added*). Thus, at the very least, FERC must sufficiently justify these withholdings and redactions under exemption 5. If it cannot provide such a sufficient legal justification for each individual document and/or redaction, it must release the document in full, or at least pursuant to lawful, clearly explained redactions.

C. FERC’s Boilerplate Assertion of the Propriety of Withholdings under Exemption 4 is Facially Improper

FERC claims that one (1) document is being withheld due to FOIA exemption 4, which covers “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” (Determination Letter, Pg. 2). However, beyond citing the standard and a supporting case affirming that standard, FERC provides no information whatsoever that would allow requesters or anyone else to determine whether the withholding rises to the level of that standard. As previously discussed, courts are clear that an agency cannot rely on “boilerplate” privilege claims, or simply recite that the withholding or redactions of a document meets statutory standards without tailoring “the explanation to” each “specific document,” and with a “contextual description” of how those standards apply to “the specific facts” of each

document. *King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987) and that “[c]ategorical description [s] of redacted material coupled with categorical indication of anticipated consequences of disclosure” was “clearly inadequate.” *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) and furthermore that “generalized” or conclusory exemption claims are insufficient; *Wiener v. FBI*, 943 F.2d. 972, 977–79 (9th Cir. 1991).

Since no information whatsoever beyond the mere bald assertion that such a document is exempt under exemption 4 is given, petitioners lack the information necessary to know if this withholding is legitimate; that is, FERC failed to demonstrate it. FERC should immediately provide a meaningful justification as to why this withholding is legitimate with factual information related to the document itself, not the law that allows for withholding. If it cannot, it should release the document subject to any legitimate withholdings.

D. FERC Fails to adequately Explain or Justify Withholding of “Lower-Level Employees” Names, and its Explanation of the Validity of Other Withholdings Under Exemption 6 is Wholly Inadequate, and Any Privacy Interests Potentially Involved Are Likely Outweighed By Public Interest In Disclosure

FERC claims that the documents released have redactions pursuant to exemption 6, and that the remaining fifty-five (55) documents are being withheld pursuant to exemptions 4, 5, and 6. (Determination Letter, Pg. 1). It later discusses exemption 6, again merely citing boilerplate language concerning the standard and claiming that, “The names of lower-level employees have been redacted from the documents.” (*Id.*, Pg. 3). It makes no mention of which documents are

being withheld entirely pursuant to exemption 6, although it clearly cites exemption 6 as being relevant to the documents being withheld.²

Similarly, the redactions on the produced documents are not labeled, nor does FERC provide any explanation of the use of exemption 6 and why it applies to withheld information.

In invoking exemption 6 to withhold the names of “lower-level employees,” FERC ignores precedent. For example, in *Gordon v. FBI*, 388 F. Supp. 2d 1028 (N.D. Cal. 2005), the Court held that the Government had not “met its burden of showing that revealing the names of TSA employees that appear on otherwise disclosable documents would ‘constitute an unwarranted invasion of personal privacy,’” and that “While several cases have held that an employee has a privacy interest in his name *and home address*,” (*emphasis in original*) *Id.* at 1040-41, there was no such interest in their names alone. Indeed, the court specifically held the opposite, stating that “revealing the names of government employees who are making important government policy serves FOIA’s core purpose of contributing to the public’s understanding of how its government operates. Knowing who is making government policy...is relevant to understanding how the government operates.” *Id.* at 1041.

This move by FERC is of particular concern to requesters given its contemporaneous withholding of responsive records discussing Constellation and/or its merger with Exelon as “personnel” information the release of which would cause clearly unwarranted violation of an individual privacy; as noted above, this is implausible, and is more likely of a part with FERC’s

² As previously noted (fn. 1), this may be an inadvertent mistake. In any event, even if that is the case, it is further evidence that requesters are owed a sufficient explanation of these redactions and withholdings as is their right under the law. So far, such an explanation has simply not been provided.

recent pattern of withholding any discussion tied to its Chairman-in-waiting Norman Bay, until he is installed as Chair. That is, some or all of the b6 withholding of parties to email is to delay disclosure of Bay's involvement in certain discussions.

Regardless, the withholding is not on its face legitimate and FERC has not satisfied its burden. The public interest in Bay's involvement with the Constellation settlement which FERC expressly tied to its merger approval with Exelon is greater now than ever, for reasons requesters elaborate in a filing due soon in *EELI et al. v. FERC* (cv: 14-502 (D.D.C.)). In short, when asked, Mr. Bay indicated to the U.S. Senate that he was peripheral to these matters as part of his effort to obtain confirmation to a high public office of significant public trust, while other records indicate greater involvement than he let on.

To the extent exemption 6 is used for withholding entire documents, or is used for information that is not simply the names of employees, the truth of which is unclear based on FERC's Determination Letter, the lack of sufficient explanation is clearly improper. As repeatedly discussed herein, such complete lack of an explanation is facially improper and leaves requesters with no way to determine if these redactions and/or withholdings are legitimate under the law, as "[c]ategorical description[s] of redacted material coupled with categorical indication of anticipated consequences of disclosure" are "clearly inadequate." *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973). Merely saying exemption 6 may be involved in the decision to withhold dozens of documents — the overwhelming majority of responsive records — in their entirety, without further explanation, does not even rise to the standard of a "categorical description." It is a virtual nullity.

Finally, to the degree any information is withheld under exemption 6, either entire documents or redacted information on already released documents, it must be balanced against the public interest in disclosure, as courts have repeatedly explained. *See Department of Defense v. FLRA*, 510 U.S. 487, 497 (1994) (“We must weigh the privacy interest . . . in nondisclosure . . . against the only relevant public interest in the FOIA balancing analysis – the extent to which disclosure of the information sought would ‘she[d] light on an agency’s performance of its statutory duties’ or otherwise let citizens ‘know what their government is up to.’” (quoting *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989))); *Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008) (noting that if requested information falls within Exemption 6, the next step in the analysis is to determine whether “disclosure would constitute a clearly unwarranted invasion of personal privacy . . . [by] balanc[ing] the privacy interest that would be compromised by disclosure against any public interest in the requested information”). Whether FERC has even attempted such a balancing test is unclear. If FERC has performed such a test, it has clearly not explained that fact, nor has it explained why it found in favor of nondisclosure, as is required by law.

Finally, it is likely that the responsive documents discuss work performed by now-Commissioner Norman Bay in his former capacity as FERC’s head of enforcement. Mr. Bay is slated to take over as the Chairman of the Commission in April, 2015, upon letter asserting that determination by the PResident. Thus, the public interest in disclosure is high. Furthermore, given Mr. Bay’s impending ascension to Chairman in the coming months, he is a candidate for public office, and is a public figure, and thus has diminished privacy interests, as courts have

repeatedly stated. *See, e.g. Iowa Citizens for Cmty. Improvement v. USDA*, 256 F.Supp.2d 946 (S.D. Iowa 2002), *Nation Magazine v. United States Customs Service*, 71 F.3d 885, 894, n.9 (D.C. Cir. 1995). It is highly unlikely that any of the requested documents could possibly survive a balancing test when the public interest in disclosure is so high and the privacy interests are so low. In any event, if FERC believes otherwise, the agency must explain why. FERC has manifestly failed to do so.

V. Conclusion

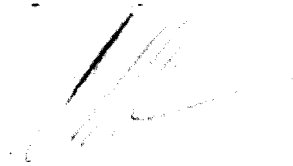
FERC's Determination Letter and extremely limited disclosure is wholly inadequate and not in accordance with the law. FERC has manifestly failed to adequately explain its extensive withholdings and redactions on any of the claimed exemptions. To the degree it has made any explanation at all concerning the nature of the documents being withheld, the facts cited indicate that nondisclosure would not be in compliance with clear case law, and would indeed violate the original purposes for the Freedom of Information Act, let alone the Obama Administration's repeated public promises and official edicts in favor of more disclosure, not less. As the President has said in his directive to all federal agencies on January 26, 2009, "The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears".

We request the Commission proceed pursuant to this appeal with the required bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, as well as the President's own directive. At the very least, this entails providing sufficient justification for

FERC's withholdings and redactions, as is required under the law and clear court precedents. Thus far, FERC has almost completely failed to do so. A proper, lawful response to this appeal would include releasing all completely withheld records, pursuant to any lawful redactions as may apply, and providing substantially unredacted copies of the documents already released. Any redactions not withdrawn need to be specifically justified and explained. Only by taking these actions can FERC cure its current, inadequate, response, and put the agency on the side of the public's right to know, rather than continuing to withhold documents and serve the political and/or public relations interests of high-level Commission personnel and a future Commission Chairman.

If you have any questions please do not hesitate to contact the undersigned.

Respectfully submitted,



Christopher C. Horner
The Free Market Environmental Law Clinic
1489 Kinross Lane
Keswick, VA 22947
(202) 262-4458
CHornerLaw@aol.com



LexisNexis

Brian K. Cummings
Federal Compliance Manager
LexisNexis, a division of Reed Elsevier Inc.
9443 Springboro Pike
Miamisburg, Ohio 45342

OCT 29 12:51

October 27, 2014

David L. Morenoff, General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Freedom of Information Act Appeal

Dear Mr. Morenoff:

This is an appeal of the Federal Energy Regulatory Commission's ("FERC") decisions to partially redact information connected to the request of current contracts related to Award FERC12F0997 (Fedlink Contract LC09D7012), between FERC and Thomson Reuters (West), pursuant to FOIA request FY14-98.

On July 29, 2014, LexisNexis sent a FOIA request seeking:

- A complete copy of any and all current contracts, including purchase orders, delivery orders, and modifications or amendments, that the Federal Energy Regulatory Commission ("FERC") has for online legal, news, financial, or public records research or information services with West Publishing or The Thomson Company, Inc. related to Award FERC12F0997, and Library of Congress/Fedlink Contract No. LC09D7012, according to the Federal Procurement Data System.

On September 30, 2014, FERC responded to the request, and provided its response which is enclosed here for your reference.

Generally, LexisNexis agrees that the redactions FERC has made to Personnel information, pursuant to 5 U.S.C §552(b)(6), and the various redactions to CLIN and unit pricing, pursuant to 5 U.S.C §552(b)(4) were appropriate. However, LexisNexis feels the redactions to Grand Totals and Appropriation information is not appropriate.

The Appropriation data is in the public domain and readily available from the Federal Procurement Data System website. (Please see the attached URL which was active on 10/23/2014

<https://www.fpds.gov/ezsearch/search.do?indexName=awardfull&templateName=1.4.4&s=FPDSNG.COM&q=ferc12F0997>). As a result, the 5 U.S.C §552(b)(4) exemption does not apply since "identical information is otherwise in the public domain." *Inner City Press/Community on the Move v. Bd. Of Governors of the Fed. Reserve Sys.*, 463 F.3d 239, 244 (2d Cir. 2006) (citing *Niagara Mohawk Power Corp. v. U.S. Dep't of Energy*, 169 F.3d 16, 19 (D.C. Cir. 1999)).



Brian K. Cummings
Federal Compliance Manager
LexisNexis, a division of Reed Elsevier Inc.
9443 Springboro Pike
Miamisburg, Ohio 45342

Additionally, the Grand Totals are not exempt under 5 U.S.C §552(b)(4). Although there are many decisions discussing whether line item pricing or unit pricing is exempt from disclosure because it can cause competitive harm (*See Essex Electro Eng'rs, Inc. v. United States Secy. of the Army*, 686 F. Supp. 2d 91, and *Canadian Commer. Corp. v. Dep't of Air Force*, 514 F.3d 37, 40) there are no decisions exempting the Total Pricing. In fact, ". . . total contract price paid by the Government 'is routinely made public,' JAMES T. REILLY, 1 FEDERAL INFORMATION DISCLOSURE § 14.84 (3d ed. 2004), because that disclosure informs citizens about 'what their government is up to.' *Dep't of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 773, 103 L. Ed. 2d 774, 109 S. Ct. 1468 (1989)." *McDonnell Douglas Corp. v. United States Dep't of the Air Force*, 375 F.3d 1182, 1193 (D.C. Cir. 2004)

Pursuant to this Appeal, LexisNexis requests that FERC provide the following information which was redacted from the prior release:

- Box 17(j) "Grand Total" of Order for Supplies or Services, dated 09-24-2012
- "Grand Total" on Page 6
- "Accounting and Appropriation Data" "Amount" on Page 6
- Contract Mod 0002, "Grand Total" and "Accounting and Appropriation Data"
- Contract Mod 0001, "Grand Total" and "Accounting and Appropriation Data"

Additionally, because FERC's Release Letter was dated September 30, 2014, and an Appeal of FERC's determination must be filed within 45 days of the date of the letter, this appeal is timely.

Therefore, LexisNexis requests that you disclose the information previously redacted, and listed above.

Sincerely,

A handwritten signature in black ink, appearing to read "BK Cummings", written over a horizontal line.

Brian K. Cummings
Federal Compliance Manager
LexisNexis, a division of Reed Elsevier, Inc.
9443 Springboro Pike
Miamisburg, OH 45342
937-247-8884
Brian.Cummings@LexisNexis.com

Cc: Charles A. Beamon
Associate General Counsel, General and
Administrative Law
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Federal Energy Regulatory Commission
Washington, D.C. 20426

SEP 30 2014

Re: Release Letter,
FOIA No. FY14-98

VIA ELECTRONIC MAIL

Mr. Brian K. Cummings
LexisNexis
9443 Springboro Pike
Miamisburg, OH
brian.cummings@lexisnexis.com

Dear Mr. Cummings:

On July 29, 2014, you submitted a request for information pursuant to the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 C.F.R. § 388.112(e) (2014) and the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012). Specifically, you requested a complete copy of any and all current contracts related to Award FERC12F0997 (Fedlink Contract LC09D7012) between the Commission and Thomson Reuters (West). On August 25, 2014, upon notification of your request, West submitted comments arguing that the contract contains information that is exempt from mandatory disclosure under FOIA Exemptions 4¹ and 6.²

Upon review of the responsive contract, West's comments, and applicable law, Commission staff has determined that portions of the contract should be withheld pursuant to FOIA Exemptions 4 and 6. As explained in the August 29, 2014, *Notice of Intent to Release* letter, portions of the contract that contain pricing and content market data are protected from disclosure pursuant to FOIA Exemption 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." Here, release of the information may be likely to

¹ 5 U.S.C. §552(b)(4) (which protects from disclosure information that would result in substantial competitive harm to the person from whom the information was obtained).

² 5 U.S.C. §552(b)(6) (which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

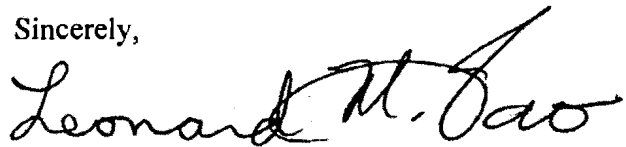
cause substantial harm to West by making commercially sensitive information available to its competitors. As such, the portions of the contract that contain that type of data will be protected pursuant to FOIA Exemption 4. *See National Parks*, 498 F.2d at 770.

In addition, the names of private citizens listed on the contract implicate a privacy interest and are protected from disclosure by FOIA Exemption 6. *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). The parts of the landowner lists that contain the names, addresses, and other data of commercial entities do not implicate a privacy interest that is protected by FOIA Exemption 6 and will be released to you.

With the expiration of the five (5) calendar day holding period provided in the August 29, 2014 Notice of Intent to Release, those portions of the contract that are not protected from disclosure are released and included on the enclosed disk. The protected portions of the document have been redacted.

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, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and clearly marked "Freedom of Information Act Appeal." Please also send a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

Sincerely,




Leonard M. Tao
Director
Office of External Affairs

Enclosure

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

Redaction Pursuant to FOIA Exemption 4

ORDER FOR SUPPLIES OR SERVICES										PAGE OF PAGES	
IMPORTANT: Mark all packages and papers with contract and/or order numbers.										1	
1. DATE OF ORDER 09-24-2012		2. CONTRACT NO. (if any) LC09D7012		3. SHIP TO:							
3. ORDER NO. PERC-12-F-0997		MODIFICATION NO.		4. REQUISITION/REFERENCE NO. See SCHEDULE		5. NAME OF COMMERCE Federal Energy Regulatory Commission					
6. ISSUING OFFICE (Address correspondence to) Federal Energy Regulatory Commission Procurement Division Attn: 888 First Street, NE, Room 4J Washington DC 20426						7. STREET ADDRESS Warehouse P-1 Attn: 888 First Street, NE, Warehouse P-1					
8. CITY Washington				9. STATE DC		10. ZIP CODE 20426					
11. NAME OF CONTRACTOR WEST PUBLISHING CORPORATION WEST, A THOMSON REUTERS BUSINESS						12. TYPE OF ORDER <input type="checkbox"/> a. PURCHASE <input checked="" type="checkbox"/> b. DELIVERY					
13. COMPANY NAME						14. REFERENCE YOUR Please attach the following on the back and conditions specified on both sides of this order and on the attached sheet, if any, including delivery as indicated.					
15. STREET ADDRESS 610 OPPENHEIM DR						16. EXCEPT FOR BILLING INSTRUCTIONS ON THE REVERSE, THE DELIVERY POINT IS THE DELIVERY POINT SPECIFIED ON THE ORDER AND IS NOT SUBJECT TO THE TERMS AND CONDITIONS OF THE ABOVE-MENTIONED CONTRACT.					
17. CITY SAINT PAUL				18. STATE MN		19. ZIP CODE 551231340					
20. ACCOUNTING AND APPROPRIATION DATA See CONTINUATION Page						21. REQUISITIONING OFFICE SEC Cristin Biarets (202) 502-6926					
22. BUSINESS CLASSIFICATION (Check appropriate boxes) <input type="checkbox"/> a. SMALL <input checked="" type="checkbox"/> b. OTHER THAN SMALL <input type="checkbox"/> c. DISADVANTAGED <input type="checkbox"/> d. WOMEN-OWNED <input type="checkbox"/> e. HUBZone <input type="checkbox"/> f. SERVICE-DISABLED <input type="checkbox"/> g. WOMEN-OWNED SMALL BUSINESS (WOSB) <input type="checkbox"/> h. EDWOSB <input type="checkbox"/> i. VETERAN-OWNED										23. F.O.B. POINT Destination	
24. PLACE OF Washington, DC				25. ACCEPTANCE Washington, DC		26. GOVERNMENT B/L NO. N/A		27. DELIVER TO F.O.B. POINT ON OR BEFORE (Date) See Schedule		28. DISCOUNT TERMS Net 30	
17. SCHEDULE (See reverse for Regulations) See CONTINUATION Page											
ITEM NO. (a)	SUPPLIES OR SERVICES (b)					QUANTITY ORDERED (c)	UNIT (d)	UNIT PRICE (e)	AMOUNT (f)	QUANTITY ACCEPTED (g)	
	This Delivery Order is issued under the terms and conditions of the Library of Congress FEOLINK Direct Express contract LC09D7012 awarded to West Publishing Corporation, as authorized under the Library of Congress' Fiscal Operations Improvement Act, P.L. 108-461, section 103 (2 U.S.C. section 182c). The Contractor's proposal dated September 18, 2012 is herein referenced.								\$0.00		
									\$0.00		
									\$0.00		
									\$0.00		
									\$0.00		
									\$0.00		
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									\$0.00		
29. SHIPPING POINT						30. GROSS SHIPPING WEIGHT		31. INVOICE NO.		1700 TOTAL (Cont. Page)	
32. MAIL INVOICE TO:											
33. NAME Federal Energy Regulatory Commission Division of Financial Services											
34. STREET ADDRESS (or P.O. Box) Attn: Payment/Invoice 888 First Street, NE, Room 42-71											
35. CITY Washington						36. STATE DC		37. ZIP CODE 20426		1700 GRAND TOTAL	
38. UNITED STATES OF AMERICA BY (Signature) 						39. NAME (Typed) Marc G MacKaigne (202) 502-8995 Contracting Officer TITLE: CONTRACTING OFFICER					

**AUTHORIZED FOR LOCAL REPRODUCTION
PREVIOUS EDITION NOT USABLE**

OPTIONAL FORM 447 (REV. 8-20-12)
PRESCRIBED BY GSA/FPMR 41 CFR 101-11.6

A.1 Price/Cost Schedule

Item Information

ITEM NUMBER	DESCRIPTION OF SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
00001	Contract Period: Base POP Begin: 09-24-2012 POP End: 08-31-2013 WestlawNext- 700 Authorized Agency Users with Unlimited Simultaneous Usage Includes Basic Westlaw Legal Databases (including Specialty databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleadings, Motions and Memoranda; Treatises & Forms Library; Sutherland Statutes and Statutory Construction Library; PastStat Locator- USCA; Graphical Statutes- USCA; RegulationsPlus; Related Documents; NewsRoom Databases on Westlaw; PeopleMap Comprehensive Content & Reports.	11.00	MO		
	Funding/Req. Number: 1			0000028191	
00002	Contract Period: Base POP Begin: 09-24-2012 POP End: 08-31-2013 CLEAR Investigator with Web Analytics- Up to 50 Authorized Agency Users (Office of Enforcement only) with Unlimited Simultaneous Usage.	11.00	MO		
	Funding/Req. Number: 1			0000028191	
10001	Contract Period: Option 1 POP Begin: 09-01-2013 POP End: 08-31-2014 Option Year 1- WestlawNext- 700 Authorized Agency Users with Unlimited Simultaneous Usage. Includes Basic Westlaw Legal Databases (including	0.00	MO		\$0.00

	Speciality databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleadings, Motions and Memoranda; Treatises & Forms Library; Sutherland Statutes and Statutory Construction Library; PastStat Locator- USCA; Graphical Statutes- USCA; RegulationsPlus; Related Documents; NewsRoom Databases on Westlaw; PeopleMap Comprehensive Content & Reports. If Option Year CLIN is exercised, the total annual price is [REDACTED]				
10002	Contract Period: Option 1 POP Begin: 09-01-2013 POP End: 08-31-2014 Option Year 1-CLEAR Investigator with Web Analytics- Up to 50 Authorized Agency Users (Office of Enforcement only) with Unlimited Simultaneous Usage; If Option Year CLIN is exercised, total annual price is [REDACTED]	0.00	MO	[REDACTED]	\$0.00
20001	Contract Period: Option 2 POP Begin: 09-01-2014 POP End: 08-31-2015 Option Year 2- WestlawNext- 700 Authorized Agency Users with Unlimited Simultaneous Usage Includes Basic Westlaw Legal Databases (including Speciality databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleadings, Motions and Memoranda; Treatises & Forms Library; Sutherland Statutes and Statutory Construction Library; PastStat Locator-	0.00	MO	[REDACTED]	\$0.00

	USCA; Graphical Statutes- USCA; RegulationsPlus; Related Documents; NewsRoom Databases on Westlaw; PeopleMap Comprehensive Content & Reports. If Option Year CLIN is exercised, the total annual price is [REDACTED]				
20002	Contract Period: Option 2 POP Begin: 09-01-2014 POP End: 08-31-2015 Option Year 2-CLEAR Investigator with Web Analytics- Up to 50 Authorized Agency Users (Office of Enforcement only) with Unlimited Simultaneous Usage. If Option Year CLIN is exercised, the total annual price is [REDACTED]	0.00	MO	[REDACTED]	\$0.00
30001	Contract Period: Option 3 POP Begin: 09-01-2015 POP End: 08-31-2016 Option Year 3- WestlawNext- 700 Authorized Agency Users with Unlimited Simultaneous Usage Includes Basic Westlaw Legal Databases (including Specialty databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleadings, Motions and Memoranda; Treatises & Forms Library; Sutherland Statutes and Statutory Construction Library; PastStat Locator- USCA; Graphical Statutes- USCA; RegulationsPlus; Related Documents; NewsRoom Databases on Westlaw; PeopleMap Comprehensive Content & Reports. If Option Year CLIN is exercised, the total annual price is [REDACTED]	0.00	MO	[REDACTED]	\$0.00
30002	Contract Period: Option 3	0.00	MO	[REDACTED]	\$0.00

	POP Begin: 09-01-2015 POP End: 08-31-2016 Option Year 3-CLEAR Investigator with Web Analytics- Up to 50 Authorized Agency Users (Office of Enforcement only) with Unlimited Simultaneous Usage If Option Year CLIN is exercised, the total annual price is [REDACTED]				
40001	Contract Period: Option 4 POP Begin: 09-01-2016 POP End: 08-31-2017 Option Year 4- WestlawNext- 700 Authorized Agency Users with Unlimited Simultaneous Usage Includes Basic Westlaw Legal Databases (including Speciality databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleadings, Motions and Memoranda; Treatises & Forms Library; Sutherland Statutes and Statutory Construction Library; PastStat Locator-USCA; Graphical Statutes-USCA; RegulationsPlus; Related Documents; NewsRoom Databases on Westlaw; PeopleMap Comprehensive Content & Reports. If Option Year CLIN is exercised, the total annual price is [REDACTED]	0.00	MO	[REDACTED]	\$0.00
40002	Contract Period: Option 4 POP Begin: 09-01-2016 POP End: 08-31-2017 Option Year 4-CLEAR Investigator with Web Analytics- Up to 50 Authorized Agency Users (Office of Enforcement only) with Unlimited Simultaneous Usage. If Option Year CLIN is	0.00	MO	[REDACTED]	\$0.00

exercised, the total annual price is [REDACTED]	GRAND TOTAL [REDACTED]
---	------------------------

Accounting and Appropriation Data

ACRN	APPROPRIATION	REQUISITION NUMBER	AMOUNT
1	X0212-9131000000-25215-6100-0-DEFAULT-00026-----	0000028191	[REDACTED]

A.2 FSS/GWAC DELIVERY ORDER—PRODUCTS—LOCAL PROVISION

This Delivery Order is issued subject to the terms and conditions of the referenced Library of Congress FEDLINK Contract LC09D7012 and the agency incorporated local provisions as listed below.

A.3 INVOICING--LOCAL PROVISION

An original invoice(s) for work provided under this order shall be submitted with proper documentation in accordance with the Prompt Payment Act, FAR 52.232-25 to:

Federal Energy Regulatory Commission
Division of Financial Services
Attn: Payment/Invoice
888 First Street, NE, Room 42-71
Washington, DC 20426

INVOICE MAY BE SUBMITTED ELECTRONICALLY TO: DFS-Invoices@ferc.gov

FOR INVOICE STATUS CONTACT: William Brown
202-502-8956

In addition, please submit at least 1 copy of all invoices simultaneously to cristin.bieretz@ferc.gov, helen.spelght@ferc.gov, monica.mccracken@ferc.gov at the physical or e-mail address listed herein.

YOUR LAST INVOICE UNDER THE ORDER SHALL BE MARKED "FINAL."

Contracting Officer Representative (COR) Level I Appointment

Cristin Bieretz has been appointed as the Contracting Officer's Representative (COR) Level I for this Contract with responsibility for technical oversight, contract administration and day-to-day inspection of the work. The appointment will be in effect until final completion of the project, or when terminated or superseded by the Contracting Officer. The COR will accomplish inspection and acceptance, including final delivery. Services shall conform to the requirements set forth in the contract.

Name: Cristin Bieretz

Federal Energy Regulatory Commission
888 First Street, NE Washington, DC 20426
Phone: 202-502-6828
Email: cristin.bleretz@ferc.gov

A.4 52.252-2 CLAUSES INCORPORATED BY REFERENCE (FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

FAR Number	Title	Date
52.212-4	CONTRACT TERMS AND CONDITIONS-- COMMERCIAL ITEMS	FEB 2012
52.212-5	CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS--COMMERCIAL ITEMS	AUG 2012

A.5 52.217-8 OPTION TO EXTEND SERVICES (NOV 1999)

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 30 days of the end of the current period of performance..

A.6 52.217-9 OPTION TO EXTEND THE TERM OF THE CONTRACT (MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within 30 days of the end of the current period of performance.; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 (sbty) days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed five years and six months..

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		BPA NO.	1. CONTRACT ID CODE	PAGE 1 OF PAGES 2
2. AMENDMENT/MODIFICATION NO. 0002	3. EFFECTIVE DATE 09-01-2014	4. REGISTRATION/PURCHASE REG. NO. See SCHEDULE		5. PROJECT NO. (if applicable)
6. ISSUED BY Federal Energy Regulatory Commission Procurement Division Attn: Glenn Emig 888 First Street, NE, Room 4J Washington DC 20426	CODE 00039	7. ADMINISTERED BY (if other than item 6) Federal Energy Regulatory Commission Procurement Division Attn: Glenn Emig 888 First Street, NE, Room 4J Washington DC 20426	CODE 00039	
8. NAME AND ADDRESS OF CONTRACTOR (for direct award, State and ZIP Code) WEST PUBLISHING CORPORATION WEST, A THOMSON REUTERS BUSINESS 610 OPPERMAN DR SAINT PAUL, MN 551231160		(X) 9A. AMENDMENT OF SOLICITATION NO. 9B. DATED (SEE ITEM 17) 10A. MODIFICATION OF CONTRACT/ORDER NO. LC09D7013 PERC-12-F-0997 10B. DATED (SEE ITEM 17) 09-24-2012		
CODE	FACILITY CODE		X	

11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

- ☐ The above numbered solicitation is amended as set forth in item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:
- (a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA (if required)
See CONTINUATION Page

13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

- (X) A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT/ORDER NO. IN ITEM 10A.
- B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.102(b).
- C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:
- D. OTHER (Specify type of modification and authority)
- X

E. IMPORTANT: Contractor ☒ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF Section headings, including subheadings where appropriate.)

The purpose of this modification is to exercise and fully fund option period 2.

Accordingly, see page 2.

Except as provided herein, all terms and conditions of the documents referenced in item 9A or 10A, as hereinafter changed, remain unchanged and in full force and effect.

15A. NAME AND TITLE OF ISSUER (Type or print) Glenn T. Emig (202) 502-8669 Contracting Officer	15B. CONTRACT/ORDER NO. BY _____ (Signature of person authorized to sign)	15C. DATE SIGNED 15D. UNITED STATES OF AMERICA (Signature of Contracting Officer)	15E. DATE SIGNED 7/28/14
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NSM 7540-01-162-0070
PREVIOUS EDITION NOT USABLE

STANDARD FORM 29 (REV. 10-97)
Prescribed by GSA - FPMR (41 CFR) 101-11.6

2

**A.1 Price/Cost Schedule
Item Information**

ITEM NUMBER	DESCRIPTION OF SUPPLIES/SERVICES	QUANTITY	UNIT	UNIT PRICE	AMOUNT
20001	Option Year 2-WestlawNext- 700 Authorized Agency Users with Unlimited Simultaneous Usage. Includes Basic Westlaw Legal Databases (Including Specialty databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleadings, Motions and Memoranda; Treatises & Forms Library; Sutherland Statutes and Statutory Construction Library; PastStat Locator-USCA; Graphical Statutes-USCA; RegulationsPlus; Related Documents; NewsRoom Databases on Westlaw; PeopleMap Comprehensive Content & Reports; FERC Practice and Procedural Manual. Contract Period: Option 2 POP Begin: 09-01-2014 POP End: 08-31-2015 The total annual price is [REDACTED] Funding/Req. Number: 1 [REDACTED] 0000032510	12.00	MO	[REDACTED]	[REDACTED]
20002	Option Year 2-CLEAR Investigator with Web Analytics. Up to 60 Authorized Agency Users (Office of Enforcement only) with Unlimited Simultaneous Usage. Contract Period: Option 2 POP Begin: 09-01-2014 POP End: 08-31-2015 The total annual price is [REDACTED] Funding/Req. Number: 1 [REDACTED] 0000032510	12.00	MO	[REDACTED]	[REDACTED]
GRAND TOTAL				[REDACTED]	[REDACTED]

Accounting and Appropriation Data

ACRN	APPROPRIATION	REQUISITION NUMBER	AMOUNT
1	X0212-9131000000-25215-6100-0- DEFAULT-00026----	0000032510	[REDACTED]

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		SFA NO	1 CONTRACT NO CODE	PAGE 1	OF PAGES 5
2 AMENDMENT/MODIFICATION NO 0001		3 EFFECTIVE DATE 09-01-2013	4 RESOLUTION/PURCHASE REQ NO See SCHEDULE	5 PROJECT NO (if applicable)	
6 ISSUED BY Federal Energy Regulatory Commission Acquisition Services Division 100 First Street, NE, Room 4J Washington DC 20426		CODE 00039	7 ADMINISTERED BY (if other than item 6) Federal Energy Regulatory Commission Acquisition Services Division 100 First Street, NE, Room 4J Washington DC 20426	CODE 00039	
8 NAME AND ADDRESS OF CONTRACTOR WEST PUBLISHING CORPORATION WEST, A THOMSON REUTERS BUSINESS 610 OFFERMAN DR SAINT PAUL MN 551231340			9A AMENDMENT OF SOLICITATION NO 9B DATED (SEE ITEM 10) 9C MODIFICATION OF CONTRACT/ORDER NO LC0507012 FERC-12-P-0997 9D DATED (SEE ITEM 10)		
CODE			11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS		
<input type="checkbox"/> The above numbered solicitation is amended as set forth in item 14. The hour and date specified for receipt of Offers <input type="checkbox"/> is extended, <input type="checkbox"/> is not extended. Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing items 9 and 10, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.					
12 ACCOUNTING AND APPROPRIATION DATA (if required) See SCHEDULE					
13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.					
14 A THIS CHANGE ORDER IS ISSUED PURSUANT TO (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A					
B THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in pricing office, appropriation data, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.101					
C THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF					
D OTHER (Specify type of modification and authority) FAR 52.717-9, Option to Extend the Term of the Contract					
E. IMPORTANT: Contractor <input type="checkbox"/> is not, <input checked="" type="checkbox"/> is required to sign this document and return 1 copies to the issuing office.					
14 DESCRIPTION OF AMENDMENT/MODIFICATION (Classified by UCP location/keywords, including contract/order number (subject matter where feasible))					
The purpose of this modification is to:					
a. exercise option period 1.					
b. incorporate by reference proposal number 40423128, dated 8 August 2013. Proposal adds the FERC Practice and Procedural Manual (10081) and increases the authorized CLEAR Investigator users by 10 from 50 users to 60 users.					
All other terms and conditions remain unchanged.					
Except as provided herein, all terms and conditions of the documents referenced in item 14 or FAR, as hereinafter changed, remain unchanged and in full force and effect.					
15A NAME AND TITLE OF CONTRACTING OFFICER (Print or type) Mary MacKaignan Contracting Officer			202-502-6394		
15B DATE SIGNED 18 Aug 2013			15C DATE SIGNED 09-27-2013		

FORM 154-01-103-070
PREVIOUS EDITION NOT USABLE

STANDARD FORM 154 (REV 10-09)
Prescribed by GSA - FAR (48 CFR) 53.243

3

<p>Authorized Agency Users with unlimited simultaneous usage. Includes Basic Westlaw Legal Databases (including Speciality databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleading, Motions and Memoranda; Treatises & Forms Library; Sutherland Statutes and Statutory Construction Library; PastStat Locator-USCA; Graphical Statutes-USCA; RegulationsPlus; Related Documents; NewsRoom Databases on Westlaw; PeopleMap Comprehensive Content & Report; FERC Practice and Procedural Manual.</p> <p>If Option Year CLIN is exercised, total annual price is [REDACTED]</p>					
20002	<p>Contract Period: Option 2 POP Begin: 09-01-2014 POP End: 08-31-2015 Clear Investigator with Web Analytics- Up to 60 Authorized Agency Users (Office of Enforcement only) with unlimited simultaneous usage. If Option Year CLIN is exercised, the total annual cost is [REDACTED]</p>	0.00	MO	[REDACTED]	\$0.00
30001	<p>Contract Period: Option 3 POP Begin: 09-01-2015 POP End: 08-31-2016 WestlawNext-700 Authorized Agency Users with unlimited simultaneous usage. Includes Basic Westlaw Legal Databases (including Speciality databases); American Law Reports (ALR); All AMJUR Library; Corpus Juris Secundum (CJS); All Federal Briefs Library; Federal Pleading, Motions and Memoranda;</p>	0.00	MO	[REDACTED]	\$0.00

If Option Year CLIN is exercised, the total annual price is [REDACTED]					
40002	Contract Period: Option 1 POP Begin: 09-01-2016 POP End: 08-31-2017 Clear Investigator with Web Analytics- Up to 60 Authorized Agency Users (Office of Enforcement only) with unlimited simultaneous usage. If Option Year CLIN is exercised, the total annual cost is [REDACTED]	0.00	MO	[REDACTED]	\$0.00
GRAND TOTAL					[REDACTED]

Accounting and Appropriation Data

ACRN	APPROPRIATION	REQUISITION NUMBER	AMOUNT
1	X0212-9131000000-25215-6100-0- DEFAULT-00026-----	0000029980	[REDACTED]
2	X0212-9131000000-25215-6100-0- DEFAULT-00026-----	0000030237	

Federal Energy Regulation Commission Westlaw and CLEAR Pricing Proposal

8 August 2013

To: Valerie Bosick
Contracting Officer
U.S. Federal Regulatory Commission
202-502-6394

WESTLAW:

West Publishing Corporation (West, a Thomson Reuters business) proposes to meet the online research needs of the Federal Energy Regulatory Commission by providing access to the following content on Westlaw (CLINS 10001, 20001, 30001, 40001):

Proposed Content	
Advanced Public Records Utilities	40422125
User Limit:	Unlimited
Usage Limit:	Unlimited Simultaneous Usage
Platform:	westlaw.com/WLNext
Fixed Monthly Charge	
September 1, 2013 – August 31, 2017	At No Charge

CLEAR:

West Publishing Corporation (West, a Thomson Reuters business) proposes to meet the online research needs of the Federal Energy Regulatory Commission by providing access for 60 users for CLEAR Investigator (CLINS 10002, 20002, 30002, 40002):

September 1, 2013 – August 31, 2014 (CLIN 20001):	per month*
September 1, 2014 – August 31, 2015 (CLIN 20002):	per month*
September 1, 2015 – August 31, 2016 (CLIN 20003):	per month*
September 1, 2016 – August 31, 2017 (CLIN 20004):	per month*

OFFER ACCEPTANCE PERIOD

The terms of this price proposal are valid through August 26, 2013.

CONTRACTING WITH WEST

Any contract resulting from this proposal will be with West Publishing Corporation. Westlaw service will begin the first day of the first month following receipt of the fully executed contract, provided adequate time is available for implementing the contract. In general, to implement a contract West must receive the fully executed contract no later than five business days prior to the end of the month preceding the start of Westlaw service.

*Price includes Fedlink Industrial Funding Fees.



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Westlaw

NOV 12 2014

November 12, 2014

David L. Morenoff
General Counsel
Charles A. Beamon
Associate General Counsel
General and Administrative Law
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: Freedom of Information Act Appeal of Partial Adverse Determination in
FOIA No. FY14-99

Dear Sirs,

I am writing this letter in timely appeal of the Federal Energy Regulatory Commission's (hereinafter "Commission") September 30, 2014 partially adverse decision¹ on my July 30, 2014 FOIA request² for disclosure of landowner lists for the Atlantic Sunrise Project under Docket No. PF14-8, which are identified in the Commission's eLibrary database under Accession Nos. 20140502-5123, 20140722-5102, 201401714-5040 and 20140818-5070.

After I provided sufficient detail concerning the nature of my request – disclosure of such documents for informational purposes to determine whether Transcontinental Gas Pipeline Company (hereinafter "Transco"), through government lobbying and ultimately eminent domain, intends to take my land – the Commission improperly decided to partially withhold the desired information, specifically the landowner lists, on the basis of an incredibly brief rationale that failed to appropriately balance the public interest against the relevant privacy interest. With this summary determination the Commission stopped my right to understand and communicate the requested information to a larger audience and thus illuminate the Commission's regulatory efforts to public oversight.

INTRODUCTION

This appeal should be viewed against FOIA's overall context in general, and development of Exemption 6 in particular. The Freedom of Information Act establishes a "general philosophy of full agency disclosure." *GTE Sylvania, Inc. v. Consumers Union, Inc.*, 445 U.S. 375, 385 (1980) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965)). Congress enacted FOIA in 1966 to ensure the public's right of access to information regarding the conduct of government affairs. "The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed." *N.L.R.B. v.*

¹ Attached hereto as Exhibit A.

² Attached hereto as Exhibit B.

Robbins Tire, 437 U.S. 214, 242 (1978). The Attorney General at the time stressed that “this statute imposes on the executive branch an affirmative obligation to adopt new standards and practices for publication and availability of information. It leaves no doubt that disclosure is the transcendent goal. . . .” R. Clark, *Attorney General’s Memorandum on the Public Information Section of the Administrative Procedure Act*, Pre- face (1967).

As the Supreme Court has declared: “FOIA is often explained as a means for citizens to know what ‘their Government is up to.’” *NARA v. Favish*, 541 U.S. 157, 171 (2004) (quoting *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). The Court elaborated that “[t]his phrase should not be dismissed as a convenient formalism.” *Id.* at 171-72. Rather, “[i]t defines a structural necessity in a real democracy.” *Id.* at 172. In enacting FOIA, Congress was “principally interested in opening administrative processes to the scrutiny of the press and public.” *Renegotiation Bd. v. Bannerkraft Clothing Co.*, 415 U.S. 1, 17 (1974).

BACKGROUND

On July 29, 2014 I submitted my FOIA request to FERC asking for disclosure of other property owners in Lancaster County, Pennsylvania whose land is to be crossed or traversed by the Atlantic Sunrise Pipeline project. On July 29, 2014 a FERC FOIA team member replied with information regarding publicly available information in the relevant FERC docket. On July 30, 2014 I replied and clarified that I am seeking landowner names and addresses, not publicly available stakeholder information. Various

On August 25, 2014 I received a letter from FERC concerning the agency’s extension of timeline to respond on the basis of further internal agency communications and review. Last, on September 30, 2014 I received a Release Letter in this matter from FERC partially releasing responsive documents to my request. However, FERC only released names, addresses and other data of commercial interests, refusing to disclose names and addresses of individuals as requested on the basis of FOIA Exemption 6.³

FOIA EXEMPTION 6

FOIA requires FERC to disclose requested information unless the information falls within one of the nine narrowly construed exemptions from FOIA listed in 5 U.S.C. § 552(b). Here, FERC has invoked FOIA’s Exemption 6 with respect to disclosure of my request for landowner names and addresses who, like me, are likely to be affected by agency and like decisionmaking. Yet FERC alleges disclosure of “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).

The government always bears the burden of showing that the withheld information is a personnel, medical, or similar file that constitutes a clearly unwanted invasion of personal privacy. 5 U.S.C. § 552(a)(4)(B) (“the burden is on the agency to

³ See Exhibit A, attached, for all documents and communications referenced in the Background subsection.

sustain its action"); see also *Multnomah County Medical Soc'y v. Scott*, 825 F.2d at 1413. "In the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure." *Local 598 United Ass'n. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry v. Dep't of the Army*, 841 F.2d 1459, 1463 (9th Cir. 1988) (abrogated on other grounds) (emphasis added); see also *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982) ("under Exemption 6, the presumption in favor of disclosure is as strong as can be found anywhere in the Act").

Exemption 6 applies to "detailed Government records on an individual which can be identified as applying to that individual." *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595, 602 (1982). It "requires the Court to balance the individual's right of privacy against the basic policy of opening agency action to the light of public scrutiny." *United States Dep't of State v. Ray*, 502 U.S. 164, 175 (1991) (internal quotations omitted). Exemption 6 is designed to protect an individual's interest in avoiding disclosure of "personal matters." *DOJ v. Reporters Comm. for Free Press*, 489 U.S. 749, 762 (1989). The relevant public interest to be balanced against the private interests at stake is the core purpose of FOIA; "to open agency action to the light of public scrutiny." *Id.* at 772 (quoting *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976)).

Exemption 6 analysis incorporates the highest presumption of disclosure in FOIA. *Local 598*, 841 F.2d at 1463; see also *Nat'l Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) (the presumption in favor of disclosure under Exemption 6 "is as strong as can be found anywhere under the Act"); *Washington Post Co. v. HHS*, 690 F.2d 252, 261 (D.C. Cir. 1982); *Kurzon v. HHS*, 649 F.2d 65, 67 (1st Cir. 1981) (the instance in which "the calculus unequivocally supports withholding [is] a rare case because Congress has weighted the balance so heavily in favor of disclosure").

Recent case law on point with the present request is illustrative. In *Columbia Riverkeeper v. FERC*, the Oregon federal district court concluded that the names and addresses of landowners potentially affected by a proposed liquefied natural gas (LNG) pipeline could not be withheld under the FOIA's "personal information" provision. 650 F. Supp. 2d 1121 (D. Or. 2009); see 5 U.S.C. § 552(b)(6). In that case, FERC argued that the landowners had a privacy interest in non-disclosure, but the court concluded that disclosure did not implicate the landowners' privacy interest because they "took no action to get either on or off this list," and therefore the list did not reveal personal information. *Id.* at 1129. Further, the court agreed with the plaintiffs that disclosure of the list was in the public interest because disclosure would shed light on the FERC's activities. *Id.* at 1130. Likewise, in the present situation, the lists of affected landowners are not subject to an exemption under FOIA and must be disclosed.

The court in *Columbia Riverkeeper* made it plain that Exemption 6 does not apply to FOIA requests such as the instant request:

FERC has not carried its burden of proving the withheld materials are exempt from disclosure. The evidence does not support the existence of a "clearly

unwarranted invasion of privacy” as that statutory term is interpreted in Supreme Court and Ninth Circuit jurisprudence. Nor has FERC carried its burden of proving that the information sought by plaintiffs would not shed light on FERC’s performance of its statutory duties governing notice.

Columbia Riverkeeper, 650 F. Supp. 2d at 1130.

FACTORS CONSIDERED IN EXEMPTION 6 DECISIONS

As explained more fully below, Exemption 6 does not apply in this matter because the data requested is not located in “personnel,” “medical files,” or “similar files.” Therefore, as a threshold issue, Exemption 6 is not implicated. However, even if FERC disagrees and concludes that the balancing of interests under Exemption 6 should be applied, the withheld information should still be made public because its release would not “constitute a clearly unwarranted invasion of personal privacy.” To be clear, I am seeking the requested information to shine light on whether my land and adjacent and other, like landowners will have their land taken for natural gas projects, and in turn whether federal agencies are discharging their legal obligations to provide adequate information and opportunities for engagement to the public about these and other actions relating to the Atlantic Sunrise Pipeline Project.

Similar Files

When evaluating the withholding of information under Exemption 6, the first issue to be determined is the “threshold question [of] whether the requested documents are ‘personnel and medical files and similar files’ within the meaning of 5 U.S.C. § 552(b)(6).” *Dobronski v. Federal Communications Comm’n*, 17 F.3d 275, 277 (9th Cir. 1994). If the requested information does not fall within Exemption 6, it must be disclosed to the public. *Id.* The information sought herein is clearly not contained in a personnel or medical file, accordingly the question is whether it is from a “similar file.”

I recognize that courts have tended to interpret Exemption 6’s use of the term “similar file” flexibly. *See, e.g. United States Dep’t of State v. Washington Post Co.*, 456 U.S. at 600 (“[T]he phrase ‘similar files’ was to have a broad, rather than a narrow meaning”). However, as noted above, even within this “broad” application, the Supreme Court has consistently required that to implicate Exemption 6, information must be found in *detailed* Government records *on an individual*. *Id.* at 600-01 (holding that files containing the *details* of a passport application were similar files); *see also, e.g. Dept. of Air Force v. Rose*, 425 U.S. 352, 355, 376-77 (1976) (holding that *detailed* case summaries of cadet disciplinary proceedings were files similar to personnel files); *Dept. of State v. Ray*, 502 U.S. at 173 (holding that *detailed* post-repatriation interviews with unsuccessful Haitian asylum seekers were similar files).

The data sought in this request are clearly not from “personnel and medical files” and the question of whether the information is “similar” to those categories of documents must be resolved in the negative. The information sought in the stakeholder/landowner

lists is merely a collection of names and addresses. This information is in no way "private" or an "intimate detail[] of personal and family life," thus it is not "similar" to the personnel or medical files expressly protected by Exemption 6.

Consequently, as a threshold matter, nothing sought in this FOIA appeal meets the preliminary standard to invoke FOIA's Exemption 6; an issue that was completely ignored by FERC in its decision. For this reason alone, the withheld information must be released.

However, even if FERC concludes that Exemption 6 applies, there are no privacy interests sufficient to outweigh the public interest inherent in release of the requested information. The question of whether disclosure of the records would constitute a clearly unwarranted invasion of personal privacy requires a balancing of the public's right to disclosure against the individual's right to privacy. *Columbia Riverkeeper*, 650 F.Supp.2d at 1125.

Privacy Interest

First, it must be ascertained whether a protectable privacy interest exists that would be threatened by disclosure. *Reporters Comm. for Free Press*, 489 U.S. at 76. If a privacy interest is found to exist, the public interest in disclosure, if any, must be weighed against the privacy interest in nondisclosure. *Id.* In its April 21, 2014 letter, exempting the Requested Item #1 from disclosure, FERC does not refer to, nor appear to have used, the balancing process discussed above.

To understand this issue, it is necessary to identify the type of privacy interest involved. In this instance, it is privacy around the names and addresses of individuals already on a government and industry mailing list. In a case regarding a mailing list generated and used solely by a government agency, the Ninth Circuit found that the privacy interest of individuals already on the mailing list is *minimal* in light of the mailings already received by the individuals and the mailings already received by the individuals and the similar subject matter of the mailings likely to be received as a result of the disclosure. *Or. Natural Desert Ass'n v. Bibbes*, 83 F. 3d 1168 (9th Cir. 2006) (reversed on other grounds).

Recent case law directly on point supports the full, un-redacted disclosure of the requested stakeholder/landowner lists. In *Columbia Riverkeeper v. FERC*, the Oregon federal district court concluded that the names and addresses of landowners potentially affected by a proposed pipeline could not be withheld under the FOIA's Exemption 6. 650 F. Supp. 2d 1121 (D. Or. 2009). In that case, FERC argued that the landowners had a privacy interest in non-disclosure, but the court concluded that disclosure did not implicate the landowners' privacy interest because they "took no action to get either on or off this list," and therefore the list did not reveal personal information. *Id.* at 1129. Further, the court agreed with the plaintiffs that disclosure of the list was in the public interest because disclosure would shed light on the FERC's activities. *Id.* at 1130. The court in *Columbia Riverkeeper* made it plain that Exemption 6 does not support withholding of information under FOIA requests in cases such as the instant request:

FERC has not carried its burden of proving the withheld materials are exempt from disclosure. The evidence does not support the existence of a "clearly unwarranted invasion of privacy" as that statutory term is interpreted in Supreme Court and Ninth Circuit jurisprudence. Nor has FERC carried its burden of proving that the information sought by plaintiffs would not shed light on FERC's performance of its statutory duties governing notice.

Columbia Riverkeeper, 650 F. Supp. 2d at 1130.

The three other key factors that the court found determinative in *Columbia Riverkeeper* apply equally to this case: 1) First, the court made a factual finding that FERC routinely releases lists similar to those sought in this request. *Id.* at 1126-27 ("FERC has failed to provide any evidence of a reason for treating the Palomar landowner list differently from the Ruby, NorthernStar and Oregon LNG landowner lists."); 2) Second, FERC provides the landowner lists to private corporations. Here, FERC and the proponents of the Atlantic Sunrise Pipeline Project have routinely shared multiple versions of the landowner lists at issue, something the *Columbia Riverkeeper* court found probative as to a lack of privacy interest. *Id.* at 1129, and; 3) There is little risk of harm or embarrassment to the landowners. *Id.* ("FERC has not identified any harm to the landowners resulting from disclosure."). *Id.* All of these *Columbia Riverkeeper* findings are equally true here and support release of the requested information.

Moreover, Requesters note that disclosure of the requested information would contribute to the public's understanding of the operations of FERC, and that Requesters need not demonstrate that FERC is failing to carry out its statutory obligations before the information is properly released. Instead, the "relevant public interest is the extent to which disclosure would contribute to the public's understanding of the activities and operations of the government." *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 776. Here, Requesters have sought the requested information for the very purpose of determining whether FERC and other federal agencies are complying with the law, namely the public participation elements of the following statutes and their implementing regulations: the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, 40 C.F.R. §§ 1500.2(d) (mandating that agencies "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment."), 1506.6 (establishing particular public participation requirements); the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. § 717f, 18 C.F.R. §§ 157.6(a)(5) ("Applications under section 7 of the Natural Gas Act must conform to the requirements of §§ 157.5 through 157.14."), 157.6(d) (Landowner notification), 153.3 (incorporating landowner notification requirement of 157.6(d) for natural gas export facility applications), 153.4 (incorporating the procedures required by §§ 157.5, 157.6, 157.8, 157.9, 157.10, 157.11, and 157.12 for natural gas export facility applications), 380.9 (incorporating and implementing NEPA's public participation regulations); the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1604(d), (f)(4), (g)(3)(F)(iv), (m)(2), 36 C.F.R. § 219(4) (requirements for public participation) and; the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. § 1739(e), 43 C.F.R. § 1610(2) (requirements for public

participation). Requesters further intend to review FERC's enforcement of Pacific Connector's compliance with 18 C.F.R. §§ 157.6(d) (Landowner notification), 380.12(c)(10) (requiring an application under the NGA to contain "the names and mailing addresses of all affected landowners specified in §157.6(d) and certify that all affected landowners will be notified as required in §157.6(d)."). *See, e.g.*, 40 C.F.R. § 1506.5(a) ("The agency shall independently evaluate the information submitted [by an applicant for use by an agency] and shall be responsible for its accuracy").

As the court in *Columbia Riverkeeper* explained, "the reasons the documents are sought under FOIA" does not inform whether an invasion of privacy is warranted. 650 F. Supp. 2d at 1129, n.2. Neither FOIA nor the *Columbia Riverkeeper* court's interpretation of Exemption 6 require the requestor to submit evidence of FERC's violations of federal law (*e.g.*, failure to provide public notice where such notice is required by law).

In its letter to me indicating that it would only release a redacted copy of the stakeholder list, FERC stated that "the names and personal addresses of private citizens implicate a privacy interest and are protect from disclosure by FOIA Exemption 6..."

In fact, the case law is split on this question, and as the United States District Court for the District of Columbia recently held, "the sum of these cases establish that where the requester has articulated a legitimate public interest in the information, courts have ordered disclosure of names and addresses, even if such information is associated with financial information, views held by the landowner, or would risk unwanted contact." *Gilman v. U.S. Dep't of Homeland Sec.*, CV 09- 0468 (BAH), 2014 WL 984309, *10 (D.D.C. Mar. 14, 2014) (releasing the names and addresses of private landowners in the right-of-way of the Mexico-Texas border fence); *but see contra, Odland v. FERC*, CV 13-141, 2014 WL 1244773 (D.D.C. 2014).⁴ Indeed, "when the disclosed information would "shed light on an agency's performance of its statutory duties or otherwise let citizens know what their government is up to, disclosure is appropriate, even if the Court has recognized a significant privacy interest. In other words, even when a significant privacy interest is at stake, Exemption 6 require[s] a balance tilted emphatically in favor of disclosure." *Id.* (internal quotations and citations omitted) (citing *Dep't of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 497 (1994); *Stern v. F.B.I.*, 737 F.2d 84, 91 (D.C. Cir. 1984); *News-Press v. U.S. Dep't of Homeland Sec.*, 489 F.3d 1173, 1198 (11th Cir. 2007) ("The federal courts, including this one, have therefore generally concluded that an agency's burden under Exemption 6 of showing that disclosure 'would constitute a clearly unwarranted invasion of personal privacy' is an onerous one").

In the present case, the requested information is not associated with financial information or the personal views on the proposed project, and there is no risk of unwanted contact, which places this request squarely within the case law compelling disclosure. *id.*; *see also, Columbia Riverkeeper*, 650 F.Supp.2d at 1126-1130.

To be clear, I again inform you that I 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 to ensure the

accuracy of information provided in support of a new pipeline, the right of a company to take private citizens' land, and to enforce the public's right to fully participate in the siting and permitting review for the Atlantic Sunrise Pipeline project. The *Columbia Riverkeeper* court found this type of public oversight — "double-check[ing]" — supported the public's access to stakeholder/landowner lists. *Id.* at 1130-31.

Public Interest

The only relevant public interest in the FOIA balancing analysis 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 v. Or. Natural Desert Ass'n*, 519 U.S. 355, 355-56 (1997) (quoting *Department of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773 (1989)). In this case, I am seeking the requested information 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 enforce the public's right to fully participate in the siting and permitting review for the Atlantic Sunrise Pipeline Project.

The Ninth Circuit has affirmed that "there is a significant public interest in knowing with whom the government has chosen to communicate." *Or. Natural Desert Ass'n v. Bibles*, 83 F.3d at 1171. The mailing list that I seek provides precisely this type of information: allowing the public to see the list that FERC and the Applicant rely on for its communications with "stakeholders" about this project. Disclosure of the mailing list in its entirety furthers the public interest by providing oversight of FERC's process, ensuring no stakeholders are left out, and ensuring no disparate communication with stakeholders.

For example, disclosing the names and addresses on the list will help the public understand the route of the Atlantic Sunrise Pipeline, including the public – and private – resources that are involved with the project. Without route and land ownership information, the public cannot fully understand the pros and cons of the Atlantic Sunrise pipeline. See, e.g., *Gilman v. U.S. Dep't of Homeland Sec.*, CV 09-0468 (BAH), 2014 WL 984309, *8 (revealing the identities of landowners along path of a border wall's planned construction route may shed light on, *inter alia*, the impacts on local communities, and thus agency's implementation of its legal authority). Similarly, disclosing the stakeholder list will allow the public to "double check" whether and how FERC – and its contractors – is engaging the public in the development and environmental review of the project, by allowing Requesters to seek information from those on the stakeholder list about how they were – or were not – contacted by FERC and its contractors. *Id.* at * 7 (noting that the public benefit under FOIA can be "significant" because when requested information can "be used derivatively in order to 'shed light on government conduct' on 'a topic of considerable public interest'"). Indeed, as I am a private landowner within the pipeline right-of-way, and thus should be on the stakeholder list, un-redacted disclosure of stakeholder names and addresses will allow me to reach out to my neighbors, compare the nature and extent of contact with FERC and its contractors,

and provide additional information that may not have been provided by project proponents.

In its September 30, 2014 denial letter addressed to me, FERC performs zero analysis as to the public interest weighing in regards to disclosure. I note again the disclosure of the requested information would contribute to the public's understanding of the operations of FERC, and that I do not need to demonstrate that FERC is failing to carry out its statutory obligations before the information is properly released. Instead, the "relevant public interest is the extent to which disclosure would contribute to the public's understanding of the activities and operations of the government." *U.S. Dept. of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. at 776.

Balancing

The Freedom of Information Act embodies a strong policy of disclosure and places a duty to disclose on federal agencies. As noted by the Supreme Court, "disclosure, not secrecy, is the dominant objective of the Act." *Rose*, 425 U.S. at 361. Exemption 6 protects only against disclosure which amounts to a "clearly unwarranted invasion of personal privacy" which connotes a strong presumption in favor of disclosure. *Local 598*, 841 F.2d at 1463.

To deny a request under Exemption 6, then, FERC must determine that Requesters' request would cause a clearly unwarranted invasion of personal privacy. As discussed above, the personal privacy interest affected by this disclosure is low, as the "personal" information is of a type already in the public sphere, has been released in the past (including when the proposed project was an import facility), and all individuals affected already allegedly receive mailings from FERC about the Atlantic Sunrise Pipeline Project. Indeed, it is more than a bit ironic that FERC is denying my request for the same list that is used by the private companies who are proposing to build the pipeline. Again, if access to the stakeholder mailing list would truly create an "invasion of personal privacy," then this invasion has already been affected by the proponents of the Atlantic Sunrise Pipeline. The privacy interests at stake in this instance are thus minimal, and FERC has not made even a perfunctory attempt to demonstrate that disclosure of the requested information would result in a clearly unwarranted invasion of personal privacy.

"The legislative history is clear that Exemption 6 was directed at threats to privacy interests *more palpable than mere possibilities*." *Rose*, 425 U.S. at 381 n. 19 (emphasis added). An agency must show that disclosure "*would constitute*," as opposed to "could reasonably be expected to constitute" a "*clearly unwarranted*," as opposed to simply "unwarranted," invasion of personal privacy. *United States Dep't of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. at 756 (comparing enhanced withholding standard under Exemption 6 to lower threshold allowed by Exemption 7(C) (law enforcement/personal privacy), emphasis added). "The phrase 'clearly unwarranted invasion of personal privacy' enunciates a policy that will involve a balancing of interests between the protection of an individual's private affairs from unnecessary public scrutiny, and the preservation of the public's right to governmental information." *Rose*,

425 U.S. at 372, *quoting* S.Rep. at 9 (emphasis added). The phrase “clearly unwarranted” is the major restraining feature of Exemption 6 which controls the ability of an agency to withhold information. *Rose*, 425 U.S. at 378-79 & n. 16. Congress retained this language despite strong pressure from the executive branch to relax the “heavy burden” it imposes on agencies seeking to apply the exemption. *Id.* As the *Rose* court explained, “the terms objected to were nevertheless retained, as a ‘proper balance,’ to keep the scope of the exemption ...within bounds.” *Id.* at n. 16 (internal citations omitted).

The case law is uniform that the phrase “clearly unwarranted” in Exemption 6 “instructs the court to tilt the balance in favor of disclosure.” *See, e.g., Getman v. NLRB.*, 450 F.2d 670,674 (D.C. Cir. 1971) (Exemption 6 does not bar disclosure of names and addresses of employees eligible to vote in union representation elections because it would not reveal “intimate details” of a “highly personal” nature); *Van Bourg, Allen, Weinburg & Roger v. NLRB*, 728 F.2d 1270, 1274 (9th Cir. 1984) (same). As the *Rose* court concluded, in the Act generally, and particularly under Exemption (6), there is a strong presumption in favor of disclosure, and that “strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents.” *Rose*, 425 U.S. at 361; *see also News-Press v. U.S. Dep’t of Homeland Sec.*, 489 F.3d at 1198 (“The federal courts, including this one, have therefore generally concluded that an agency’s burden under Exemption 6 of showing that disclosure ‘would constitute a clearly unwarranted invasion of personal privacy’ is an onerous one”).

Even if there may exist some small invasion of privacy, the court must balance that invasion versus the public interest. “The public interest to be weighed against the privacy interest in this balancing test is the extent to which disclosure would serve the ‘core purposes of the FOIA by contribut[ing] significantly to public understanding of the operations or activities of the government. *Gilman*, 2014 WL 984309 at *7 (internal citations omitted). In *Gilman*, the DC District Court explained in an analogous context that disclosure of a list of landowners was appropriate, and that the federal government had failed “to consider the extent to which the release of the landowners’ names in the aggregate will further public understanding.” *Id.*

Because the Act and case law counsel disclosure, there is significant public interest in accessing the list to provide oversight as to whom and how FERC is communicating with and considers stakeholders in this process. Even if the disclosure did result in a small “invasion of privacy,” this would not be clearly unwarranted because it would result in the realization of the public interest of FOIA: public oversight of federal agencies.

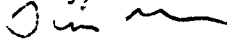
CONCLUSION

Because FERC has provided no argument to the contrary, and simply applied Exemption 6 with no analysis or balancing, FERC’s redaction of the requested information is untenable. I request that FERC immediately disclose the requested “stakeholder list” to me without redaction.

It would be useful as I evaluate the need to seek judicial review of this matter if you were to provide me with a projected date - certain by which I could expect a determination of this appeal, as is required by FOIA. Additionally, if you have implemented a "first-in/first-out" system for processing a backlog of FOIA appeals, I ask that you inform me how many appeals are in line ahead of this one. Please let us know if we can help you in your efforts to publicly disclose the important information contained in the requested documents. Should you have any questions whatsoever, please do not hesitate to contact me.

You may contact me by the information provided below.

Sincerely,



Mr. Tim Gross

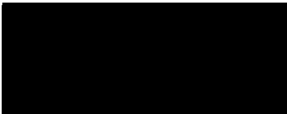


Exhibit A

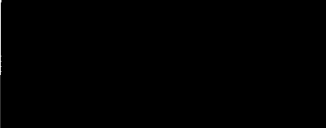
Federal Energy Regulatory Commission
Washington, DC 20426

SEP 30 2014

Re: Release Letter.
FOIA No. FY14-99

VIA EMAIL AND REGULAR MAIL

Mr. John T. Gross



Dear Mr. Gross:

On July 30, 2014, you submitted a request for information pursuant to the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 C.F.R. § 388.112(e) (2014), and the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012). Specifically, you requested the landowner lists for the Atlantic Sunrise 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.

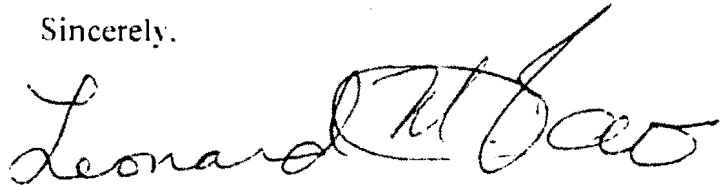
By letters dated August 8, 2014, and September 11, 2014, Michelle A. Davis, Attorney-Advisor, notified Transcontinental of your request and provided five (5) business days in which to submit comments. On August 11, 2014, and September 12, 2014, Transcontinental submitted comments arguing that disclosure of the documents would constitute an unwarranted invasion of privacy and that the documents should be exempt from disclosure under FOIA Exemption 6.¹

Commission staff agrees in part with Transcontinental's arguments concerning the landowner list. The names and personal addresses of private citizens implicate a privacy interest and are protected from disclosure by FOIA Exemption 6, 5 U.S.C. § 552(b)(6) (which protects files the disclosure of which would constitute a clearly unwarranted invasion of privacy), and will be redacted. However, the names, addresses, and other data of commercial entities do not implicate a privacy interest that is protected by FOIA Exemption 6 and will be released to you.

¹ 5 U.S.C. § 552(b)(6) (2012) (which protects files the disclosure of which would constitute a clearly unwarranted invasion of privacy).

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, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, and clearly marked "Freedom of Information Act Appeal." Please 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" written in a larger, more prominent script than the last name "Tao".

Leonard M. Tao
Director
Office of External Affairs

Enclosures (4)

Cc: Mr. William Hammons
Team Leader Rates & Regulatory
Transcontinental Gas Pipe Line Company
P.O. Box 1396
Houston, TX 77251-1396
William.h.hammons@williams.com

Exhibit B

FOIA request

FOIA-2014-99
Accepted: July 30, 2014
Track 1
Due Date: August 27, 2014

[REDACTED]
Tue 7/09/2014 5:17 PM

To: FOIA-CEII <FOIA-CEII@ferc.gov>

Dear sirs,

My name is John T. Gross. I am a stakeholder/ property owner who's land is to be traversed by the Williams Pipeline co. llc Atlantic Sunrise Project. My address is 198 Meadow lane Conestoga, Pa 17516. As a stakeholder, I am requesting the following information / documents. The names and addresses submitted to FERC by Williams Company of all of the other property owners in Lancaster County Pennsylvania who own land that is to be crossed or traversed by the Atlantic Sunrise Pipeline. I am requesting a waiver of fees for these documents as I intend to use it for informational purposes. As this is a private company who may use the weight of our own government to condemn our land in an eminent domain proceeding; I believe we have the right to discuss with one another our feelings about this proposed intrusion in to our privately owned property. And, as these documents have been filed with our own government, we have the right to view them.

Thank you in advance for your expeditious reply.

Documents may be mailed to:
John T. Gross

[REDACTED]
[REDACTED]

From: Toyia Johnson on behalf of FOIA-CEII

Sent: Tuesday, July 29, 2014 8:12 PM

To: jtim gross

Cc: FOIA-CEII

Subject: REQUEST FOR ADDITIONAL INFORMATION - GUIDANCE TO ELIBRARY - John Gross - Atlantic Sunrise Project -PF-14-8

Mr. Gross

Please be advised that a review of the FERC elibrary reflects that the Atlantic Sunrise Project, is identified as docket number PF14-8. You are only required to submit a Freedom of Information Act for non public material. The following privileged material (non public) may be of interest to you. We kindly ask that you indicate the amount of fees that you are willing to pay that may be associated with the processing of this request.

Submittal	07/13/2	PF14-8-	Transcontin	Applicant	PDF	18	INF
20140714-5040	014	000	ental Gas	Correspondence /	1K		Q
<u>Document</u>	07/14/2		Pipe Line	Supplemental/Ad	FERC		FIL
<u>Components</u>	014		Company.	ditional	General	19	E
			LLC	Information	ted	4K	
			submits		PDF		
			updated				
			mailing lists				
			for the				
			Atlantic				
			Sunrise				
			Project				
			under				
			PF14-8-				
			000.				
			(Supplemen				
			tal				
			Information				
			/ Request)				
			Availability				
			: Privileged				
Submittal	05/02/2	PF14-8-	Transcontin	Applicant			
20140502-5123	014	000	ental Gas	Correspondence /			
<u>Document</u>	05/02/2		Pipe Line	Supplemental/Ad			
<u>Components</u>	014		Company.	ditional			
			LLC	Information			
			submits the				

Stakeholder
and
Landowner
Mailing
Lists for the
Atlantic
Sunrise
Project
under
PF14-8-
000.
(Supplemen
tal
Information
/ Request)
Availability
: Privileged

As a courtesy we are also providing a link to the elibrary index sheets for PF14-8. Please be advised that public documents identified on this list can be viewed on your computer.

Elibrary search: PF14-8 Atlantic Sunrise - January 2013 - July 2014 (934 items)

<http://elibrary.ferc.gov/idmws/search/eSaveAdv.asp?cat=submittal&fdt=on&fd=06/29/2013&td=07/29/2014&fdd=06/29/2014&tdd=07/29/2014&fpd=06/29/2014&tpd=07/29/2014&dk1=PF14%2D8&dk2=000>

If you have questions or need further assistance, please do not hesitate to contact our FOIA-CEI Service Center by email at foia-cei@ferc.gov or by phone at 202 502-6088.

Sincerely,

Toyia Johnson

Toyia Johnson
Federal Energy Regulatory Commission
Office of External Affairs
FOIA Public Liaison
Phone: (202) 502-6389 / Toll Free: 1-866-208-3372
Email: foia-cei@ferc.gov

Online FOIA & CEI request forms: <http://www.ferc.gov/legal/cei-foia.asp>

ADDITIONAL INFORMATION:

From: [REDACTED]
Sent: Wednesday, July 30, 2014 2:18 PM
To: FOIA-CEII
Subject: Me Again

So Sorry Ms. Johnson. I wanted to clarify after reading your email again and better understanding the different terminology used in FERC filing PF14-8 I am only seeking the landowner names and addresses, not the publicly available stakeholder information.

Many Thanks,

John Gross

From: [REDACTED]
Sent: Wednesday, July 30, 2014 2:15 PM
To: FOIA-CEII
Subject: Re: REQUEST FOR ADDITIONAL INFORMATION - GUIDANCE TO ELIBRARY - John Gross - Atlantic Sunrise Project -PF-14-8

Dear Ms. Toyia Johnson,

Thank you so much for your quick response to my FOIA request. I am requesting the landowners form lancaster county, pa mailing list which Transco has asked to be filed by FERC as priveleged. As all property owners in Lancaster County are registered in the Lancaster County courthouse, I would think this particular list should be available to the public. I thought as a property owner who's land the proposed Atlantic Sunrise Pipeline is going through I was considered a stakeholder. But regardless, I am requesting the names and addresses of all of the other landowners who's property this pipeline FERC docket PF14-8 is proposed to cross. I am willing to pay \$ 30.00 if need be but as I have recently become unemployed am pleading for a reduction of fees.

Thank you in advance Ms. Johnson.

Sincerely,

John T. Gross
[REDACTED]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

August 25, 2014

Re: Extension of Time.
FOIA No. FY14-99

VIA REGULAR MAIL

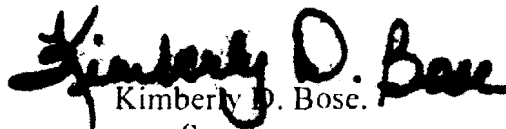
Mr. John T. Gross

Dear Mr. Gross:

This letter is in reference to your Freedom of Information Act, 5 U.S.C. § 552 (2012), request filed with the Federal Energy Regulatory Commission (Commission) on July 30, 2014. We have determined that to reply to your request, we need to consult with other components of the agency having substantial subject-matter interest therein. *See* 18 C.F.R. § 388.110(b)(1) and (b)(4)(iii) (2014).

Therefore, in accordance with the provisions in Section 388.110(b) of the Commission's Rules of Practice and Procedure, we are notifying you that we have extended the time limit to make an initial determination on your request. We expect to be able to send you an initial determination on your request by September 11, 2014.

Cordially,


Kimberly D. Bose,
Secretary.

cc: Leonard M. Tao
Director
Office of External Affairs
Federal Energy Regulatory Commission
Washington, DC 20426

6/4/2014 10:10:15

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D C 20426

SEP 11 2014

Re: Supplemental Submitter's
Rights Letter, FOIA No.
FY14-99

VIA ELECTRONIC MAILING

William Hammons
Team Leader Rates & Regulatory
Transcontinental Gas Pipe Line Company
P.O. Box 1396
Houston, TX 77251-1396
william.h.hammons@williams.com

Dear Mr. Hammons:

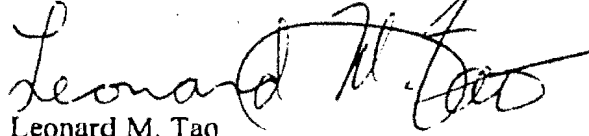
Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission) regulations, 18 C.F.R. § 388.112(d) (2014), you are hereby notified that John Gross filed the enclosed request seeking copies of Accession Nos. 20140722-5102, *Transcontinental Gas Pipe Line Company, LLC submits supplemental information regarding the Atlantic Sunrise Project under PF14-8-000*; and 20140818-5070, *Transcontinental Gas Pipe Line Company, LLC submits updated mailing lists for the Atlantic Sunrise Project under PF14-8-000*.

Because Transcontinental Gas Pipe Line Company (Transco) has asserted a "privileged" interest in the information requested, we are soliciting your comments on whether its release is required under the FOIA. Your written comments are due within five (5) business days from the date of this letter, and should clearly explain whether you oppose the release of this document, or portions thereof, and the rationale for your position. The Commission will not be persuaded by conclusory statements as to why the information deserves protection, and may construe a non-response as evidence that the submitter does not object to releasing the document.

Transco's comments, if any, may be mailed to the undersigned at the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Your comments may also be mailed electronically to the email address provided below or

facsimiled to (202) 208-2106. If you have any questions regarding this matter, please contact Ms. Toyia Johnson of my staff by phone at (202) 502-6088 or e-mail to foia-ceii@ferc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Leonard M. Tao", with a stylized flourish extending from the end.

Leonard M. Tao
Director
Office of External Affairs

Enclosure

cc: Mr. John Gross

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

AUG 08 2014

Re: Submitter's Rights Letter,
FOIA No. FY14-99

VIA ELECTRONIC MAILING

William Hammons
Team Leader Rates & Regulatory
Transcontinental Gas Pipe Line Company
P.O. Box 1396
Houston, TX 77251-1396
william.h.hammons@williams.com

Dear Mr. Hammons:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012) and the Federal Energy Regulatory Commission's (Commission) regulations, 18 C.F.R. § 388.112(d) (2014), you are hereby notified that John Gross filed the enclosed request seeking a copy of Accession No. 20140502-5123, *Transcontinental Gas Pipe Line Company, LLC submits the Stakeholder and Landowner Mailing Lists for the Atlantic Sunrise Project under PF14-8-000* and 20140714-5040, *Transcontinental Gas Pipe Line Company, LLC submits updated mailing lists for the Atlantic Sunrise Project under PF14-8-000*.

Because Transcontinental Gas Pipe Line Company (Transcontinental) has asserted a "privileged" interest in the information requested, we are soliciting your comments on whether its release is required under the FOIA. Your written comments are due within five (5) business days from the date of this letter, and should clearly explain whether you oppose the release of this document, or portions thereof, and the rationale for your position. The Commission will not be persuaded by conclusory statements as to why the information deserves protection, and may construe a non-response as evidence that the submitter does not object to releasing the document.

Transcontinental's comments, if any, may be mailed to the undersigned at the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426. Your comments may also be mailed electronically to the email address provided below or facsimiled to (202) 208-2106. If you have any questions regarding this matter, please

contact Ms. Toyia Johnson of my staff by phone at (202) 502-6088 or e-mail to foia-ceii@ferc.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Leonard M. Tao", with a stylized flourish at the end.

Leonard M. Tao
Director
Office of External Affairs

Enclosure

cc: Mr. John Gross

Federal Energy Regulatory Commission
Washington, DC 20426

SEP 11 2014

Re: Initial Notice of Intent to Release, FOIA
No. FY14-99

VIA EMAIL AND REGULAR MAIL

Mr. William Hammons
Team Leader Rates & Regulatory
Transcontinental Gas Pipe Line Company
P.O. Box 1396
Houston, TX 77251-1396
William.h.hammons@williams.com

*Office of
Electricity
Delivery
Michelle Davis
202 502-6172*

Dear Mr. Hammons:

Pursuant to the Federal Energy Regulatory Commission's (Commission or FERC) regulations, 18 C.F.R. § 388.112(e) (2014), you are hereby notified that the Commission is intending to release portions of the documents requested by Mr. John Gross pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012). Specifically, Mr. Gross requested the landowner lists for the Atlantic Sunrise Project under Docket No. PF14-8 that were submitted to the Commission under Accession Nos. 20140722-5102, 20140818-5070, 20140714-05040 and 20140502-5123. Mr. Gross states that he needs the information for informational purposes to determine whether Transcontinental Gas Pipe Line Company (Transcontinental), through government lobbying and ultimately eminent domain, intends to take his land.

By letter dated August 8, 2014, Michelle A. Davis, Attorney-Advisor, notified you of Mr. Gross's request and provided five (5) business days in which to submit comments regarding release of Accession Nos. 20140714-05040 and 20140502-5123.¹ On August 11, 2014, you submitted comments objecting to release of the document. In particular, you argue that disclosure of the landowner lists would reveal detailed information about the property owners located along the proposed route of the Atlantic Sunrise Project without the property owners' consent. You further argue that disclosure

¹ On August 8, 2014, the Commission notified you that Accession Nos. 20140502-5123 20140714-05040 are responsive to Mr. Goss's request. Upon further review, the Commission has determined that Accession Nos. 20140722-5102 and 20140818-5070 are also responsive to Mr. Gross's request. In accordance with the Commission's regulations, we will issue a letter soliciting your comments on the potential release of Accession Nos. 20140722-5102 and 20140818-5070.

of the documents would constitute an unwarranted invasion of privacy, and that the documents should be exempt from disclosure under FOIA Exemption 6.²

Commission staff agrees in part with your arguments concerning the landowner list. The names and personal addresses of private citizens implicate a privacy interest and are protected from disclosure by FOIA Exemption 6, (which protects files the disclosure of which would constitute a clearly unwarranted invasion of privacy), and will be redacted. *See* 5 U.S.C. § 552(b)(6). However, the names, addresses, and other data of commercial entities do not implicate a privacy interest that is protected by FOIA Exemption 6 and will be released to the requester.

Accordingly, your request for privileged treatment of all documents designated confidential is denied in part. The document we intend to release to the requester with any proposed redactions is enclosed for your information, and will be made publicly available no sooner than five (5) calendar days from the date of this letter. *See* 18 C.F.R. § 388.112(e).

Sincerely,



Leonard M. Tao
Director
Office of External Affairs

Enclosures (2)

cc: Mr. John Gross

Appeal

*223-5731
Rhoads & Simon LLP*




² 5 U.S.C. § 552(b)(6) (2012) (which protects from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy").

Additional Information

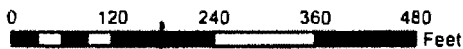
ALT-B-PA-LA-105.000



We make energy happen.™

 Pipeline
 Parcel Boundary
 Survey Corridor

N


0 120 240 360 480 Feet


CPL South Project

GROSS, JOHN TIMOTHY

CONESTOGA, PA

R/W No: ALT-B-PA-LA-105.000

Created by: Universal Field Services

APN: 1207698200000

Date: 6/2/2014

Note: Preliminary Study Area. The information presented in this map is not derived from survey and is intended for reference purposes only.

Executive Order 13406

From Wikisource

Executive Order 13406 *by President of the United States*

Protecting the Property Rights of the American People

◄ Executive Order 13405

Executive Order 13407 ►

Signed (<http://www.archives.gov/federal-register/executive-orders>

/2006.html#13406) by President **George W.**

Bush Friday, June 23, 2006

Federal Register page & date: 71 FR 36973 (<http://www.gpo.gov/fdsys/search/citation.result.FR.action?federalRegister.volume=2006&federalRegister.page=36973&publication=FR>). Wednesday, June 28, 2006

See the *Notes* section for a list of Executive Orders affected by or related to the issuance of this Executive Order.

Executive Order 13406 of June 23, 2006

Protecting the Property Rights of the American People

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to strengthen the rights of the American people against the taking of their private property, it is hereby ordered as follows:

Section 1. Policy.

It is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by the Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.

Sec. 2. Implementation.

- (a) The Attorney General shall:
 - (i) issue instructions to the heads of departments and agencies to implement the policy set forth in section 1 of this order; and
 - (ii) monitor takings by departments and agencies for compliance with the policy set forth in section 1 of this order.
- (b) Heads of departments and agencies shall, to the extent permitted by law:
 - (i) comply with instructions issued under subsection (a)(i); and

- (ii) provide to the Attorney General such information as the Attorney General determines necessary to carry out subsection (a)(ii).

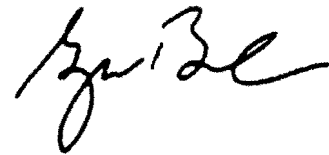
Sec. 3. *Specific Exclusions.*

Nothing in this order shall be construed to prohibit a taking of private property by the Federal Government, that otherwise complies with applicable law, for the purpose of:

- (a) public ownership or exclusive use of the property by the public, such as for a public medical facility, roadway, park, forest, governmental office building, or military reservation;
- (b) projects designated for public, common carrier, public transportation, or public utility use, including those for which a fee is assessed, that serve the general public and are subject to regulation by a governmental entity;
- (c) conveying the property to a nongovernmental entity, such as a telecommunications or transportation common carrier, that makes the property available for use by the general public as of right;
- (d) preventing or mitigating a harmful use of land that constitutes a threat to public health, safety, or the environment;
- (e) acquiring abandoned property;
- (f) quieting title to real property;
- (g) acquiring ownership or use by a public utility;
- (h) facilitating the disposal or exchange of Federal property; or
- (i) meeting military, law enforcement, public safety, public transportation, or public health emergencies.

Sec. 4. *General Provisions.*

- (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.
- (b) Nothing in this order shall be construed to impair or otherwise affect:
 - (i) authority granted by law to a department or agency or the head thereof; or
 - (ii) functions of the Director of the Office of Management and Budget relating to budget, administrative, or legislative proposals.
- (c) This order shall be implemented in a manner consistent with Executive Order 12630 of March 15, 1988.
- (d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity against the United States, its departments, agencies, entities, officers, employees, or agents, or any other person.



GEORGE W. BUSH

THE WHITE HOUSE,
June 23, 2006.

[FR Doc. 06-5828 Filed 6-27-06; 8:45 am]

Billing Code 3195-01-P

Note: This item was not received in time for publication in the appropriate issue.

Notes

See Related:

- Executive Order 12630, March 15, 1988



This work is in the **public domain** in the United States because it is a work of the United States *federal* government (see 17 U.S.C. 105).



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Freedom of Information Act Appeal
FOIA Reference Number 2014-104

November 20, 2014

VIA ELECTRONIC MAIL AND REGULAR MAIL

To: David L. Morenoff
General Counsel, FERC
888 First Street, NE
Washington, DC 20426
FOIA-CEII@FERC.GOV

Dear Mr. Morenoff,

In Mr. Tao's response letter of 10/8/14 he indicated that he denied my FOIA request, explaining that two of eight documents were not released and were protected pursuant to FOIA Exemption 5.

I am appealing this denial of my request and ask for the release of the two documents. The response references 5 U.S.C. § 552 (b)(5), "inter 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".

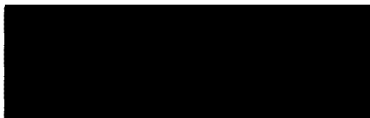
However, Title 18, Chapter I, Subchapter W, Part 380.9(b) of the Code of Federal Regulations is explicit about FOIA exclusions, such as 5 U.S.C. § 552 (b)(5), not being applicable where such interagency memoranda transmit comments of Federal Agencies on the environmental impact of the proposed action. It states, "The Commission will make environmental impact statements, environmental assessments, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552 (/uscode/text/5/552) (1982)). The exclusion in the Freedom of Information Act for interagency memoranda is not applicable where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action." I believe that the non-released documents transmit "comments of Federal agencies on the environmental impact of the proposed action" and so is not subject to 5 U.S.C. § 552 (b)(5).

FERC did release six documents to PHMSA for FOIA evaluation, but did not describe in any way the subject matter of the two non-released documents. The absence of transparency in this process is in violation of FOIA regulations. Thus I appeal this denial of my FOIA request.

Sincerely,



Barbara Blumenthal



CC: Charles A. Beamon, Associate General Counsel
General and Administrative Law, FERC

FREEDOM OF INFORMATION ACT APPEAL

October 20, 2014

Mr. David L. Morenoff
Acting General Counsel FERC
888 First Street, NE
Washington, DC 20426

BY ELECTRONIC MAIL: FOIA-CELL@ferc.gov

Re: FREEDOM OF INFORMATION ACT APPEAL (FY14-105)

Dear Mr. Morenoff,

We appeal FERC's partial denial of the above-captioned FOIA request by the Energy & Environment Legal Institute (EELI) and the Free Market Environmental Law Clinic (FMELC), communicated in its production letter dated October 10, 2014. Specifically, FERC withheld twenty-six documents in full, citing FOIA Exemptions 5 and 6, producing only six identified responsive records in full. Additionally, FERC has partially withheld ten documents under a claim of both Exemptions 5 and 6, and two documents citing Exemption 6.

In summary, we note in this appeal that FERC must justify all withholdings, and that withholding an entire document with segregable factual information (in the case of an email, the most obvious examples are the To:, From:, Re:, time stamp, and typically Subject fields) is facially improper under FOIA.¹ We remind FERC that the request at issue was for certain

¹ It seems FERC may agree with us. In its response to an administrative appeal in FY14-93, FERC's counsel stated: "I agree with your assertion that the agency is required to produce purely factual portions of documents." (Appeal Determination letter, pp. 3-4) FERC then released factual portions of seven documents at issue in that request.

described *emails* in FERC's possession. The Commission provided no information about the 26 withheld documents, which is improper in and of itself and more questionable given they are emails, with clearly segregable factual information. By providing no credible explanation that all such information must be withheld in its entirety, FERC's decision to withhold the documents in full is on its face presumptively impermissible.

FERC's improper withholdings extend to more than just factual information about emails, however. FERC provides only boilerplate justification regarding its claims to Exemption 5, and boilerplate does not suffice for withholding public information. FERC did not provide us any basis to assess to legitimacy of these withholdings. It simply invokes Exemption 5 as if this is sufficient to not release public records, although it has the obligation of demonstrating they are both deliberative and pre-decisional. For example, this boilerplate language fails to identify what agency decision withheld information is pre-decisional to. FERC's justification for withholding this information, particularly the 26 records withheld in full for which requesters have no context, is therefore facially invalid as a matter of law. Further, the contexts of the redactions in the partially released emails give strong evidence that these records were neither pre-decisional nor deliberative. The only released information shedding any light on the matter indicates that the partially withheld documents and information are at best post-decisional, or that the agency is broadly applying Exemption 5 to withhold the identity of certain individuals.

Regarding FERC's Exemption 6 claims, FERC leaves requesters to guess whether the names of "private individuals" or low-level staff have been withheld (Determination letter, p. 2). Requesters must be able to determine certain basic information about withheld information, and

assess the reasonableness of all claimed justifications for withholdings. If FERC is redacting the identities of private individuals, it must properly balance the privacy interests of those individuals against the public interest in disclosure, with a bias toward disclosure. The instant request was triggered by media reports about former Chairman Wellinghoff's involvement with Steel Rives while still FERC Chairman, and as such public interest in correspondence with anyone affiliated with that firm is high.²

The result of FERC's inadequate response, specifically its failure to demonstrate or otherwise justify its withholdings are proper, is to leave requesters without sufficient meaningful information or means by which to make a reasoned conclusion about the legitimacy of these withholdings. This indicates insufficient consideration as to what ought to properly and lawfully be released to the public, and insufficient effort to release segregable portions.

For reasons stated herein, FERC should immediately release all factual information contained in these emails and other information absent a sufficient justification for each specific withholding, subject only to legitimate redactions.

I. Jurisdictional Statement

The underlying FOIA request was properly filed under 5 U.S.C. § 552. In response, the Commission released only six documents in full, and twelve in part. Furthermore, FERC withheld twenty-six documents in their entirety pursuant to FOIA exemptions 5 and 6. The

² See, e.g., Public Power Daily, *Senator questions Wellinghoff's remaining FERC chairman after agreeing to take job with law firm*, <http://www.publicpower.org/Media/daily/ArticleDetail.cfm?ItemNumber=39722> (Nov. 12, 2013), Hannah Northey, E&E Publishing, *Outgoing chairman vows to steer clear of law firm's business, but others fear conflicts of interest*, <http://www.eenews.net/stories/1059989605> (Oct. 29, 2013).

deficiencies in the redactions where FERC invokes exemptions 5 and 6 are highly similar. FERC has provided no substantive description of the withheld documents or justified their withholding. Pursuant to 18 C.F.R. § 388.110, you have jurisdiction because “A person whose request for records, request for fee waiver or reduction, or request for expedited processing is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination.” 18 C.F.R. § 388.110 (a)(1). Further, all procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as a “Freedom of Information Act Appeal” and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed within 45 days of the date of FERC’s October 10, 2014 denial. 18 C.F.R. § 388.110.

II. Proceedings Below

This appeal involves one FOIA request, sent by electronic mail on August 28, 2014 to FERC at FOIA-CEII@ferc.gov, seeking:

- 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).

FERC assigned the number FY14-105 to the request.

On October 10, 2014, FERC provided a production of some responsive information, withholding the overwhelming majority, citing FOIA exemptions 5 and 6.

III. Boilerplate is Insufficient to Justify Withholdings Under FOIA

In its October 10 partial production/partial denial, FERC provided insufficient explanation of the withheld information beyond claiming exemptions 5 and 6 in the generic sense, and citing “internal staff emails” and “lower-level FERC employees” as the source of the legitimacy of the withholdings. FERC’s only explanation is boilerplate language explaining each of the exemptions, not citing to specific documents but instead to entire groups of documents, and making sweeping, non-specific claims about the documents in question. There is no substantive information about the nature of the documents being withheld, what they are discussing, or why the exemptions cited would rightly apply to such documents. Adding to the conclusion that this language is boilerplate, FERC’s initial determination letter closely mirrors FERC’s initial determination letter in FY14-93, which we also appealed to your office, resulting in the production of additional records and a less incomplete, if still inadequate, explanation of FERC’s continued withholdings.

It is black letter law that an agency cannot rely on “boilerplate” privilege claims, or simply recite that the withholding or redactions of a document meets statutory standards without tailoring “the explanation to” each “specific document,” and with a “contextual description” of how those standards apply to “the specific facts” of each document. *King v. United States Dep’t of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987) (“[c]ategorical description [s] of redacted material coupled with categorical indication of anticipated consequences of disclosure” was

“clearly inadequate.”); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973) (“generalized” or conclusory exemption claims are insufficient); *Wiener v. FBI*, 943 F.2d 972, 977–79 (9th Cir. 1991) (“boilerplate” explanations without an effort to “tailor the explanation to the specific document withheld” were insufficient). *See also Halpern v. FBI*, 181 F.3d 279, 293–94 (2d Cir. 1999) (agency’s Vaughn Index must apply statutory standards for exemption “to the specific facts of the documents at hand,” giving a “contextual description” of “the documents subject to redaction” and “the specific redactions made to the various documents.”); *ACLU v. Office of the Director of Nat. Intelligence*, No. 10-449, 2011 WL 5563520, *6 (S.D.N.Y. Nov. 15, 2011) (improper for an agency to submit a Vaughn Index “proffering conclusory and nearly identical justifications for” withholding each document); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90–91 (D.D.C. 2009) (agency must “‘disclose as much information as possible’ in its Vaughn Index,” and not merely “parrot” or “recite the statutory standards”). Yet that is exactly what FERC has done here and the presumption toward disclosure requires that FERC’s withholdings either be sufficiently justified, or alternatively, reversed and the information released to the public.

FERC instead owes requesters sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA” (*Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979)), and should “describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.” *King v. DoJ*, 830 F.2d at 223–24.

IV. Standards of Review: All Doubts Must be Resolved in Favor of Disclosure

It is also well-settled that Congress, through FOIA, “sought ‘to open agency action to the light of public scrutiny.’” *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (quoting *Dep’t of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, “‘general philosophy of full agency disclosure’” that animates the statute. *Rose*, 425 U.S. at 360 (quoting S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)).

Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed’n of America v. Dep’t of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically cited in the underlying request to FERC to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, “a democracy requires accountability, and accountability requires transparency,” and “the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government.” Accordingly, the President has directed that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails” and that a “presumption of disclosure should be applied to all decisions

involving FOIA.” Similarly, FERC’s withholdings are not consistent with statements by the President and Attorney General, *inter alia*, that **“The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today”** (President Barack Obama, January 21, 2009), and **“Under the Attorney General’s Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5.”** (Department of Justice, Office of Information Policy, OIP Guidance, “Creating a ‘New Era of Open Government’”).

FERC’s withholding of twenty six documents in full and twelve in part is in error, for reasons already stated, and discussed in greater detail below. FERC’s denial should thus be reversed, the withheld responsive records made available, and all improperly redacted documents be released in an unredacted form, or else with only legitimate redactions, labeled with the appropriate exemption and a clearly articulated explanation as to why each redaction is justified.

V. Arguments and Support

A. FERC improperly withheld records in full without explaining why it could not produce the records in redacted form, including but not limited to segregable factual information, despite its demonstrated ability to redact and produce similar information when it wishes to do so without violating FOIA.

FERC’s withholding of most responsive emails in their entirety pursuant to exemptions 5 and 6 is facially unlawful. Unfortunately, FERC decided to withhold twenty six emails in full. The law has always been very clear even about this improper tactic, even before this

administration promised it would be “the most transparent administration, ever”, and repeated its vows to err on the side of disclosure as never before but, regardless, consistent with FOIA and judicial precedent that it be a disclosure statute, not a withholding statute. Under 5 U.S.C. § 552(b), any “reasonably segregable” information must be disclosed—that is, information that can be separated from the rest of a document—even if the document is otherwise exempt from disclosure, unless the exempt and non-exempt portions are “inextricably intertwined with exempt portions.” *Trans-Pacific Policing v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C.Cir.1999) (court has “an affirmative duty to consider the segregability issue sua sponte.”); *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977).

Purely factual information must be released, unless it is so intertwined with properly exempt information that it cannot reasonably be segregated. We reiterate that factual information in the requested records includes, e.g., To, From, Date, and Subject information. As also detailed above, withholding emails in full is a facially impermissible practice given the simplicity of redacting such records' exempt information, which FERC has demonstrated it is capable of, even in its limited production so far.

FEC must justify this practice, and it has failed to do so. FERC does not provide any individualized justification for withholding the fully withheld documents in their entirety, which must be emails given the request language. An agency must provide a “detailed justification,” not just “conclusory statements” to demonstrate that it has released all reasonably segregable information. *Mead Data*, 566 F.2d at 261. “The government must show with reasonable specificity why a document cannot be further segregated.” *Marshall v. F.B.I.*, 802 F.Supp.2d

125, 135 (D.D.C. 2011); see *Quinon v. FBI*, 806 F.3d 1222, 1227 (D.C. Cir. 1996) (“reasonable specificity” required). FERC has done nothing of the sort.

Requesters cannot judge the propriety of withholding the entire content of the 26 emails that were withheld in full without a clear explanation of the role parties to the communications played in the deliberative process, the nature of the decision being made, and a clear indication of what agency decision any communications were pre-decisional to. While providing factual information about the 26 emails that were withheld in full is surely a step in the right direction, requesters nevertheless note that it is impossible to say, on the face of the current record, whether withholding the entire content of those communications, because there is no reasonably segregable content, was proper or not. As such, requesters seek either the production of those documents in full without redactions, or a clear, specific articulation from FERC of why it believes each record is subject to withholding either in full or, upon review, in part.

B. FERC Improperly Withholds Information as Deliberative Without Showing it is Directly Related to Actual Policy Formulation of the Kind Contemplated by Exemption 5

FERC’s rationale for withholding this information sheds no light whatsoever on the information it is withholding, and thus fails to meet FERC’s burden of showing that the material is privileged. See *King v. United States Dep’t of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987); *Vaughn v. Rosen*, 484 F.2d 820, 826 (D.C. Cir. 1973); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009); *Wiener v. FBI*, 943 F.2d 972, 977–79 (9th Cir. 1991); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999). It surely fails to demonstrate that the withheld information is both deliberative and pre-decisional.

Some internal staff emails concerning Chairman Wellinghoff's deliberations regarding whether to recuse himself from a particular case may indeed be deliberative, but a broad assertion that 26 emails responsive to the request at issue are exempt is untenable. FERC also must justify all partial withholdings, which it has not done. We note that the instant request implicated three categories of responsive documents, and that FERC's response doesn't indicate which category of responsive documents the withheld emails may fall into. FERC has the burden of demonstrating that the records it withholds from the public citing Exemption 5 are properly exempt because they are deliberative in nature. In each of the three categories of records at issue in the instant request, it is easy to imagine responsive emails that are not properly subject to withholding. With respect to the first category of documents, an email announcing a decision to recuse would not be deliberative, but rather post-decisional in nature. The same holds true for the second category of documents: emails merely announcing a decision or discussing a decision about solar interconnections after the fact would not be deliberative. With respect to the third category of documents, this same calculus applies. There is no categorical exemption for all communications between former Chairman Wellinghoff and agency counsel. For example, if former Chairman Wellinghoff was discussing with agency counsel a decision that had already been made, or asking agency counsel for resume tips and pointers on the post-FERC legal job market, or even whether to order Chinese take-out for lunch, then Exemption 5 would not apply. The bottom line is that requesters cannot be required to make these sort of speculative arguments. Instead, FERC must clearly explain each claim it has to a deliberative process exemption, and articulate the facts that give rise to the exemption, including what agency

decisions were being discussed by what parties, and the relative position in the chain of command held by parties to the correspondence at issue. FERC has manifestly failed to do so here.

Requesters note also that it is difficult to imagine how redacting the name of a party to correspondence could ever be appropriate under Exemption 5. FERC claims some of the partially-released records are exempt under both Exemptions 5 and 6. However, the only clear redaction in these records is located in the "To:" field of the emails. We are left to wonder what the basis for FERC's belief that the mere identity of a party could be deliberative information might be. Two documents for which requesters note this deficiency are entitled "FOIA FY14-105_B5_Redacted_Scanned.pdf" and "FOIA FY14-105_B4_Redacted_Scanned.pdf" in FERC's response.

Other partially released records also indicate similarly improper withholdings. Indeed, one email released in part appears to be FERC's staff simply sharing a study conducted in Denmark (FOIA FY14-105_14_Redacted_Scanned.pdf). Even if it is in fact true that every section of each fully-withheld email is both predecisional and deliberative, and thus properly withheld under exemption 5, FERC manifestly fails to demonstrate this fact. Instead, it has merely alleged that the information withheld is protected under Exemption 5 and thus has not fulfilled its duty under the law. As the Southern District of New York found in *Fox News Network, LLC v. U.S. Dept. of Treasury*, 911 F.Supp.2d 261, 279 (S.D.N.Y. 2012), "[t]o be deliberative, a document must actually be 'related to the process by which policies are formulated.' Grand Cent. P'ship, 166 F.3d at 482. ... *[The agency] must actually identify and explain the role that a given document has played in the decisionmaking process. See, e.g.,*

Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C.Cir.1980) ('agency has the burden of establishing what deliberative process is involved, and the role played by the documents in issue in the course of that process')." (*emphasis added*). Thus, at the very least, FERC must sufficiently justify these withholdings and redactions under exemption 5. If it cannot provide such a sufficient legal justification for each individual document and/or redaction, it must release the document in full, or at least pursuant to lawful, clearly explained redactions.

C. FERC Improperly Withholds the Identities of "Private Individuals" Under Exemption 6 or Fails to Explain Withholdings are of Low-Level Employee Identities

FERC cannot withhold information under Exemption 6 without applying a balancing test, and there is no case law to support the idea that FERC can withhold the names of high-level individuals who practice law before the Commission, whose firm has a substantial practice before the Commission, and/or who recruit FERC employees for non-government positions.

Requesters note that FERC cites *Elec. Privacy Inf. Ctr v. Dep't of Homeland Sec.*, 348 F. Supp.2d 100 to bolster a broad claim that it is entitled to withhold the names of both "lower-level employees" and "private individuals." As an initial matter, requesters point out that that case and each of the others the government cites in support of that proposition all relate to withholding identifying information about government employees. Compare *AIDS Healthcare Found. v. Leavitt*, 256 F. App'x 954 (9th Cir. 2007) with *Tax Reform Research Grp. v. IRS, et al.*, 419 F. Supp. 415 (D.D.C 1976). Beyond this preliminary level of analysis, requesters also point out that Exemption 6 requires the application of a balancing test. To determine whether a disclosure would constitute a clearly unwarranted invasion of personal privacy, FERC must

weigh the privacy interests in nondisclosure against the public interests in disclosure. *Nat'l Ass'n of Home Builders v. Norton*, 353 U.S. App. D.C. 374, 309 F.3d 26, 32 (D.C. Cir. 2002) (citing *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 279 U.S. App. D.C. 27, 879 F.2d 873, 874 (D.C. Cir. 1989)).

The first step in this analysis is determining whether an individual has a privacy interest in their own name. The case law suggests there is no such privacy interest. The most expansive reading of Exemption 6 holds that protected information included “[i]nformation such as place of birth, date of birth, date of marriage, [and] employment history,” not the mere identity of an individual. *U.S. Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 600 (1982). Requesters note that identity information is regularly shared in polite society. It is hard to imagine any of the supposedly “private individuals” whose names appear in the responsive emails declining to introduce themselves at a social event or, as is more likely the case, in a hearing before the Commission. We reasonably imagine they even pay appreciable sums for business cards precisely to identify themselves in similar professional contexts. Whatever privacy interests they may have in this context, if they exist, would surely be negligible and often-waived.

Even if an individual did have a privacy interest in their identity, that alone would not justify these withholdings. The second step in analyzing FERC’s Exemption 6 claims is to determine the level of public interest in the information. “The quantum of the public’s interest in disclosure depends on the degree to which disclosure would shed light on an agency’s performance of its statutory duties and its compliance with the law.” *Elec. Privacy Inf. Ctr.*, 384 F. Supp. 2d at 115. Moreover, “[i]n assessing the public interest, the court must examine the

nature of the requested document and its relationship to the basic purpose of [FOIA] to open agency action to the light of public scrutiny . . . [and official] information that sheds light on an agency's performance of its statutory duties merits disclosure.” *Id.*

In this case, FERC does not inform requesters in each instance whether FERC justifies a withholding under Exemption 6 because the identity of a lower-level employee was implicated, or that of a private individual. Regardless, however, FERC has not adequately justified its withholdings. In each instance, FERC must apply a balancing test to assess whether the public’s right to know how public servants are behaving is outweighed by any privacy interests at issue. Requesters note that the calculus of a balancing test will look quite different depending on whether the information withheld would identify low-level administrative staff, or high-ranking individuals engaged in the practice of law before the Commission and/or soliciting senior government employees for outside employment. The instant request arose because of public concerns regarding the propriety of FERC’s former Chairman negotiating employment at an outside law firm while still serving on the Commission. Any communications between the then-FERC Chairman, or other FERC staff, and any individuals affiliated with Stoel Rives, the Chairman’s current employer, is of great interest to the public.

To adequately respond to the instant request, FERC must explain whether it is withholding information relating to lower-level staff, or to supposedly “private individuals”. FERC must then apply and demonstrate the equities of a balancing test determining whether the mere identity of a private individual, especially an individual of such prominence that he or she regularly corresponds with a FERC Chairman, can properly be withheld in the face of great

public interest in Chairman Wellinghoff's actions *vis a vis* Steel Rives. It is extraordinarily unlikely that these withholdings could withstand such a balancing test.

VI. Conclusion

FERC's Determination Letter and extremely limited disclosure is wholly inadequate and not in accordance with the law. FERC has manifestly failed to adequately explain its extensive withholdings and redactions on any of the claimed exemptions. To the degree it offers any explanation at all concerning the nature of the documents being withheld, the facts cited indicate that the withholdings are not in compliance with the statute and clear precedent, and violate both the original purposes of the Freedom of Information Act and the Obama Administration's repeated public promises and official edicts regarding implementation of that Act with a bias toward more disclosure, not less. As the President has said in his directive to all federal agencies on January 26, 2009, "The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears."

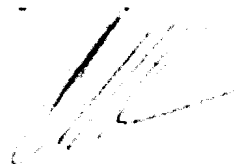
We request the Commission review this appeal with the required bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, as well as the President's own directive. At the very least, this entails providing sufficient justification for FERC's withholdings and redactions, as is required under the law and clear court precedents.

A proper, lawful response to this appeal would include releasing all completely withheld records, pursuant to any lawful redactions as may apply, and providing substantially unredacted

copies of the documents already released. Any redactions not overruled must be specifically justified and explained. For Exemption 5 claims, this would include, at a minimum, an explanation of what staff, at what place in the chain of command, were deliberating what agency decisions in the responsive documents. For Exemption 6 claims, this includes at a minimum explaining whether the redacted identities are those of "private individuals" or "lower-level employees" and applying the public-interest balancing test, describing its application. Only by taking these actions can FERC cure its current, inadequate, response, and bring the Commission into compliance with its obligations under FOIA.

If you have any questions please do not hesitate to contact the undersigned.

Respectfully submitted,



Christopher C. Horner, on behalf of
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Energy & Environment Legal Institute
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Associate General Counsel
Federal Energy Regulatory Commission
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FEB 10 2015

FY15-15

2014-DEC 29 P 5 33



Mr. David L. Morenoff
General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

December 19, 2014

Ref: FOIA No. FY15-15 – Response Letter

Dear Mr. Morenoff,

I have received Mr. Tao's letter of December 11, 2014 denying my request for access to Documents #20141104-0167 and #20141007-0209. He informs me that document 20141106 may only be released if I submit a CE11 request form which I already have done. Ms. Johnson informs me that it was added to FOIA/CE11 request CE11-2015-12.

Regarding Documents #20141104-0167 and #20141007-0209, please accept this letter as my formal appeal against Mr. Tao's determination. Mr. Tao cites FOIA Exemption 5 for denying my request noting the three same purposes, open, frank discussion, premature disclosure of policies and protect against public disclosure, that were used in a previous denial.

Since the FERC is using the same Exemption 5 to deny my application I am enclosing my previous Feb 12, 2014 response which makes the same arguments. Additionally, I have previously been granted access to documents on the same subjects and referring to the same studies. Would you please explain why these two particular documents should suddenly engender a FOIA Exemption 5 when the other documents covering the same subjects did not.

You rejected my previous appeal #FY14-21 with a curt comment that I had presented no further information. I was too busy at the time to pursue the matter. Please be assured that I will take the time to pursue this matter. My Feb 12, 2014 appeal clearly addressed the three issues quoted under Exemption 5 and there was ample additional information provided. My Feb 12, 2014 response is eminently applicable to this appeal.

I look forward to your early and positive response.

Respectfully,

A handwritten signature in black ink, appearing to read "Roy Mendelsohn". The signature is fluid and cursive, with the first name "Roy" being more prominent.

Roy Mendelsohn

Cheryl A. LaFleur, Commision Chairperson

~~Charles A.~~ Beamon, Associate General Counsel

The Honorable Jeff Duncan

Mr. David L. Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
Washington, DC 20426

February 12, 2014

Dear Mr. Morenoff,

Re: FOIA Appeal No. FY 14-21

I acknowledge receipt of your letter of January 31st, denying my appeal against the decision to withhold two documents 20131031-0181 and 0182.

Your rejection was under Exemption 5. The documents refer to an on-going study demanded by FERC regarding the SSPMP and the PMF and the Lake Greenwood project. Those studies are being carried out by consultants HDR with BOC oversight and review by the FERC. To what extent will release of these documents discourage open and frank discussion? These are engineering studies and there are no policies or proposed policies to be disclosed. Depending on the engineering conclusion there will be actions or inactions which will be dictated by the engineering conclusions. There is no basis for public confusion based on disclosure of "reasons or rationale that were not in fact ultimately the grounds for an agency's action". There will in fact be no agency action since any action or inaction will be determined by the engineering conclusions.

I would point out that this study was preceded by another study mandated by the FERC, regarding the seismic sufficiency of Lake Greenwood. This engineering study determined that the dam was seismically sufficient and warranted no action. Throughout this study there was (1) no discouragement of open, frank discussions between subordinates or superiors. (Who, in fact, were the subordinates and who the superiors?). (2) There were no proposed policies that needed protection from premature disclosure, and (3) the only public confusion was to the need for the seismic study in the first place.

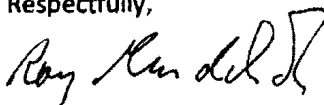
Given both of the above engineering studies, why "would it be impossible to have any frank discussions of legal or policy matters?" There were no "legal or policy matters", only engineering conclusions.

Your statement that "any factual portions of these documents are so inextricably intertwined with the deliberative matter that disclosure would reveal the pre-decisional deliberations" is sheer nonsense and bureau-speak of the worst kind. There is no decision making, merely acknowledgement of the engineering conclusions.

Finally, if the documents are provided to me under the FOIA, I am required to sign a Non-Disclosure form and I am not permitted to disclose the information, not even to my wife, so where is the restriction to "open, frank discussion", where is the "premature disclosure of proposed policies", and where would the "public confusion" stem from?

In my previous letter I stated that the CEI process is a device to keep FERC machinations out of the public eye. Your response to that letter simply verifies the truth of that statement. I request that you review this letter and agree to release those documents to me as requested by my FOIA/CEI request.

Respectfully,

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

Roy Mendelsohn

Copies to: Congressman Jeff Duncan
Senator Tim Scott

[REDACTED]

The Honorable Jeff Duncan
House of Representatives
116 Cannon HOB
Washington, DC 20515

December 20, 2014

Dear Congressman Duncan,


Attached is a copy of a letter I have written to Mr. Morenoff of the Federal Energy Regulatory Commission. I am appealing a decision to deny my FOIA/CEI request for access to documents related Lake Greenwood. These documents will indicate that the FERC is mis-using its bureaucratic powers to deter oversight of its bullying tactics regarding Lake Greenwood.

Facilities of critical importance to security are designated Critical Energy Infrastructure, CEI, and information, CEI, can be restricted if it can be of use to terrorists or others with harmful intent. I have no problem with this concept but can you imagine why tiny Lake Greenwood would be of any interest to terrorists. It is a only 11000 acres with a mere 18 megawatts of generating capacity. If some terrorists with low expectations were to blow up the dam, there is nothing downstream that would be harmed. Of the many hundreds of major hydro-electric facilities in the U.S., why would a terrorist be interested in Lake Greenwood?

Nevertheless, the FERC have classified this facility as CEI and are using that designation to force me through an administrative morass to get information or to deny me access to such information. If you would have your staff read through the FERC reasons for rejecting my FOIA/CEI request for documents, they will see just how flimsy the FERC arguments are. The FERC's primary purpose is to coerce Greenwood County to spend several million dollars on remediating the Fuse Plug. This is totally unnecessary, as were the several hundred thousands of dollars spent on consultant studies. These funds are more desperately needed for critical needs of the County and its taxpayers.

Please help us to get this juggernaut off our backs.

Sincerely,


Roy Mendelsohn

CC: David L. Morenoff, FERC
Cheryl A. LaFleur, FERC

12/14/2014



17 NORTH STATE STREET
SUITE 1600
CHICAGO, ILLINOIS 60602
PHONE: 312.236.0000
FAX: 312.239.6543

Brandon M. Cavanaugh
bcavanaugh@siprut.com

December 5, 2014

VIA ELECTRONIC MAIL:
FOIA-CEII@FERC.GOV

Leonard Tao
Director, Chief FOIA Officer, Federal
Energy Regulatory Commission
888 First Street, Northeast
Washington DC, 20426

Re: FOIA Request Regarding FERC's July 2013 Settlement With JPMorgan Chase & Co.

Dear Mr. Tao:

Pursuant to The Freedom of Information Act, 5 U.S.C. § 552, I request that you send the documents requested in the attached rider to the following e-mail address:

bcavanaugh@siprut.com

Please bill me at the above address for the cost of these photocopies. Please do not hesitate to contact me if you have any questions or comments.

Yours sincerely,

Brandon M. Cavanaugh

Encl.

RIDER FOR FREEDOM OF INFORMATION ACT
REQUEST TO FEDERAL ENERGY REGULATORY COMMISSION

DEFINITIONS

As used herein, all terms shall have the fullest and broadest meaning accorded to those terms and shall have the meaning generally ascribed to such terms in common parlance. In addition, the words and terms listed below shall have the following meanings:

1. The term "communication" shall mean the transmittal of information (facts, ideas, inquiries or otherwise) in any form (written, oral, electronic or otherwise).

2. The term "person" shall mean any natural person or any corporation, partnership, limited liability corporation, limited partnership, joint venture, firm, association, proprietorship or any other business, legal or governmental entity or association.

3. The term "correspondence" shall mean any communication whatsoever including but not limited to letters, notes, electronic mail ("e-mail"), memoranda, telegrams or any other written or verbal communications.

4. The term "document" is used herein in the broadest sense utilized under Federal Rule of Civil Procedure 34 and means, by way of example and without limitation, all written, recorded or graphic matters, including originals and copies, however produced or reproduced, whether or not privileged, pertaining in any way to the subject matter of this action. This definition includes, but is not limited to, all written, recorded or graphic matters, drawings, charts, photographs, and other data compilations from which data can be obtained, and including originals and copies, however produced or reproduced, whether or not privileged, pertaining in any way to the subject matter of this action. This definition also includes all electronic information and data, including email, stored on computer hard drives, disks or tapes (together with programming instructions and other written material necessary to use the computer records and memory devices

supplied and together with printouts of the information contained therein). A draft or non-identical copy is a separate document within the meaning of this term.

5. The terms “referring” and “relating” shall mean directly or indirectly concerning, reflecting, pertaining to, describing, evidencing or constituting, or in any way legally, logically, or factually connected with the stated person or subject matter.

6. The connectives “and” and “or” shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

7. The terms “you” and “FERC” shall mean the Federal Energy Regulatory Commission and any of its officials, agents, employees, representatives, or attorneys, whether or not acting within the scope of their authority.

8. The term “CAISO” shall mean the California Independent System Operator and any of its officials, agents, employees, representatives, or attorneys, whether or not acting within the scope of their authority.

9. The term “MISO” shall mean the Midwest Independent System Operator and any of its officials, agents, employees, representatives, or attorneys, whether or not acting within the scope of their authority.

10. The term “Senator Warren’s Letter” shall refer to the letter that Massachusetts Senator Elizabeth Warren co-authored with fellow Massachusetts Senator Edward Markey and sent to FERC Chairman Jon Wellinghoff on July 31, 2013 regarding the settlement reached between FERC and JPMorgan Chase over claims that JPMorgan Chase engaged in serial frauds against electricity consumers and state energy authorities.

11. The term “FERC Response” or “FERC’s Response” shall refer to the August 26, 2013 letter FERC Chairman Jon Wellinghoff authored in response to Senator Warren’s Letter.

12. The use of the singular form of any word includes the plural and vice versa. The masculine includes the feminine and neuter genders. The past tense shall include the present tense where the clear meaning is not distorted by change of tense.

DOCUMENTS TO PRODUCE

1. The “Settlement Statement” from CAISO referred to in FERC’s Response.
2. Any and all documents substantiating, or tending to substantiate, CAISO’s Settlement Statement.
3. Any and all communications between CAISO and FERC, and amongst FERC’s agents, regarding CAISO’s Settlement Statement.
4. The “Settlement Statement” from MISO referred to in FERC’s Response.
5. Any and all documents substantiating, or tending to substantiate, MISO’s Settlement Statement.
6. Any and all communications between CAISO and FERC, and amongst FERC’s agents, regarding MISO’s Settlement Statement.
7. Any and all documents relating to whether CAISO’s consumers “are being fully compensated for all direct and indirect impacts of JP Morgan’s manipulative schemes” as referred to in FERC’s Response.
8. Any and all communication between CAISO and FERC, and amongst FERC’s agents, confirming that CAISO’s consumers “are being fully compensated for all direct and indirect impacts of JP Morgan’s manipulative schemes” as referred to in FERC’s Response.

9. Any and all documents relating to whether MISO's consumers "are being fully compensated for all direct and indirect impacts of JP Morgan's manipulative schemes" as referred to in FERC's Response.

10. Any and all communication between MISO and FERC, and amongst FERC's agents, confirming that MISO's consumers "are being fully compensated for all direct and indirect impacts of JP Morgan's manipulative schemes" as referred to in FERC's Response.

11. Any and all documents sent by FERC to JP Morgan regarding JP Morgan's involvement in the California electricity market.

****Please produce records in electronic format if you have them stored in electronic format***

Brenda Greer

From: Nneka Frye
Sent: Monday, May 18, 2015 6:25 PM
To: Christopher A. Macfarlane
Cc: Charles Beamon; Marcos Araus; Kathryn Allen; Brenda Greer
Subject: FW: FREEDOM of INFORMATION ACT APPEAL

FY15-37

We received this FOIA appeal today. I think it is past the deadline for appeal. I believe it was assigned to Chris.

From: David Morenoff
Sent: Monday, May 18, 2015 6:15 PM
To: Charles Beamon; Nneka Frye; Marcos Araus
Subject: Fwd: FREEDOM of INFORMATION ACT APPEAL

Could you process this FOIA appeal appropriately?

Thanks,
David

Sent from my iPad

Begin forwarded message:

From: Keara Prom <kearaprom@gmail.com>
Date: May 18, 2015, 6:09:16 PM EDT
To: david.morenoff@ferc.gov
Subject: FREEDOM of INFORMATION ACT APPEAL

Name: Keara C. Prom
Initial Request Number: FY15-37
Release Date: February 24, 2015

Brief Statement:

I am appealing the action of partially releasing the mailing list at issue (specifically, the names and personal home addresses of private citizens). I would like the entire mailing list (not redacted) in regards to the Nexus Gas Transmission Line.

Under:
Docket PF15-10
Accession No 20141230-5314

Thank you.

GENERAL COUNSEL LAW
INCOMING

Joe Hyclak



2015 FEB -5 A 11:18

January 29, 2015

Mr. David L. Morenoff, General Counsel
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

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

Dear Mr. Morenoff:

As provided by the Freedom of Information Act and 18 CFR § 388.110(a)(1) of the Commission's regulations, I am hereby appealing FERC's refusal to give my FOIA request Expedited Processing treatment. The FERC denial notice states that I failed to show that there is an imminent threat to life or physical safety of an individual, or that I had not articulated any reason for urgency to inform the public concerning Federal Government activity in regard to the proposed plan. To the contrary, this appeal is based on the fact that there is a dire urgency which should justify having this FOIA request processed as Expedited.

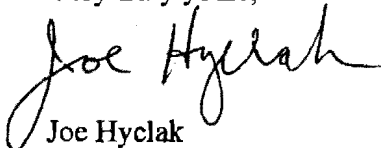
There is a very short time frame to the FERC process for the Spectra Energy Nexus pipeline. Nexus plans on filing its final application in November, 2015, and the fact is that landowners are already being pressured into making decisions about, and entering into easement consents, under the shadow of eminent domain sanctioned by FERC, all before a final certificate has been awarded. This activity, as spelled out in the attached letter from Terry J. Lodge, Esq. to Ms. Kimberly D. Bose, is currently being carried out and is violating the letter, as well as the spirit, of NEPA, and is likely illegal.

Time is of the essence. I am attempting to exercise my First Amendment freedom of association with other property owners located in the shadow corridor identified by Spectra Energy, in order to inform the landowners in a timely fashion. I also am attempting to alert those landowners of the possible illegal activity of the Federal Government, so that they may protect those property rights of theirs which FERC is bound to protect. FERC's actions in allowing Nexus to engage in alleged illegal activity before any finalization of the formal process means that the Commission is arguably not fulfilling its obligations under the Natural Gas Act and the National Environmental Policy Act, and landowners who may be asked to give up substantial private property rights for this pipeline project need and deserve to know this information.

Since (1) the time frame of the FERC approval process is short, (2) FERC seems to be sanctioning illegal activities to secure both property and easements prior to the final route

approval, and (3) the existence of potential collusion suggests that project approval may be preordained and the the whole approval process is nothing but a sham, I am hereby requesting that the decision to deny my request for Expedited Treatment of my Freedom of Information Act request No. FY15-38 be vacated and the FOIA request be fast-tracked.

Very truly yours,

A handwritten signature in black ink, appearing to read "Joe Hyclak", written in a cursive style.

Joe Hyclak

Cc: Charles A. Beamon
Associate General Counsel, General and Administrative Law
888 First Street NE
Washington, DC 20426

Terry J. Lodge, Esq.
316 N. Michigan St., Suite 520
Toledo, OH 43604-5627



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January 27, 2015

Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426
Via email and certified mail, return receipt requested

RE: Proposed Energy Transfer Partner L.P.'s Rover Pipeline project, Docket No. PF14-14-000; and Nexus Pipeline project, Docket No. PF15-10 (Demand for FERC to halt all actions biased toward granting pipeline permits)

Dear Ms. Bose:

I'm writing on behalf of the FreshWater Accountability Project of Grand Rapids, Ohio; Food and Water Watch of Cincinnati, Ohio; Neighbors Against Nexus of Swanton, Ohio; the Buckeye Forest Council, of Columbus, Ohio; and Concerned Citizens of Medina County, Ohio. These are all non-governmental groups and associations which work on behalf of grassroots Ohio activists. They collectively question the need for, and circumstances of, the E.T. Rover and Nexus pipeline projects. Some of their members are private property owners who have been told that their homes lie within the apparent rights-of-way of the Rover or Nexus pipeline. We are writing, prior to formally intervening in the upcoming FERC certificate proceedings, to give the Commission the opportunity, now, to curtail the certain unlawful and unfair eminent domain tactics which are being used by pipeline companies.

Specifically, we request that FERC immediately intercede to halt high-pressure tactics which are being routinely used against the public to force consent to easements for pipeline routes. We urgently request that FERC revoke the November 2014 Notice of Intent published in the Rover case, and that in all future public notices, FERC state clearly that it unconditionally prohibits corporate pipeline applicants from undertaking any acquisition efforts unless and until FERC has granted a convenience/necessity certificate. Finally, we ask that FERC publicly order the pipeline companies to halt all acquisition negotiations before issuance of an actual certificate.

FERC is unlawfully enabling pipeline companies to acquire property rights, and thus commit the routing of these pipeline projects, long before completion of the application process and the finalization by the agency of an Environmental Impact Statement ("EIS"). For example, in the Rover pipeline case, on November 18, 2014, FERC published in the Federal Register (Vol. 79, No. 222, at pp. 68676-68679) a "Notice of Intent to prepare an Environmental Impact Statement for the Planned Rover Pipeline Project, Request for Comments on Environmental



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Issues and Notice of Public Scoping Meetings,” (“NOI”) which announced that “The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will discuss the environmental impacts of the planned Rover Pipeline Project (Project) involving construction and operation of facilities by Rover Pipeline LLC (Rover) in multiple counties in Michigan, Ohio, West Virginia, and Pennsylvania.” FERC has a legal responsibility to give the public various notifications to promote the ends of NEPA and public participation in the decision. But this NOI goes too far. It advises that:

If you are a landowner receiving this notice, a pipeline company representative may contact you about the acquisition of an easement to construct, operate, and maintain the planned pipeline facilities. The company would seek to negotiate a mutually acceptable agreement. However, if the Commission approves the Project, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, a condemnation proceeding could be initiated where compensation would be determined in accordance with state law. (Emphasis added).

Id. pp. 68677-68678. Clearly this paragraph authorizes use of the threat of eminent domain before FERC has even formally decided whether or not to grant a certificate of convenience and necessity - or at least pipeline companies are interpreting it that way.

Such wording in legal notices is quite consistent with the advisory booklet which FERC requires each pipeline applicant to distribute, entitled, “An Interstate Natural Gas Facility On My Land? What Do I Need To Know?” On page 4, in response to the question, “How will I first hear about proposed facility construction?”, FERC states:

If you are an owner of property that may be affected by the project, you will probably first hear of it from the natural gas company as it collects the environmental information or conducts surveys required for the Commission application. The company may ask you for permission to access your land to conduct civil and environmental surveys. It is also possible that the company will contact you to discuss obtaining an easement prior to filing the application. In the case of a compressor station or other above-ground facility, the company will often offer to purchase, or obtain an option to purchase, the property for the station or facility. This usually occurs prior to the filing of the application. (Emphasis added).

The way this translates into action is this: pipeline companies are threatening property owners in their study corridors that FERC will be vesting them with eminent domain powers, and warning that FERC’s licensing decision is a given. They are trying to bully owners into conceding easements for pipelines to be constructed on their land. FERC has explained that the eminent domain process has commenced even before an application to build the pipeline has



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been submitted, and by doing so, has endorsed whatever the pipeline company wishes to do by way of acquisition of the right-of-way. This expresses an overwhelming bias by FERC toward approval of the project. Before Spectra's or E.T. Rover's application is complete and analyzed by the agency - even before the public has had an opportunity to participate in the decision-making process - property owners have been warned by the supposedly "impartial" regulator that informal settlement outside of court should be seriously considered *now*. Although the final choice of route supposedly remains open, FERC creates a condemnation "shadow" by its acts, and the pipeline companies proceed to lock in their preferred alternative before the application period even commences. Thus the pipeline companies are armed with the eminent domain threat more than a year before construction to force holdout property owners to give survey access and consent to pipeline easements.

Rover's eminent domain bullying is evident in testimony from the December 2, 2014 Defiance, Ohio scoping public hearing, where private property owners stated on the record that they are being threatened by Rover representatives with the use of eminent domain if they do not consent to granting an easement as quickly as possible.¹

This attitude is also prevalent in the Nexus acquisition campaign, which is in a more preliminary stage than Rover. One property owner in the 600-foot "study zone" has told me of being tracked down at her job when she refused to respond to letters and phone calls to discuss surveys and acquisition of easement rights across her farmland. Other property owners have reportedly been told that Spectra Energy "will" be granted eminent domain powers and that it would be wise to settle on payment for their easements now.

For FERC to foster this atmosphere, and to not require a clear legal and time separation between the application process and land acquisition activity, suggests collusion between the agency and the companies it is supposed to regulate. Consequently, the Environmental Impact Statements for these projects, and the overall permitting proceedings, are reduced to merely

¹ See Issuance 20141222-4003, Transcript ("Tr.") p. 20 (pp. 40-41 of .pdf of transcript) (enclosed), testimony of stakeholder James Meyer: "Another concern is the speed at which this proposed project has taken. This is a huge, and hopefully a one-time, lifetime experience for a landowner. I feel as stakeholders we need more time to evaluate and determine what we need to do to become whole. I just feel that we're being pushed, bullied. Comments like, well, what you want doesn't really make any difference. We're going to do it anyway. It's going to be a project that's going to take place. I just think things need to be slowed down so that we can take a look at how it's going to affect me, my family in the future."

Also, see Tr. pp. 32-33 (pp. 64-66 of .pdf), testimony of Ben Polasek: "As the first subcontractor land agents approached us several months ago, requesting survey permission, it was presented as give us permission or else. We're going to come on anyway. We asked several times for notification if they were going to come out and did not receive it. There was no concern for the timing of the survey. . . . We kept hearing, well, we'll pay for the damages. That wasn't the issue. The issue was they couldn't conduct an accurate survey. However, they appeared to have no interest in us joining them for the survey or helping them understand the effects that this was going to have on our land. We just kept hearing this project is on a fast track. It's coming along. There was no possible way they conducted an accurate survey. It was more of a formality than any sincere effort to gather good information."



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perfunctory and *post hoc* exercises.

Here's how FERC's concession of eminent domain powers to the pipeline companies, even before the application is submitted, violates the National Environmental Policy Act ("NEPA") and the Natural Gas Act. Courts interpreting NEPA require that the law not be implemented as a mere exercise. NEPA mandates that an agency "take a 'hard look' at the impacts of a proposed action." *Citizens' Comm. to Save Our Canyons*, 513 F.3d at 1179 (10th Cir.2008) (quoting *Friends of the Bow v. Thompson*, 124 F.3d 1210, 1213 (10th Cir.1997)); *Morris v. U.S. Nuclear Regulatory Comm'n*, 598 F.3d 677, 681 (10th Cir.2010) (noting that NEPA "requires ... that an agency give a 'hard look' to the environmental impact of any project or action it authorizes"). This examination "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 712 (10th Cir. 2010) (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)) (internal quotation marks omitted); see also 40 C.F.R. § 1502.2(g) ("Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made"); *id.* § 1502.5 ("The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made").

"[I]f an agency predetermines the NEPA analysis by committing itself to an outcome, the agency likely has failed to take a hard look at the environmental consequences of its actions due to its bias in favor of that outcome and, therefore, has acted arbitrarily and capriciously." *Forest Guardians*, 611 F.3d at 713 (citing *Davis v. Mineta*, 302 F.3d 1104, 1119 (10th Cir.2002); see also *id.* (stating that "[w]e [have] held that ... predetermination [under NEPA] resulted in an environmental analysis that was tainted with bias" and was therefore not in compliance with the statute (citing *Davis*, 302 F.3d at 1112-13, 1118-26)). In *Forest Guardians*, the Tenth Circuit held that

... predetermination occurs only when an agency irreversibly and irretrievably commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, before the agency has completed that environmental analysis— which of course is supposed to involve an objective, good faith inquiry into the environmental consequences of the agency's proposed action.

Id., 611 F.3d at 714.

In sum, the FERC Staff is violating the letter as well as the spirit of NEPA by overtly encouraging Rover LLC to engage with property owners at this stage of the permitting proceeding. Rover and Nexus personnel are taking maximum advantage of FERC's official



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notice to property owners. Using the NOI to inform property owners about the eminent domain "hard path" while warning them to use the negotiation "soft path" lends FERC's imprimatur to corporate corruption of the decision process. FERC has put the "hard path" ahead of the "hard look."

As the court stated in *Forest Guardians*, "an individual's [employee of a federal "lead" agency's] comments remain immaterial to the predetermination analysis unless they (1) may fairly be attributed to the agency, and (2) tend to reflect the agency's irreversible and irretrievable commitment to a course of action - in contemplation of a particular environmental outcome - even before the requisite environmental analysis has been completed." 611 F.3d at 718 n. 20.

By fostering a biased system, FERC also mocks statutory changes dating to 2005 which require fuller consideration of alternatives to the corporation's preferred route. Some opponents of the present Rover and Nexus proposals seek consideration of a dedicated, multi-pipeline corridor, while others will make a serious case for the no-action alternative because of the dramatic global warming effects of the proposed gas transportation activities. Moreover, there is essentially no consideration being given to the fact that pipelines 42" in diameter are effectively experimental in the threats they pose to populations along their routes. There are no margins or setbacks from occupied structures and populated areas to mitigate accidents, and the prospects of accidents have not historically received significant treatment in the environmental documents required by NEPA..

It is imperative that FERC quickly halt the current process toward a biased approval. FERC must issue an immediate retraction of the November 18, 2014 NOI in Docket No. PF14-14, and further direct Rover and Spectra, whether as pre-applicants or applicants, that they must cease and desist from contacting any of the affected property owners in their proposed routes for purposes of land acquisition without a valid certificate of convenience and necessity. Please respond protectively of private owners' rights as stakeholders in the proposed Nexus and Rover corridors by February 10, 2015. Thank you very much.

Respectfully,

/s/ Terry J. Lodge, Esq.

316 N. Michigan St., Suite 520

Toledo, OH 43604-5627

(419) 255-7552

lodgelaw@yahoo.com

Letter sent via certified U.S. mail and email; Rover transcript accompanies digital letter

Joe Hyclak

MAR 23 2015

2015 MAR 23 P 12:00

GENERAL COUNSEL
INCOMING

March 15, 2015

Mr. David L. Morenoff, General Counsel
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Freedom of Information Act Appeal, FOIA-2015-38 FOIA Exemption 6 Assertion

Dear Mr. Morenoff:

As provided by the Freedom of Information Act and 18 CFR § 388.110(a)(1) of the Commission's regulations, I am hereby appealing FERC's decision to accept Nexus' assertion that FOIA Exemption 6 applies to the list of affected landowners and to only provide me with a redacted copy of the list. In their response to my FOIA request, "Nexus asserted that the names and personal home addresses of landowners identified in the document should be protected because the privacy interest of the individuals outweighs the public interest in disclosure". I am asserting that this is not an accurate interpretation and implementation of Exemption 6.

As defined in the Department of Justice Guide to the Freedom of Information Act, on page 417, "Exemption 6 protects information about individuals in "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy". Also in the DOJ Guide, on page 425, it states "Initially, it must be determined "whether disclosure of the files 'would compromise a substantial, as opposed to de minimis, privacy interest,' because 'if no significant privacy interest is implicated...FOIA demands disclosure.'"

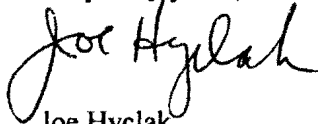
These definitions, as spelled out by the Department of Justice, surely negate the assertion by Nexus that this is privileged information, as well as, FERC's decision to not provide me with the information I requested in my FOIA request. Simply by virtue of having published and publically displayed maps of the current proposed route of the Nexus pipeline, and with the public availability of products such as Google Earth and the fact that names associated with specific parcels are public information, Nexus itself has already divulged the bulk of this information, making the requested information public knowledge. Therefore, the release of the Landowner List requested in my FOIA-2015-38 request would, at best, be a de minimis compromise of the privacy interest of the affected landowners and should immediately be provided to me unredacted "because if no significant privacy interest is implicated...FOIA demands disclosure".

There is a very short time frame to the FERC process for the Spectra Energy Nexus pipeline. Nexus plans on filing its final application in November, 2015, and the fact is that landowners are already being pressured into making decisions about, and entering into easement consents, under the shadow of eminent domain sanctioned by FERC, all before a final certificate has been awarded. This activity is allegedly currently being carried out and is violating the letter, as well as the spirit, of NEPA, and is likely illegal.

Time is of the essence. I am attempting to exercise my First Amendment freedom of association with other property owners located in the shadow corridor identified by Spectra Energy, in order to inform the landowners in a timely fashion. I also am attempting to alert those landowners of the possible illegal activity of the Federal Government, so that they may protect those property rights of theirs which FERC is bound to protect. FERC's actions in allowing Nexus to engage in alleged illegal activity before any finalization of the formal process means that the Commission is arguably not fulfilling its obligations under the Natural Gas Act and the National Environmental Policy Act, and landowners who may be asked to give up substantial private property rights for this pipeline project need and deserve to know this information.

Since (1) the time frame of the FERC approval process is short, (2) FERC seems to be sanctioning illegal activities to secure both property and easements prior to the final route approval, and (3) the existence of potential collusion suggests that project approval may be preordained and the whole approval process is nothing but a sham, I am hereby requesting that the decision to deny me an unredacted version of the Landowners List per my request via my Freedom of Information Act request No. FY15-38 be vacated and the FOIA request be fast-tracked.

Very truly yours,



Joe Hyclak

Cc: Charles A. Beamon
Associate General Counsel, General and Administrative Law
888 First Street NE
Washington, DC 20426

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

FEB 27 2015

Re: Release Letter,
FOIA No. FY15-38

ELECTRONIC AND REGULAR MAIL

Mr. Joe Hyclak
Coalition to Reroute Nexus



Dear Mr. Hyclak:

This is a response to your correspondence of January 22, 2014, in which you requested a document pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2014). Specifically, you requested "a copy of 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 non-public files identified one document responsive to your request. That document, the Landowners List, is privileged and is contained within Accession No. 20141230-5314 in the Commission's eLibrary database. The Landowner List contains the names and addresses of landowners along the proposed route of the pipeline in question.

In response to notice provided pursuant to 18 C.F.R. § 388.112, NEXUS objected to the release of the Landowner List on the grounds that the document contains information about property owners that is exempt from disclosure under FOIA Exemption 6.¹ NEXUS asserted that the names and personal home addresses of landowners identified in the document should be protected because the privacy interest of the individuals outweighs the public interest in disclosure and that withholding the list is consistent with FERC policy.

The Commission will release the Landowner List in redacted form. Specifically, the names and personal home addresses of private citizens will be withheld pursuant to FOIA Exemption 6, which exempts from release "files the disclosure of which would constitute a clearly unwarranted invasion of privacy." It is well-established that

¹ 5 U.S.C. § 552(b)(6).

information like the material being withheld about private citizens is protected from release under FOIA Exemption 6. *See Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997); *Odland v. FERC*, Civil Action No. 13-141, 2014 WL 1244773, *10 (D.D.C. 2014); *National Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873 (D.C. Cir. 1989). However, the names, addresses, and other data of commercial entities do not implicate a privacy interest that is protected by FOIA Exemption 6 and will be released to you.

As provided by 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. The appeal must be in writing, addressed to David L. Morenoff, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, and clearly marked "Freedom of Information Act Appeal." Please send a courtesy copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at the same address.

Sincerely,



For

Leonard M. Tao
Director
Office of External Affairs

Enclosure

jhyclak@aol.com - Electronic FOIA Request Form FOIA-2015-38

Accepted: January 22, 2015

Webform@ferc.gov <webform@ferc.gov>

Track 1

Fee waiver requested

Thu 1/22/2015 10:47 AM EXPEDITED TREATMENT RESPONSE DUE: February 1, 2015

Inbox

STATUTORY DUE DATE: February 20, 2015

To: Sterling Poteat <Sterling.Poteat@ferc.gov>; FOIA-CEII <FOIA-CEII@ferc.gov>;

Title:

First Name: Joe

Last Name: Hyclak

Organization: Coalition to Reroute Nexus

Street Address: [REDACTED]

Street Address2:

City: [REDACTED]

State: [REDACTED]

Zip Code: [REDACTED]

Country: United States

Phone: [REDACTED]

Fax:

Email: [REDACTED]

Request Type: FOIA

Your Request: Receive the material in electronic form (if possible)

Reasonably describe the records you are seeking: I am requesting a copy of Appendix B Stakeholder List - Landowners as included in the Pre-filing Application of the Nexus Public and Agency Participation Plan December, 2014. FERC docket PF15-10.

Intake Method: Web

Requested Delivery Method: Electronic Copy

Reason for Expedited: An urgency to inform the public concerning actual or alleged Federal government activity (this option available only for requesters primarily engaged in disseminating information)

Submitter Expedited Justification: Each landowner along the proposed right needs to be informed of their rights.

I certify that the above statement(s) concerning expediting processing are true and correct to the best of my knowledge and belief: Yes

Payment of Fees: Request Fee Waiver

Fee Waiver Justification: This information is very important in order to provide each landowner of the activities of FERC regarding this project PF15-10.

Date Received: 01-22-2015 10:47:08 AM EDT

ELIBRARY INDEX SHEET

Submittal	12/30/2014	PF15-10-000	NEXUS Gas	Application/Petition/Request
20141230-5314	12/30/2014		Transmission, LLC	/
<u>Document Components</u>			submits its Request	Certificate of Public
			for Approval to Use	Convenience and Necessity
			the Pre-Filing	
			Process for its	
			NEXUS Gas	
			Transmission Project	
			under PF15-10.	
			Availability:	
			Privileged	

*APPENDIX B

AGUIRRE & SEVERSON, LLP
ATTORNEYS AT LAW

FX15-48

Michael J. Aguirre, Esq.
maguirre@amslawyers.com

501 West Broadway, Suite 1050
San Diego, CA 92101
Telephone (619) 876-5364
Facsimile (619) 876-5368

April 8, 2015

David L. Morenoff
General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: FREEDOM OF INFORMATION ACT APPEAL

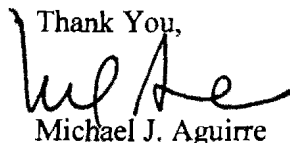
Dear Mr. Morenoff:

As provided by the FOIA and 18 CFR 388.110(a)(1) of FERC's regulation, I am appealing the decision to provide no records in response to the FOIA request described below after delaying the response and leading me to believe records would be produced. If this appeal is not granted, an immediate lawsuit will be filed to obtain them.

FERC has acknowledged that on February 18, 2015, I filed a FOIA request 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, and any documents and information related to the Order Approving Stipulation and Consent Agreement found at 149 FERC ¶ 61,061 (Docket No. IN14-8-000). FERC also acknowledged in a conversation between myself and Commission staff on March 9, 2015, the request was narrowed to email communications between FERC Staff and SCE regarding the Staff Notice of Alleged Violations dated January 22, 2014."

No prejudice will be suffered by FERC in any on-going investigation. The incident in question occurred in going on 4 years ago. FERC has already issued sanctions in the case, albeit minor ones with regard to SCE. Withholding documents that are subject to disclosure under FOIA later produced under court order subjects FERC to having to pay legal fees. We live in San Diego, which is the primary population center that suffered the blackout. We have a deep and vital interest in learning what your investigation showed, including whether an adequate investigation was conducted. Please honor our request and provide the requested documents.

Thank You,



Michael J. Aguirre

cc: Charles A. Beamon,
Associate General Counsel, General and Administrative Law

SOUTHERN ENVIRONMENTAL LAW CENTER

Telephone 434-977-4090

201 WEST MAIN STREET, SUITE 14
CHARLOTTESVILLE, VA 22902-5065

Facsimile 434-977-1483

FREEDOM OF INFORMATION ACT APPEAL

Via facsimile to: 202.208.2115

June 1, 2015

David L. Morenoff, General Counsel
Charles A. Beamon, Associate General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**Re: Freedom of Information Act Appeal
FOIA No. FY15-58**

Dear Mr. Morenoff and Mr. Beamon:

We are writing on behalf of Rick Webb to appeal FERC's denial of FOIA No. FY15-58. In his March 9 request, Mr. Webb sought copies of the:

- Geographic Information System (GIS) digital shapefiles associated with pipeline routes in FERC docket nos. PF15-5-00 and PF15-6-00.

On April 17, FERC denied Mr. Webb's request and claimed that the requested GIS files contained Critical Energy Infrastructure Information (CEII) as defined in 18 C.F.R. § 388.113(c). Mr. Webb then submitted a CEII request to which Dominion Transmission and Atlantic Coast Pipeline, LLC, objected.¹ To date, Mr. Webb has not received the GIS files that he asked for almost three months ago. For the following reasons, FERC must reverse its denial and provide the requested records as soon as possible.

FERC erroneously identified GIS files of pipeline routes as CEII. As spelled out in the agency's regulations, CEII does not include information that "simply give[s] the general location of the critical infrastructure."² But GIS files of a proposed pipeline route *only* provide the location of the route. These files are no different than a detailed map and, in fact, are the underlying data used to generate maps of the proposed pipelines.

Mr. Webb intends to use these files with map generating software to evaluate the environmental impacts of the Atlantic Coast Pipeline and to comment on FERC's environmental review documents. In FERC Order 630, the Commission specifically

¹ A copy of all the correspondence related to this FOIA request is attached.

² 18 C.F.R. § 388.113(c)(1).

recognized the need to provide location information to facilitate the NEPA review process.³ According to Order 630, topographic maps depicting pipeline routes, alignment sheets, site or project drawings, and general location maps are not CEII unless they also include technical details about the infrastructure.⁴ A GIS file defining a route does not contain this type of technical information, and Dominion did not identify any when it objected to Mr. Webb's request. Furthermore, the requested GIS shapefiles meet none of the categories of CEII applicable to natural gas infrastructure specifically identified in Order 630.⁵

Dominion itself has already made detailed route information available for the Atlantic Coast Pipeline through its website. Dominion's county level maps provide links to aerial photographs of the proposed route that identify each parcel the pipeline would cross by parcel number.⁶ These parcel numbers can be traced to specific property owners through county land records. Therefore, the concern that the project's landowner list would be compromised if FERC releases the GIS files for the route is irrelevant—that information is already public. These maps also show where the pipeline route crosses public roads and railroads, and Dominion's concern about releasing this information is also spurious.

FERC erroneously claimed that the GIS shapefiles were exempt from mandatory disclosure under FOIA exemption 7(F). In order to rely on exemption 7, agency records must have been "compiled for law enforcement purposes."⁷ According to the Supreme Court, the term "compiled" requires that a document be "created, gathered, or used by an agency for law enforcement purposes at some time *before* the agency invokes the exemption."⁸ Here, FERC cannot claim that it compiled the requested GIS shapefiles for law enforcement purposes *before* relying on exemption 7(F). The agency has not received a formal application for a certificate for the Atlantic Coast Pipeline, and it has no law enforcement interest in a mere proposal that it may or may not approve at some point in the future.

Thank you for your prompt resolution of this appeal. Please contact me at 434.977.4090 or gbuppert@selcva.org if I can provide more information.

³ FERC, Final Rule: Critical Energy Infrastructure Information, 68 Fed. R. 9857, 9862 (Mar. 3, 2003).

⁴ *See id.*

⁵ *See id.*

⁶ *See, e.g.,* <https://www.dom.com/library/domcom/pdfs/gas-transmission/atlantic-coast-pipeline/area-maps1/augusta-4.pdf>.

⁷ 5 U.S.C. § 552(b)(7).

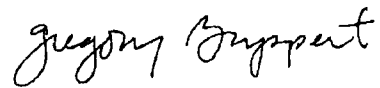
⁸ *Pub. Emps. for Envtl. Responsibility v. U.S. Section, Int'l Boundary & Water Comm'n, U.S.-Mexico*, 740 F.3d 195, 202-03 (D.C. Cir. 2014) (citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 155 (1989) (emphasis added)).

From:

06/01/2015 18:13

#326 P.003/012

Sincerely,

A handwritten signature in cursive script that reads "Gregory Buppert".

Gregory Buppert, Senior Attorney
Southern Environmental Law Center

FOIA-2015-58

Accepted: March 9, 2015

Received via email: Friday, March 6, 2015 7:10 PM

Track 1

DOMINION PIPELINE MONITORING COALITION Due Date April 6, 2015



481 Ravens Run Road, Monterey, Virginia 24465; 540-468-2881; rwebb@virginia.edu

Ms. Toyia Johnson
FOIA Public Liaison
Office of External Affairs
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: Freedom of Information Act Request; Docket Nos. PF15-5-000, PF15-6-000

Ms. Johnson:

This is a request submitted on behalf of the Dominion Pipeline Monitoring Coalition (DPMC) for information related to the above-cited docket numbers and the public notice published by the Federal Energy Regulatory Commission (FERC), dated February 27, 2015, and titled:

NOTICE OF INTENT TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE PLANNED SUPPLY HEADER PROJECT AND ATLANTIC COAST PIPELINE PROJECT, REQUEST FOR COMMENTS ON ENVIRONMENTAL ISSUES, AND NOTICE OF PUBLIC SCOPING MEETINGS

Specifically, this is a request for Geographic Information System (GIS) digital shapefiles for the alternate pipeline routes depicted in Appendix 1, Figures 1-4 of the above-cited public notice.

We are willing to pay reasonable fee for cost associated with fulfilling this request. Please advise me if the cost will exceed \$200.00. On behalf of the DPMC, I request a waiver for any costs above \$200.00.

Ms. Toyia Johnson
page 2

March 6, 2015

The DPMC is a public interest organization representing twelve central Appalachian region conservation organizations. Our interest in the requested GIS shapefiles is for purposes of comparative analysis of environmental and other impacts of the proposed pipeline alternatives. Access to the GIS shapefiles is necessary for informed analysis of the different alternatives.

The DPMC will share the results of our analysis with the public for educational purposes. We also intend to use the requested GIS shapefiles in the development of input to FERC during the Environmental Impact Statement preparation process.

Please let me know if there are any questions related to this request.

Thank you,

A handwritten signature in black ink that reads "Rick Webb". The signature is written in a cursive, slightly slanted style.

Rick Webb, Coordinator
Dominion Pipeline Monitoring Coalition

cc: Kimberly D. Bose, Secretary, FERC

From:

06/01/2015 18:14

#326 P.006/012

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

April 2, 2015

Re: Extension of Time,
FOIA No. FY15-58

VIA REGULAR MAIL

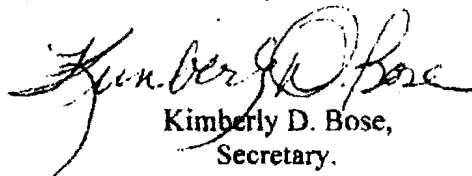
Mr. Rick Webb
Coordinator
Dominion Pipeline Monitoring Coalition
481 Ravens Run Road
Monterey, VA 24465
rwebb@virginia.edu

Dear Mr. Webb:

This letter is in reference to your Freedom of Information Act, 5 U.S.C. § 552 (2012), request filed with the Federal Energy Regulatory Commission (Commission) on March 9, 2015. We have determined that to reply to your request, we need to consult with other components of the agency having substantial subject-matter interest therein. See 18 C.F.R. § 388.110(b)(1) and (b)(4)(iii) (2014).

Therefore, in accordance with the provisions in Section 388.110(b) of the Commission's Rules of Practice and Procedure, we are notifying you that we have extended the time limit to make an initial determination on your request. We expect to be able to send you an initial determination on your request by April 20, 2015.

Cordially,


Kimberly D. Bose,
Secretary.

cc: Leonard M. Tao
Director
Office of External Affairs
Federal Energy Regulatory Commission
Washington, DC 20426

Federal Energy Regulatory Commission
Washington, DC 20426

APR 17 2015

Re: Final Response,
FOIA No. FY15-58**VIA CERTIFIED MAIL**

Rick Webb
Dominion Pipeline Monitoring Coalition
481 Ravens Run Road
Monterey, VA 24465

Dear Mr. Webb:

On March 6, 2015, you 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 (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2015). Specifically, you requested copies of Geographic Information System (GIS) digital shapefile associated with pipeline routes in Docket Nos. PF15-5-000 and PF15-6-000.

A search of the Commission's non-public files identified one responsive document. The document you seek contains material designated as Critical Energy Infrastructure Information (CEII) as defined in 18 C.F.R. § 388.113(c) and should only be released to you subject to the terms of the CEII process. These documents are exempt from mandatory disclosure pursuant to FOIA Exemption 7(F). You may seek access to this CEII material by completing a CEII request form online at: <http://www.ferc.gov/legal/ceii-foia/ceii/eceii.asp>.

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, 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,



Leonard M. Tao
Director
Office of External Affairs

• Country: United States

• Phone: N/A
(Phone number of entity listed above)

• Description of Information Requested: Geographic Information System (GIS) digital shapefiles associated with the pipeline in FERC Docket No. PF-6-000.

• Statement explaining need and intended use of the information: The data are necessary to conduct analysis and prepare detailed comments during the preparation of a draft Environmental Impact Statement to be conducted by FERC for the proposed Atlantic Coast Pipeline.

Payment of Fees

I agree to pay all applicable fees ☐ Fee I Agree To Pay \$ 200.00

Request a waiver or reduction of fees ☒ Notify me if the amount exceeds the entered amount ☐

Fee Waiver Justification

The Freedom of Information Reform Act of 1986 provides that documents are to be furnished without charge or for a reduction in established fees if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. If you request a waiver of fees or a reduction in fees, please explain why it is justified.

I am engaged in analysis of the proposed Atlantic Coast Pipeline (FERC Docket No. PF-6-000) on behalf of a public interest citizens group, the Dominion Pipeline Monitoring Coalition. I seek the requested data to inform development of comments and input on development of a draft EIS for the proposed project. The requested information is critical for this purpose, and it will not serve private or commercial interest. FERC should seek to facilitate informed comments and should not impose cost for access to fundamental information.

• Signature:

Rick Webb

Note: Typed characters constitute a signature pursuant to 18 CFR 383.2005(c)

OMB Clearance

Critical Energy Infrastructure Information General Non-Disclosure Agreement

1. These provisions govern the use of Critical Energy Infrastructure Information (CEI) provided to an individual who files a request for access to CEI pursuant to 18 C.F.R. § 388.113.
2. Definitions - For purposes of these provisions:
 - The term "CEI Coordinator" refers to the Federal Energy Regulatory Commission official designated as Critical Energy Infrastructure Information Coordinator, with delegated authority under 18 C.F.R. § 375.313 to make determinations with respect to requests for CEI.
 - The terms "non-disclosure agreement" and "NDA" mean this agreement by which requesters certify their understanding that access to CEI is provided pursuant to the terms and restrictions of these provisions, and that such requesters have read the provisions and agree to be bound by them.
 - The term "Recipient" means someone who is approved to receive CEI in accordance with the provisions of 18 C.F.R. § 388.113.
3. A Recipient may only discuss CEI with another Recipient of the identical CEI. A Recipient may check with the CEI Coordinator to determine whether another individual is a Recipient of the identical CEI.
4. If any Recipient submits information to the Commission that includes CEI obtained under these provisions, portions of the filing containing CEI must be submitted in accordance with 18 C.F.R. § 388.112(b).
5. A Recipient of CEI may use CEI as foundation for advice provided to others, but may not disclose CEI to another individual unless that individual is an approved Recipient of the same CEI.
6. A Recipient will not knowingly use CEI for an illegal or non-legitimate purpose.
7. All CEI shall be maintained by Recipient in a secure place. Access to those materials shall be limited to other Recipients of the identical material. Recipients may make copies of CEI, but such copies become CEI and subject to these same procedures. Recipients may make notes of CEI, which shall be treated as CEI notes if they contain CEI.
8. Recipients must return CEI to the CEI Coordinator or destroy CEI within fifteen days of a written request by the CEI Coordinator to do so, except that CEI notes may be retained in accordance with Paragraph 7, above. Within such time period, each Recipient if requested to do so, shall also submit to the CEI Coordinator an affidavit stating that, to the best of his or her knowledge, all CEI has been returned or destroyed and that CEI notes have either been returned, destroyed or are being maintained by Recipient in accordance with Paragraph 7.
9. The Recipient remains bound by these provisions unless the CEI Coordinator or the Commission rescinds the provisions or a court of competent jurisdiction finds that the information does not qualify as CEI.
10. The Commission may audit the Recipient's compliance with this non-disclosure agreement.
11. Violation of this non-disclosure agreement may result in criminal or civil sanctions against the Recipient.
12. I hereby certify my understanding that access to Critical Energy Infrastructure Information (CEI) is provided to me pursuant to the terms and restrictions of the above CEI provisions, that I have been given a copy of and have read the provisions, and that I agree to be bound by them. I understand that the contents of the CEI, any notes or other memoranda, or any other form of information that copies or discloses CEI shall not be disclosed to anyone other than another person who has been granted access to these same materials by the Federal Energy Regulatory Commission. I acknowledge that a violation of this agreement may result in criminal or civil sanctions, including the suspension of my ability to appear before the Commission pursuant to 18 C.F.R. § 385.2102. I agree that my compliance with this agreement is subject to audit by the Federal Energy Regulatory Commission.

Signature: Rick Webb

Note: Typed characters constitute a signature pursuant to 18 CFR 385.2005(c)

Title: Coordinator

Email: rwebb@virginia.edu

Representing: Dominion Pipeline Monitoring Coalition

FERC



Federal Energy Regulatory Commission

Enter Search Term

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[Settlements](#)

[Legal Resources](#) >> [FOIA & CEII](#) >> [CEII](#) >>

CEII - Electronic CEII Request Form

Thank you for submitting your Request!

Dominion Transmission, Inc.
120 Tredegar Street, Richmond, VA 23219



May 20, 2015

VIA ELECTRONIC MAIL

Ms. Tiffany Haigler
Attorney-Advisor
General & Administrative Law
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

Re: CEII No. CE15-75: Request for Document Release

Dear Ms. Haigler:

Dominion Transmission, Inc. (Dominion) on behalf of Atlantic Coast Pipeline, LLC, hereby responds to your letter of May 18, 2015 regarding the recent request submitted by Mr. Rick Webb of the Dominion Pipeline Monitoring Coalition. Mr. Webb requests a copy of the Geographic Information System (GIS) digital shape files associated with Docket No. PF15-6-000, the Atlantic Coast Pipeline, LLC pre-filing application.

Dominion objects to the release of the GIS shape files. The shape files provide specific geographic coordinates for the location of Atlantic Coast Pipeline's proposed pipeline facilities. This information qualifies as CEII because it contains detailed information that could be useful to someone planning an attack on the energy infrastructure; further it is exempt from FOIA disclosure, and reveals more than just the location of the potential facilities. See 18 C.F.R. § 388.113(c)(1). In this instance, releasing a GIS shape file of the route centerline would provide any user of the data with specific route locations at public locations such as road or railroad crossings, as well as on private lands. Release of this specific location information could have significant infrastructure security concerns for the project facilities that are eventually constructed.

Further, release of a geo-referenced route centerline in digital shape file format could compromise the privacy of private landowners crossed by the route. A user with access to the shape files could combine them with publically available landowner parcel data and re-create ACP's landowner list. It is well established that the names and addresses of private landowners are protected from release under FOIA exception 6. Exception 6 (§388.107(f)) provides an exemption for "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). See Letter from Leonard M. Tao, Federal Energy Regulatory Commission, to Robert Gordon, DuretteCrump PLC, FOIA No. FY15-12 (December 17, 2014); Letter from Leonard M. Tao, Federal Energy Regulatory Commission, to Lois Henry, Counsel for Dominion Resources, FOIA No. FY15-42 (March 13, 2015).

Ms. Tiffany Haigler
Attorney-Advisor General & Administrative Law
May 20, 2015
Page 2 of 2

Accordingly, Dominion requests that the GIS shape files be withheld from disclosure in this proceeding. Should you have any additional questions or need more information, please feel free to contact the undersigned.

Sincerely,

/s/ Lois M. Henry
Lois M. Henry
Counsel for Dominion Transmission, Inc.

CC: Angela M. Woolard
Dominion Transmission, Inc.
701 E. Cary Street, 5th Floor
Richmond, VA 23219
angela.m.woolard@dom.com

Rick Webb
481 Ravens Run Road
Monterey, VA 24465
rwebb@virginia.edu

PAUL V. NOLAN, Esq.

5515 North 17th Street
Arlington, Virginia 22205

E-mail: pvnrvndiver@gmail.com

Work: (703) 534-5509
Fax: (703) 538-5257
Cell: (703) 587-5895
Truck: (571) 205-0304

July 10, 2015

TO: David L. Morenoff, Esq.
General Counsel
Federal Energy Regulatory Commission

CC: Charles A. Beamon
Associate General Counsel
General and Administrative law
Federal Energy Regulatory Commission

FR: Paul Nolan

RE: FOIA No. FY15-102
P-3442, P- 2814, and P- 3255
Freedom of Information Act Appeal

Dear Mr. Morenoff:

Per a recent request for documents, I have received a letter dated July 8, 2015, denying the existence of any non-public documents related to my request. See FERC eLibrary Accession No. I note that I my request was not limited to non-public documents and that I specifically requested documents filed in response to information required of a licensee under section 4.41 -- Initial cost statement.

The determination letter states the following:

This letter responds to your request received on June 15, 2015 and amended June 19, 2015, 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) regulations, 18 C.F.R. § 388.108 (2015). You requested documents related to original construction cost information, including Commission audits for Docket Nos.

A search of the Commission's **non-public** files identified no documents responsive to your request.

I respectfully note that the following standard license articles¹ and regulations govern the above cautioned-projects that are the subject of the FOIA request:

Standard license article no. 7 states:

Article 7. The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

This task is accomplished by a licensee's compliance, etc., with the Commission's regulations under Subpart A; which states:

Subpart A — Determination of Cost of Projects Constructed Under License
Contents

§4.1 Initial cost statement.

(a) Notification of Commission. When a project is constructed under a license issued under the Federal Power Act, the licensee shall, within one year after the original project is ready for service, file with the Commission a letter, in quadruplicate, declaring that the original costs have been booked in compliance with the Commission's Uniform System of Accounts and the books of accounts are ready for audit.

(b) Licensee's books. The licensee's books of accounts for each project shall be maintained in such a fashion that each year's additions, betterments, and deletions to the project may be readily ascertained.

(c) Availability of information to the public. The information made available to the Commission in accordance with this section must be available to the public for inspection and copying when specifically requested.

(d) Compliance with the Act. Compliance with the provisions of this section satisfies the filing requirements of section 4(b) of the Federal Power Act (16 U.S.C. 797(b)).

§4.2 (omitted).

§4.3 Report on project cost.

¹ P-2814, Form L-4, P-3255, L-4; and, P-3442, Form L-11.

(a) Scheduling an audit. When the original cost declaration letter, filed in accordance with §4.1 is received by the Commission, its representative will schedule and conduct an audit of the books, cost records, engineering reports, and other records supporting the project's original cost. The audit may include an inspection of the project works.

(b) Project records. The cost records shall be supported by memorandum accounts reflecting the indirect and overhead costs prior to their spread to primary accounts as well as all the details of allocations including formulas utilized to spread the indirect and overhead costs to primary accounts.

(c) Report by Commission staff. Upon completion of the audit, a report will be prepared for the Commission setting forth the audit findings and recommendations with respect to the cost as claimed.

§4.4 Service of report.

Copies of such report will be served upon said licensees, and copies will also be sent to the State public service commission, or if the State has no regulatory agency, to the Governor of the State where such project is located, and to such other parties as the Commission shall prescribe, and the report will be made available for public inspection at the time of service upon the licensee.

§4.5 Time for filing protest.

Thirty days after service thereof will be allowed to such licensee within which to file a protest to such reports. If no protest is filed within the time allowed, the Commission will issue such order as may be appropriate. If a protest is filed, a public hearing will be ordered in accordance with subpart E of part 385 of this chapter.

§4.6 Burden of proof.

The burden of proof to sustain each item of claimed cost shall be upon the licensee and only such items as are in the opinion of the Commission supported by satisfactory proof may be entered in the electric plant accounts of the licensee.

§4.7 Findings.

(a) Commission determination. Final action by the Commission will be in the form of an order served upon all parties to the proceeding. One copy of the order will be furnished to the Secretary of Treasury by the Commission.

(b) Adjustments to licensee's books. The licensee's books of account for the project shall be adjusted to conform to the actual legitimate cost as revised by the order of the Commission. These adjustments and the project may be audited by Commission representatives, as scheduled.

Standard Article 7 explicitly states that ***the actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission*** in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

Given the importance of the purpose served by the license articles and the regulations, I do not believe that the determination of legitimate costs are discretionary. See PART 101—UNIFORM SYSTEM OF ACCOUNTS PRESCRIBED FOR PUBLIC UTILITIES AND LICENSEES SUBJECT TO THE PROVISIONS OF THE FEDERAL POWER ACT. Nor, do I believe that the Commission has any leniency in the preserving the accumulation of such information as both license articles and regulations have imposed therein a continuing obligation. See PART 125—PRESERVATION OF RECORDS OF PUBLIC UTILITIES AND LICENSEES.

For the above stated reasons, I respectfully appeal the determination that there are no non-public records or any other records responsive to my request.

If indeed such costs are not available, then I respectfully request that the Commission request the required information from the licensees for the above captioned projects and conduct the requisite audits, etc.

Paul V.
Nolan

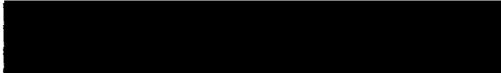
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V. Nolan,
email=pvnvpndiver@gmail.com,
c=US
Date: 2015.07.10 16:40:39 -04'00'

Paul V. Nolan, Esq.

5515 North 17th Street
Arlington, Virginia 22205

FY 15-107

Coyne Gibson



August 13, 2015

FOIA Officer
Department of Energy
Federal Energy Regulatory Commission

David Morenoff
Acting General Counsel
Federal Energy Regulatory Commission
Room 10A-01
888 First Street, NE
Washington, DC 20426

Fax: 202-208-2115
Email: david.morenoff@ferc.gov

CC:

Leonard M. Tao, Director, Office of External Affairs
Toyia Johnson, FOIA Public Liason, Office of External Affairs

Subject: FOIA Appeal

Dear FOIA Officer:

This is an appeal under the Freedom of Information Act, 5 U.S.C. § 552.

On July 16, 2015 I filed a FOIA request with FERC for Accession Number 20150708-5199, Report of Trans-Pecos Pipeline, LLC (Trans-Pecos) under FERC Docket CP15-500, Response to FERC Data Request issued July 1, 2015.

I am individually a movant to intervene, with standing, on FERC Docket CP15-500. For reference, the standing motion, associated with this action is:

Accession Number: 20150630-5064, "MOTION TO INTERVENE OF COYNE A. GIBSON, PROTEST AND COMMENTS IN OPPOSITION TO THE APPLICATION OF TRANS-PECOS PIPELINE LLC FOR NATURAL GAS ACT SECTION 3 AUTHORIZATION AND PRESIDENTIAL PERMIT TO CONSTRUCT CROSS-BORDER FACILITIES"

On August 12, 2015, your agency denied my request. Copies of my request and the denial are enclosed. Additional documents supporting this appeal are also enclosed herein.

The information which I have requested is clearly releasable under FOIA and, in my opinion, may not validly be protected by any of the Act's exemptions.

Citing:

1) I am an individual citizen, not a business competitor, or otherwise in competition with the applicant in CP15-500. I have no intent to disclose to the public, any information received as a result of the FOIA disclosure.

2) As a movant to intervene on FERC Docket CP15-500, any use of the information disclosed under FOIA request FY15-107 would be made by Privileged filing (FERC Online e-Filing system). Further to 2), this material is clearly eligible for release under a Protective Order, allowing parties with standing to the docket to have fair, and equitable access to the information. As a movant, with standing, I am freely able to sign a protective order acceptable to the applicant, the FERC, and maintain integrity of any privileged information that may be disclosed.

3) Given that the applicant in CP15-500 has represented to FERC, that the non-jurisdictional facilities associated with the Presidio Crossing Project are part of an intrastate system, and that the applicant is entitled to classification as a gas utility, non-jurisdictional intrastate system, the applicant must disclose fact and detail, substantiating this claim to movants to intervene on CP15-500.

Specifically, the applicant in CP15-500 must have two or more suppliers, and one or more domestic customers, to qualify for intrastate gas utility status under Texas Utility Code 121, and Texas Natural Resource Code 111. Absent meeting these requirements, under Texas statutes, the applicant in CP15-500 is classified as a private pipeline, not an intrastate gas utility system, and as such, the claimed status in CP15-500 is invalid.

In this regard, the requested FOIA disclosure with respect to FY15-107 is material, and requires response from FERC.

4) The project proposed in CP15-500 exists in isolation, and there are no extant, or potential competitors that may benefit. The proposed project, including both the jurisdictional, and non-jurisdictional facilities were won in a sole-source, closed bidding process with the Comisión Federal de Electricidad ("CFE"), and the bidding process is closed, having been won by the consortium representing Trans-Pecos Pipeline, LLC, the CP15-500 applicant.

5) FERC appears to claim clause (2), under the Section 4 exemption (parenthetical emphasis added):

"The requested material contains a list of potential interconnections for the Trans-Pecos pipeline and maps depicting potential compressor stations and valve sites that Trans-Pecos has not publically (*sic*) disclosed. Release of this material could cause substantial competitive harm to Trans-Pecos by releasing sensitive information to third parties while negotiations for potential interconnection sites are ongoing. See, e.g., *Gavin v. SEC*, No. 04-4522, 2007 WL 2454156, at *7 (D.C. Min. 2007) (finding that negotiated agreements with price and other terms were properly withheld); *Raytheon Co. v. Dep 't of Navy*, 1989 WL 550581, at *5 (D.D.C. 1989) (noting the expectation of confidentiality of information proposed, but not accepted). Moreover, release of this information could also provide counterparties (*sic*) with an unfair competitive advantage in negotiations."

In this case, the claims regarding unfair competitive advantage, substantial competitive harm, etc. are unfounded, given that the proposed project has already been awarded to the consortium,

and that the competitive bidding process closed. The companion claim, regarding the identification of, existence, or interest in distribution interconnects for municipal or other intrastate consumer customers is harmful is similarly false.

6) Specifically, Tran-Pecos has made prior disclosures with respect to the number of, approximate locations of, and intended purpose of interconnections:

In (2), pg.1, ¶ 4, of a response to the Alpine, Texas City Council, the project consortium representative ETP stated:

“To enable deliveries of gas to counties in Texas , TPP is contemplating installing taps at TPP's expense for Pecos County, Brewster County and Presidio County. Currently, the number of tap locations for each county are: Pecos - 1; Brewster - 1 and Presidio - 3. Each county can designate more as needed but prior to the commencement of construction on TPP.”

In (12), pg. 4, ¶ 4, of a response to Congressman Will Hurd, the project consortium representative ETP stated:

“The exact locations of the taps for each county will be finalized upon final determination of the pipeline centerline. TPP is installing these at our cost prior to construction. Currently, the number of tap locations for each county are: Pecos – 1; Brewster – 1 and Presidio – 3. Each county can designate more as needed but prior to construction.”

As such, in the general sense, the applicant has already publicly disclosed the possibility of creating these interconnections, and further disclosure as to their proposed location, who they will serve, and related detail regarding these interconnections creates no harm for the applicant.

With respect to FOIA FY15-107 to FERC, the disclosure of the proximal locations of the claimed five (5) interconnections, and potential distribution franchise (or franchisees) in no way materially impacts the applicant of CP15-500, in terms of damaging, harmful, or other adverse impacts on its business.

Having made this request in the capacity of a movant to CP15-500, and this information is of timely value, I would appreciate your expediting the consideration of my appeal in every way possible. In any case, I will expect to receive your decision within 20 business days, as required by the statute. Thank you for your assistance.

Thanks and regards,
Coyne A. Gibson



Schoharie County Board Of Supervisors

P.O. Box 429, County Office Building
Schoharie, NY 12157

Phone: (518) 295-8347 Fax: (518) 295-8482



Earl VanWormer, III
Chairman

Larry Bradt
Vice Chairman

October 1, 2015

Max Minzner, General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: Freedom of Information Act Appeal – FOIA No. FY15-116

Dear Mr. Minzner:

By letter dated September 2, 2015, the Schoharie County Planning and Development Agency was denied information by the Federal Energy Regulatory Commission (FERC) regarding the location and nature of three archaeological sites in Schoharie County where an adverse effect would occur due to the proposed Constitution Pipeline project.


On September 18, 2015, the Schoharie County Board of Supervisors met and discussed the issue and determined that the County would respectfully appeal the determination. The Schoharie County Board of Supervisors believes it should have the opportunity to review the impacted sites in order to recommend mitigation actions that could assist in decreasing the negative impacts of the pipeline installation on important archaeological sites in our County.

In order to decrease the chance of information concerning the location, nature, and character of the archaeological sites being released to the general public, the County Board asks that the original requested information be relayed to our County Historian, Mr. Theodore B. Stuart, P.O. Box 394 Warnerville, NY 12187 or our County Old Stone Fort Museum Director, Mr. Carle J. Kopecky, 145 Fort Road, Schoharie, NY 12157. Either one of these individuals could confidentially review the information and assist the full County Board in devising recommendations on measures to mitigate adverse impacts to the sites. The County Board of Supervisors is willing to adhere to any requirements FERC places on disclosure of the information as long as the County Board is afforded the opportunity to make comprehensive recommendations based on detailed information.

Schoharie County believes it should be an equal partner in the possible construction of the Constitution Pipeline project through our County. It is our opinion that withholding the identification of these three archaeological sites would demonstrate discourtesy to our role and involvement in the project.

Please consider our obligation to our constituents and afford us the opportunity to assist by releasing the information as requested. Feel free to contact the Schoharie County Board Chair to discuss details of how the information could be released in an appropriate manner. Thank you for your time and consideration.

Sincerely,

A handwritten signature in cursive script that reads "Earl Van Wormer III".

Earl Van Wormer III, Chairman
Schoharie County Board of Supervisors

A handwritten signature in cursive script that reads "Shane Nickle".

Shane Nickle, AICP
Senior Planner

cc: Charles A. Beamon, FERC Associate General Counsel, General and Administrative Law
Theodore B. Shuart, Schoharie County Historian
Carle J. Kopecky, Old Stone Fort Museum Director
Representative Chris Gibson
Senator Charles Schumer
Senator Kirsten Gillibrand



Save Passamaquoddy Bay

A 3-Nation Alliance

(US • Passamaquoddy • Canada)

PO Box 222 • Eastport, ME 04631

(207)853-2922

info@SavePassamaquoddyBay.org

www.SavePassamaquoddyBay.org

Max Minzner
General Counsel
Federal Energy Regulatory Commission
88 First Street, NE
Washington, DC 20426

2015 October 13

2015 OCT 20 A 11:34

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

Dear General Counsel Minzner:

Save Passamaquoddy Bay, a Non-Government Organization in Maine, filed a Freedom of Information Act request to FERC via FERC's online form on 2015 September 28. On 2015 October 8 we received via email a response from Leonard Tao, Director, Office of External Affairs. The communication indicated that our request for expedited service was denied.

Even though we indicated in our request that one of our organization's primary functions is disseminating information regarding LNG in Passamaquoddy Bay and in North America, the denial states that...

- 1) We did not speak to imminent threat to life or physical safety of an individual;
- 2) Although we may be primarily engaged in dissemination of information to the public regarding Federal Government activity, our request did not specify the need for urgency to inform the public; and
- 3) We did not provide credible documentation supporting justification for expedited treatment.

Our Response in Appeal of FERC's Denial

Imminent Threat to Life

The imminent threat to life reason is only one of two justifications for expedited treatment. That reason does not apply to our request, and we did not indicate that it applies.

Urgency to Inform the Public

The online FOIA request form provides the following choice that we selected:

An urgency to inform the public concerning actual or alleged Federal government activity
(this option available only for requesters primarily engaged in disseminating information)

The above selection that we made in our request is intrinsic indication of urgent need to inform the public. In contradiction to Mr. Tao in his letter, we *did* specify an urgent need to inform the public.

As to not providing sufficient credible documentation supporting justification for expedited treatment, we are appending to our request the following evidence:

- Save Passamaquoddy Bay has had website presence since 2004, with comprehensive information regarding LNG activity in Passamaquoddy Bay and in North America. See <<http://www.savepassamaquoddybay.org>>.
- Our News Archive, available at...
<http://www.savepassamaquoddybay.org/news_articles.html>
...(and our website menu) provides more-than-adequate credible evidence of our information-providing activity:

News Archive Menu

- 2015 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct |
- 2014 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2013 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2012 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2011 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2010 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2009 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2008 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2007 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2006 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2005 | Jan | Feb | Mar | Apr | May | Jun | Jul | Aug | Sep | Oct | Nov | Dec |
- 2003 Feb — through — 2004 | Aug | Sep | Oct | Nov | Dec |

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- FERC
- USDOT-PHMSA
- BEP
- LNG Developers
- Best Practices
- ANNOUNCEMENTS
- LATEST NEWS
- News Archives
- News Releases
- Legislation Watch
- Calendar
- Past Events
- LNG History
- Timeline
- Photographs
- Slide Shows
- Sound / Multimedia
- Banner Images
- Resources & Links
- Contacts
- Fundraising Items
- The Green Coast

...provides the vast range and depth of information Save Passamaquoddy Bay provides to the public regarding LNG and related government activities.

FERC Lack of Transparency

FERC indicates that its LNG terminal permitting process is transparent. When Save Passamaquoddy Bay has made enquiries of FERC staff regarding information related to

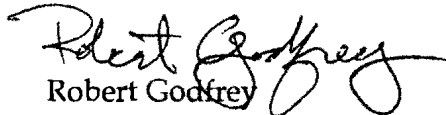
specific LNG project permitting, in some instances staff has simply indicated that we should follow the docket. Even the October 15 "PROJECT UPDATE FOR THE DOWNEAST LNG IMPORT/EXPORT PROJECT" advises the public to refer to the docket for information. That has resulted in lack of information availability. Minutes of the Bi-Weekly Telephone Conferences — rather than just the terse summary that is current practice — should be posted to the docket. Current practice establishes opacity, contrary to the public interest.

Comment Re FERC's Online FOIA Request Form

There is no obvious or convenient way for the public to save a digital copy of FERC's online FOIA request form with completed fields. Since the response we received from FERC also did not contain the submitted information that we included in our request, we suggest that, upon submission, FERC automatically email back to the requester the completed form with submitted data included, for the requester's records.

We respectfully anticipate a response indicating expedited service for our FOIA request.

Very truly,


Robert Godfrey
Researcher and Webmaster

CC: Charles A. Beamon, Associate General Counsel, General and Administrative Law
Federal Energy Regulatory Commission
88 First Street, NE
Washington, DC 20426

Sen. Angus King, via email
Sen. Susan Collins, via email

FREEDOM OF INFORMATION ACT APPEAL – FY16-4

August 12, 2016

Max Minzer, General Counsel
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

VIA EMAIL AND CERTIFIED MAIL- RETURN RECEIPT REQUESTED

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

Dear Mr. Minzer:

Pursuant to the Freedom of Information Act (“FOIA”) and Section 388.110 of the Commission’s regulations,¹ this letter serves as an appeal on behalf of ETRACOM LLC and Michael Rosenberg (collectively “ETRACOM”) of the Federal Energy Regulatory Commission’s (“FERC” or the “Commission”) denial of ETRACOM’s October 13, 2015 FOIA request for certain records, documents, and materials (collectively “records”) in FERC’s possession.²

Background

On October 13, 2015, ETRACOM requested pursuant to FOIA records related to FERC’s oversight of certain electricity markets administered by the California Independent System Operator Corporation (“CAISO”), and FERC’s enforcement of its regulations including pursuant to a referral by CAISO’s Department of Market Monitoring (“DMM”). ETRACOM asserted that disclosure of the requested records was critical to its ability to meaningfully respond to allegations made by the staff of FERC’s Office of Enforcement (“Enforcement staff”) as part of a then-pending investigation into ETRACOM’s trading activity during 2011 at New Melones, a location in CAISO’s markets. ETRACOM’s request enumerated eight specific subject matters for which it believes the Commission or its staff might possess relevant records.

FERC’s Office of External Affairs (“OEA”), in six response letters over a period of approximately seven months, asserted that 15,982 agency records were responsive but did not produce a single record in response to ETRACOM’s request. OEA invoked FOIA exemption 4 (privileged or confidential commercial or financial information), exemption 5 (deliberative process and attorney work-product privileges), exemption 7(A) (records or information compiled for law enforcement purposes), and exemption 7(E) (techniques and procedures for law enforcement investigations) with respect to some or all of the records. OEA improperly seeks to use FOIA as a shield from any disclosure of records to ETRACOM whatsoever, including of reasonably segregable information.

¹ 5 U.S.C. § 552 (2012); 18 C.F.R. § 388.10 (2016).

² A copy of ETRACOM’s FOIA request is attached.

FREEDOM OF INFORMATION ACT APPEAL – FY16-4

Enforcement staff's investigation of ETRACOM has now concluded; the Commission issued an Order Assessing Civil Penalties ("OAP") on June 17, 2016.³ Nevertheless, disclosure of the requested records remains critical to ETRACOM's ability to respond to the OAP as ETRACOM has elected for a *de novo* review by a federal district court.⁴

As explained below, ETRACOM believes that OEA withheld the responsive records in their entirety without adequate justification, providing ETRACOM scant information or means by which it can make a reasoned judgment about the legitimacy of those denials.

Applicable Standards

Presumption in Favor of Disclosure

FOIA operates in the context of a "general philosophy of full agency disclosure," subject only to the application of several exclusive and narrowly construed exemptions.⁵ The White House has directed FERC, along with other government agencies, to adopt a presumption in favor of disclosure when evaluating each FOIA request.⁶ After carefully reviewing the six response letters, we do not believe OEA has done so here.

In withholding records responsive to ETRACOM's FOIA request, FERC must provide ETRACOM sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA."⁷ OEA's response letters offer, at best, cursory justifications for the cited exemptions, such that ETRACOM does not have a reasonable basis to conclude that the withheld information is properly within the scope of each cited exemption.

³ *ETRACOM LLC and Michael Rosenberg*, 155 FERC ¶ 61,284 (2016).

⁴ Notice of Election of ETRACOM LLC and Michael Rosenberg, Docket No. IN16-2-000 (January 14, 2016). Enforcement staff has argued that a federal court should affirm the penalty assessment on the basis of a paper record alone, in which the subjects of investigations have had no discovery rights, and that there should be little or no discovery. *See, e.g., FERC v. Barclays Bank PLC*, et al., No. 2:13-cv-02093-TLN-EFB (E.D. Cal.); *FERC v. Richard Silkman*, et al., No. 1:16-cv-00205 (D. Maine); *cf. FERC v. Maxim Power Corp.*, et al., No. 3:15-cv-30113, Slip Op. at 29-30 (D. Mass. July 21, 2016) (ruling that the Federal Rules of Civil Procedure apply to *de novo* review and discovery will be available); *FERC v. City Power Marketing*, et al., No. 1:15-cv-01428, Slip Op. at 16-20 (D.D.C. August 10, 2016) (same).

⁵ *See Nat'l Ass'n. of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002).

⁶ Presidential Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 21, 2009) (emphasizing that the Freedom of Information Act reflects a "profound national commitment to ensuring an open Government") available at <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/presidential-foia.pdf>; accord Attorney General Holder's Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act (Mar. 19, 2009), available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>.

⁷ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979).

FREEDOM OF INFORMATION ACT APPEAL – FY16-4

Segregability

FOIA requires that in the event a requested record is withheld because portions of it are exempted from release, the remainder must still be released.⁸ The D.C. Circuit Court of Appeals has held that “non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions.”⁹

Here, OEA did not provide ETRACOM with a single record redacted in this manner, despite ETRACOM’s request that it do so. It is implausible that of the nearly 16,000 responsive records FERC reviewed, none contained non-exempt portions that were reasonably segregable by redacting non-factual information.

Index of Withheld Documents

Courts have long held that in responding to a FOIA request, an agency cannot rely on “boilerplate” privilege claims, or simply recite that the withholding of responsive records meets statutory standards without tailoring its explanation to each specific document along with a “contextual description” of how those standards apply to the specific facts of each document.¹⁰ The agency’s explanation should “describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information.”¹¹

On appeal of FOIA denials, courts have required agencies to meet their burdens of proving exemption by compiling and submitting a “*Vaughn* index” – a descriptive listing of withheld records or documents as the rationale for not disclosing each, under the rule from *Vaughn v. Rosen*.¹² An index must have the specificity and particularity required for a determination of whether the withheld documents are properly exempt from disclosure.¹³ Though typically not required until the reviewing court hears an agency’s motion for summary judgment of a FOIA appeal, the United States District Court for the District of Columbia has exercised its discretion to require agencies to produce *Vaughn* indices earlier to expedite the

⁸ 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”) *See, e.g., Williston Basin Interstate Pipeline Co. v. FERC*, 1989 WL 44655, 2 (D.D.C. 1989) (finding that the Commission had met its FOIA obligations by disclosing reasonably segregable factual materials).

⁹ *Mead Data Cent., Inc. v. United States Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). This standard is met by the agency “look[ing] to a combination of intelligibility and the extent of the burden in ‘editing’ or ‘segregating’ the nonexempt material.” *Yeager v. DEA*, 678 F.2d 315, 322 n.16 (D.C. Cir. 1978).

¹⁰ *King v. United States Dep’t of Justice*, 830 F.2d 210, 219-25 (D.C. Cir. 1987) (finding that the government’s “[c]ategorical description[s] of redacted material coupled with categorical indication of anticipated consequences of disclosure” was “clearly inadequate.”); *see also Wiener v. FBI*, 943 F.2d 972, 977-79 (9th Cir. 1991).

¹¹ *King*, 830 F.2d at 223-24.

¹² 484 F.2d 820, 827 (D.C. Cir. 1973) (requiring an itemized index which “must state the exemption claimed for each deletion or withheld document, and explain why the exemption is relevant.”)

¹³ *See, e.g., Morley v. CIA*, 508 F.3d 1108, 1127 (D.C. Cir. 2007) (criticizing “minimal information” provided in agency submissions as being inadequate for court to determine if privilege was claimed properly).

FREEDOM OF INFORMATION ACT APPEAL – FY16-4

process – as early as virtually simultaneous to when the agency completes processing of FOIA requests.¹⁴

Commission staff may have already prepared a *Vaughn* index of the records responsive to ETRACOM's request. In the interest of fairness and efficiency, FERC should provide ETRACOM with detailed justifications for its withholding of responsive records and a *Vaughn* index as soon as practicable, rather than wait for a district court to inevitably compel it to do so. Otherwise, ETRACOM is at a significant disadvantage in evaluating whether to appeal to federal district court (should FERC continue to withhold responsive records and deny this appeal) and tailoring the scope of such an appeal, because ETRACOM has precious little information on which to make a reasoned judgment about the legitimacy of those denials.

FOIA Exemption 4: Trade Secrets and Commercial Information

FOIA exemption 4 protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.”¹⁵ OEA invokes exemption 4 in five of its response letters to prevent disclosure of at least 1,153 records.¹⁶

The D.C. Circuit has defined “trade secret” in the context of FOIA very narrowly, as “a secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.”¹⁷ OEA does not allege that withheld information constituted trade secrets, but rather attempts to broadly apply exemption 4 to confidential commercial or financial information that “is the kind that would customarily not be released to the public by the person from whom it was obtained.”¹⁸

OEA invokes exemption 4 to entirely withhold responsive records which Commission staff received from CAISO, simply by stating that “CAISO does not customarily release such material to the public.” OEA applies exemption 4 both to surveillance records from CAISO and to other, non-surveillance related records, including CAISO's communications with Commission staff and data and analyses of ETRACOM's activities.¹⁹ OEA does not explain why exemption 4 applies to both surveillance and non-surveillance records. Further, the manner in which OEA

¹⁴ See, e.g. *Natural Resources Defense Council v. Dep't of Energy*, 191 F. Supp. 2d 41, 43-44 (D.D.C. 2002) (requiring agency to produce a *Vaughn* index within 15 days of completing FOIA review and response).

¹⁵ 5 U.S.C. § 552(b)(4) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Dec. 31, 2007).

¹⁶ In its Fifth Response Letter, OEA does not state how many additional documents are being withheld under exemption 4, and confusingly refers to withheld CAISO data and analyses as having been “provided to the Commission by the company being investigated [ETRACOM].” Fifth Response Letter at 3; see also Fourth Response Letter at 3. This statement may have been erroneous, because ETRACOM is not requesting records already in its possession.

¹⁷ *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

¹⁸ See, e.g., First FOIA Response at 3, citing *Nat'l Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 862 (D.C. Cir. 1974).

¹⁹ E.g. First Response Letter at 3.

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describes categories of responsive records purportedly falling under exemption 4 varied with each response letter, leaving ETRACOM unable to discern clearly the nature of those records or OEA's basis for withholding such records.

OEA's denial is premised on the unsubstantiated statement that CAISO originally submitted all responsive material to FERC voluntarily, because information submitted "voluntarily" to the government is categorically exempted provided it is not customarily disclosed to the public by the submitter.²⁰ It is important to recognize that CAISO is a public utility under the Federal Power Act and the Commission therefore has the power to compel CAISO to produce both surveillance and non-surveillance records. In its response letters, OEA does not address whether CAISO was compelled by Commission regulations, orders, or otherwise to provide the Commission with any of the responsive records.

When an agency obtains records by compulsory submission rather than voluntarily, it is not dispositive of a FOIA request whether those records would customarily be publicly disclosed. Rather, the agency may withhold the records only under the two-prong test established by the D.C. Circuit in *Nat'l Parks and Conservation Ass'n v. Morton* for whether information is "confidential" for the purposes of FOIA Exemption 4 – if its disclosure would be likely either: 1) "to impair the government's ability to obtain necessary information in the future" or 2) "to cause substantial harm to the competitive position" of the person from whom the information was obtained.²¹

For the first *Morton* prong, courts look to whether disclosure would cause the submitter to be less likely to release such information voluntarily in the future.²² The second prong – the "substantial competitive harm" test – requires the government to show more than just likelihood that a business might suffer some embarrassment or commercial loss if its records are disclosed.²³ Records that are held to "cause substantial harm" if disclosed include those including proprietary information that could be affirmatively used by competitors.²⁴

Here, OEA did not assert, much less substantiate, that either of the prongs of *Morton* justified withholding of the records which CAISO was compelled to provide to FERC. Even if OEA performed such an analysis, it likely would not satisfy *Morton* because it is improbable that release of the requested trading data and analyses would impair FERC's future ability to obtain necessary information or would harm the competitive positions of CAISO market participants.

ETRACOM requested data and analyses related to trading activity (primarily activities in daily virtual/convergence bidding markets and monthly Congestion Revenue Rights (CRR) auctions) that occurred in early-mid 2011, more than five years ago. Disclosure of such information cannot cause substantial harm to market participants or anyone else at this time. No market participants could use the requested transactional and commercial data for commercial

²⁰ See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 879 (D.C. Cir. 1992).

²¹ *Morton* at 770.

²² See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992).

²³ See *Worthington Compressors, Inc. v. Costle*, 662 F.2d 45 (D.C. Cir. 1981), *supplemental opinion sub nom.*, 668 F.2d 1371 (D.C. Cir. 1981).

²⁴ See *Public Citizen Health Research Group v. FDA*, 185 F.3d 898 (D.C. Cir. 1999).

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advantage because not only is it stale and outdated, but in August 2011 CAISO suspended the ability to engage in this particular market activity: convergence or virtual bidding at fully encumbered interties, of which New Melones was one. Further, CAISO suspended convergence bidding on all interties, regardless of their nature, on November 28, 2011,²⁵ and has not reinstated convergence bidding on interties.²⁶ OEA does not assert – nor could it – that CAISO or other ISO/RTOs are likely to cease submitting market data and design information to FERC if limited data from early-mid 2011 – about a type of strategy and trading activity no longer permitted – is disclosed to ETRACOM.

Further, although ETRACOM's FOIA Request Nos. 1, 4, 6, and 7 referenced DMM, OEA does not state whether any of the records withheld under exemption 4 were from DMM. This is surprising because the investigation began after a referral from DMM to FERC Enforcement. In fact, ETRACOM received from Enforcement staff during the investigation (not pursuant to FOIA): 1) a redacted referral to Enforcement from DMM dated July 29, 2011; 2) an unredacted referral (produced to ETRACOM in July 2014) to Enforcement from DMM dated July 29, 2011; and 3) a draft memo to Enforcement from DMM dated December 9, 2013. Thus, we assume that either the OEA response letters erroneously referred to "DMM" as "CAISO," or OEA failed to collect or analyze any records from DMM.

To the extent there are DMM-related records responsive to our FOIA request, it is possible that OEA would argue that any such records were submitted "voluntarily" to the government and thus categorically exempted because they are not customarily disclosed to the public by DMM. Any such argument would fail because DMM was compelled by the Commission's regulations to share investigative information with Commission staff, including many records which were the subject of ETRACOM's FOIA request.

First, FERC's regulations state that "[a] Market Monitoring Unit is to make a referral to the Commission in all instances where the Market Monitoring Unit has reason to believe market design flaws exist that it believes could effectively be remedied by rule or tariff changes."²⁷ ETRACOM's FOIA request specifically covered materials related to CAISO DMM's determination that CAISO's market design was flawed, and any subsequent referral to FERC.

Second, FERC's regulations state that a core function of a Market Monitoring Unit is to "identify and notify the Commission's Office of Enforcement staff of instances in which a market participant's or the Commission-approved independent system operator's or regional transmission organization's behavior may require investigation, including, but not limited to, suspected Market Violations."²⁸ ETRACOM's FOIA request specifically covered DMM referrals to FERC regarding ETRACOM's alleged potential violations as well as CAISO's violations of its own tariff. This would generally include the "documents from CAISO regarding ETRACOM's trading activity in May 2011," which OEA claims fall within Exemption 4.²⁹

²⁵ *Cal. Indep. Sys. Operator Corp.*, 137 FERC ¶ 61,157, at P 38 (2011).

²⁶ *See Cal. Indep. Sys. Operator Corp.*, 151 FERC ¶ 61,074 (2015).

²⁷ 18 C.F.R. § 35.28(g)(3)(v)(A).

²⁸ 18 C.F.R. § 35.28(g)(3)(ii)(C). *See also* 18 C.F.R. § 35.28(g)(3)(iv) (protocols on referrals to the Commission of suspected violations).

²⁹ *See, e.g.*, First Response at 3.

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Third, FERC's regulations state that after a Market Monitoring Unit refers a matter to FERC staff, the Commission or its staff may expressly direct a market monitor to "undertake any investigative steps regarding the referral."³⁰ ETRACOM's FOIA request specifically covered communications and correspondence relating to DMM's cooperation and assistance in Enforcement staff's investigation of ETRACOM, and the response letters are silent as to whether the DMM was directed by the Commission or staff to undertake any investigative steps regarding the referral.

Each of OEA's response letters cites a federal district court case where highly confidential market surveillance data and documents held by the New York Stock Exchange ("NYSE") were protected because they would reveal sensitive information, including the methods by which NYSE surveils or investigates anomalous trading.³¹ However, OEA does not assert – and it would be implausible – that all of the at least 1,153 records and documents withheld under exemption 4 would be analogous.

Without an index of withheld records or adequate descriptions of them, it is impossible for ETRACOM to determine whether all of the records OEA seeks to withhold under exemption 4 relate either to confidential surveillance and investigative techniques or would otherwise confer a commercial advantage on competitors if released. ETRACOM believes that at least some of the responsive records likely include routine analysis of ETRACOM's now-stale trading activities and CAISO's now-public market dysfunction, neither of which is properly protected by exemption 4.

ETRACOM requests that the General Counsel: 1) reverse the overly broad and unsubstantiated invocation of exemption 4 to withhold at least 1,153 records; 2) describe what records from DMM were collected and withheld, and the basis therefor; 3) identify the unspecified number of additional documents withheld pursuant to exemption 4 in the fifth response letter; and 4) clarify the reference in the fourth and fifth response letters to withheld CAISO data and analyses as having been provided to the Commission "by the company" being investigated.

FOIA Exemption 5

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."³² To qualify for exemption 5, an agency document must "fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it."³³ In its response letters, OEA stated that with the exception of the records withheld under Exemption 4, the material "is being withheld in full under FOIA Exemption 5."³⁴ Thus,

³⁰ 18 CFR § 35.28(g)(iv)(E); *see also* CAISO's Open Access Transmission Tariff ("OATT"), App'x. P § 11.5.

³¹ *See* First Response Letter at 3, *citing* *Gavin v. SEC*, 2007 WL 2454156 (D. Minn. 2007).

³² 5 U.S.C. § 552(b)(5) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Dec. 31, 2007).

³³ *Dep't of Interior v. Klamath Water Users Protective Assn.*, 532 U.S. 1 (2001).

³⁴ *See, e.g.*, First Response letter at 3.

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OEA invoked exemption 5 to withhold close to 15,000 records and documents – without quantifying exactly how many – citing both the deliberative process privilege and attorney work-product privilege.

Deliberative Process Privilege

Exemption 5 prevents disclosure of materials that would reveal agency deliberations, but only if the materials are both “predecisional” and “deliberative.”³⁵ The deliberative process privilege exists “to prevent injury to the quality of agency decisions.”³⁶ Materials should only be withheld where they are subjective and are “so candid or personal in nature that public disclosure is likely in the future to stifle honest and frank communication within the agency.”³⁷ Factual information generally may not fall within the deliberative process privilege, which is designed to exempt only the materials that embody officials’ deliberations to make recommendations or express opinions on legal or policy matters.³⁸

The law is clear that the deliberative process privilege is inapplicable to factual material that cannot “reasonably be said to reveal an agency’s or official’s mode of formulating or exercising policy-implicating judgment.”³⁹ Like other bases for FOIA exemptions, the deliberative process privilege is to be construed narrowly, and not every report or memorandum qualifies as deliberative, even when it reflects the author’s views on policy matters.⁴⁰ The particular role played by each document in the course of the deliberative process must also be established.⁴¹

ETRACOM’s request focused largely on factual materials: trading data, information on market functionality, and the compilation and analysis of facts (primarily by CAISO and DMM) related to ETRACOM’s trading activities. OEA did not segregate factual portions of any pre-decisional deliberative documents for which it claims exemption 5. It is not supportable for FERC to argue that disclosure of records specific to the investigation of ETRACOM would “stifle honest and frank communications within” FERC⁴² on future enforcement or market design matters and that all of this material properly falls within the deliberative process privilege.

³⁵ *Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978) (defining “predecisional” as “antecedent to the adoption of agency policy.”)

³⁶ *Petroleum Info Corp. v. Dept. of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992), quoting *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

³⁷ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

³⁸ *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975).

³⁹ *Petroleum Information Corp. v. Dept. of the Interior*, 976 F.2d 1429, 1437 (D.C. Cir. 1992).

⁴⁰ See *Hennessey v. U.S. Agency for Int’l Development*, No. 97-1133, 1997 WL 437998, *5 (4th Cir. Sept. 2, 1997) (finding that a withheld report did not bear on a policy-oriented judgment of the kind contemplated by Exemption 5, citing *Petroleum Info. Corp. v. Dept. of Interior*, 976 F.2d 1420, 1437 (D.C. Cir. 1992)).

⁴¹ See *Judicial Watch v. Reno*, 154 F.Supp.2d 17, 18 (D.D.C. 2001).

⁴² See *Coastal States*, 617 F.2d at 866.

Attorney Work-Product Privilege

Exemption 5 prevents disclosure of materials protected by the traditional privilege for documents and memoranda prepared by an attorney in anticipation of litigation, and does not apply until “some articulable claim, likely to lead to litigation” – including an administrative proceeding – has arisen.⁴³ In four of its six response letters, OEA asserts that “some” of the close to 15,000 records and documents being withheld included records prepared by attorneys in the Office of Enforcement including their impressions of the investigation of ETRACOM and their legal conclusions, without stating how many.

It is implausible that, with the exception of the at least 1,153 records withheld under Exemption 4, all of the materials ETRACOM requests constitute deliberative process materials and attorney work-product as claimed by FOIA staff. ETRACOM further finds it implausible that none of the close to 15,000 records withheld under exemption 5 contain reasonably segregable factual information. A *Vaughn* index is particularly critical to ETRACOM’s ability to evaluate the applicability of privileges claimed under FOIA exemption 5.

FOIA Exemption 7(A): Interference with Law Enforcement Proceedings

Exemption 7(A) authorizes the withholding of “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings.”⁴⁴ OEA invokes exemption 7(A) in four of its response letters to prevent disclosure of at least 14,920 records.

For Exemption 7(A) to apply, FERC must show that: (1) law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm.⁴⁵ When an agency concludes that disclosure would interfere with an ongoing law enforcement proceeding, it must articulate that harm as to each category or type of responsive records or documents by providing a functional description of each the types of records or documents, sufficient to indicate the type of interference threatening the law enforcement proceeding.⁴⁶

The Supreme Court has held that exemption 7(A) does not “endlessly protect material simply because it [is] in an investigatory file,” but rather may only be invoked so long as the law enforcement proceeding involved remains pending or prospective.⁴⁷ Courts have found very limited circumstances where exemption 7(A) may continue to apply after an enforcement

⁴³ *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 865 (D.C. Cir. 1980).

⁴⁴ 5 U.S.C. § 552(b)(7)(A) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110 175, 121 Stat. 2524 (December 31, 2007).

⁴⁵ See, e.g., *Juarez v. DOJ*, 518 F.3d 54, 58-59 (D.C. Cir. 2008).

⁴⁶ *DOJ v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 776-80 (1989); *Crooker v. ATF*, 789 F.2d 64, 67 (D.C. Cir. 1986) (“The hallmark of an acceptable *Robbins* category is thus that it is functional; it allows the court to trace a rational link between the nature of the document and the alleged likely interference.”)

⁴⁷ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978).

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proceeding is closed – where the requested information will be used again in a related pending or prospective law enforcement proceeding.⁴⁸

In its response letters, OEA failed to adequately describe the functional categories of responsive records and articulate why release of each would interfere with FERC's then-existing enforcement proceeding against ETRACOM. Therefore, OEA's invocation of exemption 7(A) was not properly supported.

In any event, FERC's investigation of ETRACOM and its enforcement proceeding at the agency against ETRACOM have now fully concluded. Although ETRACOM has elected for a federal district court to review *de novo* FERC's OAP, that litigation will not be a law enforcement proceeding to which exemption 7(A) applies and therefore is not a related prospective action allowing FERC to continue to invoke exemption 7(A). Thus, the General Counsel should determine that exemption 7(A) no longer applies.

FOIA Exemption 7(E): Investigative Techniques and Procedures

Exemption 7(E) authorizes the withholding of records and documents 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.”⁴⁹ In five of its response letters, OEA invokes exemption 7(E) for “some” or “a number of” the documents it reviewed, without stating how many.⁵⁰

The purpose of exemption 7(E) is to prevent disclosure that would reduce or nullify the future effectiveness of certain law enforcement procedures.⁵¹ Here, Request Nos. 1, 6, and 7 of ETRACOM's FOIA request focused on records related to the analysis of trading data and other facts specific to ETRACOM. Because the Commission has reiterated that each investigation into potential market manipulation is a unique case-by-case inquiry depending on all the relevant facts and circumstances, there is no support for an argument that disclosing analysis of ETRACOM's trades would reduce or nullify the effectiveness of future investigations. Yet OEA entirely withholds even responsive records factually unique to ETRACOM.

⁴⁸ Related law enforcement actions in the context of exemption 7(A) typically include where additional criminal defendants are being prosecuted or investigated based on the same or substantially similar facts to those being requested. *See, e.g., Martino v. FBI*, 577 F. Supp. 2d 178, 182 (D.D.C. 2008) (explaining that case remains open and pending because a co-defendant is “scheduled to be retried” and “other unindicted co-conspirators” remain at large).

⁴⁹ 5 U.S.C. § 552(b)(7)(E) (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524 (Dec. 31, 2007).

⁵⁰ *See*, First Response Letter at 5; Second Response Letter at 4; Third Response Letter at 5; Fourth Response Letter at 4; Fifth Response Letter at 5. ETRACOM requests that the General Counsel identify the number of records withheld pursuant to exemption 7(E).

⁵¹ *See, e.g., Shores v. FBI*, 185 F. Supp. 2d 77, 85 (D.D.C. 2002) (determining that FBI properly withheld polygraph information to preserve effectiveness of polygraph examinations in future investigations).

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Courts have consistently found that to prove a risk of circumvention of the law under 7(E), agencies must show that the law enforcement technique or procedure at issue must not already be well known to the public.⁵² ETRACOM requested records related to CAISO DMM's referral of potential violations to FERC Enforcement staff, and subsequent follow-up analysis by DMM and Enforcement staff that presumably resulted from routine investigative procedures which the Commission has made public in its regulations, numerous policy statements,⁵³ or orders related to prior enforcement actions. It is implausible that every single responsive record for which OEA invoked exception 7(E) would, if disclosed, reveal some aspect of the Commission's enforcement process not already made public.

Notably, OEA cites a case from the federal district court for the District of Columbia allowing FERC to prevent release of an audit report that would constitute "the functional equivalent of a manual of investigative techniques," but OEA does not assert that the records ETRACOM requested would be functionally equivalent to a manual of investigative techniques.⁵⁴

Conclusion

To meet its obligations under FOIA, FERC must provide requested records unless it can overcome the strong presumption in favor of disclosure by invoking one of several narrowly-tailored exemptions. Here, OEA has invoked a series of exemptions to wholly prevent disclosure to ETRACOM of nearly 16,000 responsive records.

The Commission issued its OAP in June 2016 and ETRACOM has elected a *de novo* review by a federal district court. The requested records are critical to ETRACOM's ability to defend itself in federal district court after the Commission commences an action to enforce the OAP. To promote the interests of fairness, transparency, and due process, the General Counsel should reverse OEA's denials.

OEA's responses to ETRACOM's FOIA request are insufficient to justify complete denial of the requested records under the well-established law applicable to each of the FOIA exemptions. ETRACOM therefore asks the General Counsel to grant its appeal and produce promptly records responsive to ETRACOM's FOIA Request FY16-4, which OEA has withheld under FOIA exemptions 4, 5, 7(A), and 7(E). Further, ETRACOM requests that the General Counsel provide promptly an index of withheld records and provide the clarifications requested above so ETRACOM can make a reasoned judgement about the legitimacy of any records which continue to be withheld.

⁵² See, e.g., *Goldstein v. Office of Indep. Counsel*, No. 87-2028, 1999 WL 570862, at *14 (D.D.C. July 29, 1999) (holding that portions of documents were improperly withheld under 7(E) because they did not contain "a secret or an exceptional investigative technique.")

⁵³ See, e.g., Revised Policy Statement on Enforcement, 123 FERC ¶ 61,156 (2008).

⁵⁴ Fifth Response Letter at 5, citing *Williston Basin Interstate Pipeline Co. v. FERC*, 1989 WL 44655, at *2 (D.D.C. 1989).

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Very truly yours,

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Mr. Max Minzner
General Counsel
Federal Energy Regulatory Commission
888 First Street, NE, Washington, DC 20426

December 14, 2015

Re: Freedom of Information Act Appeal, FOIA no. FY16-10

Dear Mr. Minzner:

On December 11, 2015, your agency denied my FOIA request for to the Emergency Action Plan for the Yadkin Project dams and related documents. I write today to appeal that decision.

In its letter, FERC outlines two exemptions—FOIA Exemption 7 and FOIA Exemption 6—as the basis on which my request was denied. However, I believe FOIA Exemption 7 does not apply to the information I am seeking and would contend that the Commission has misapplied FOIA Exemption 6. I discuss these two points below.

FOIA Exemption 7

In its letter, FERC cites FOIA Exemption 7(F) as the leading basis for denying access to the documents I have requested. Exemption 7(F) allows federal agencies to withhold “records or information compiled for law enforcement purposes.” In withholding the documents I seek under Exemption 7(F), FERC cited the opinion handed down in *Public Employees for Environmental Responsibility v. U.S. International Boundary & Water Commission*. In its opinion, the Court ruled that emergency action plans could be withheld under Exemption 7(E) and inundation maps could be withheld under Exemption 7(F). In its denial of my request, FERC misapplied the Court’s ruling.

My request was for a copy of “the emergency action plan (EAP) compiled by Alcoa Power Generating Inc (AGPI) for its dams on the Yadkin River in North Carolina (Yadkin Project.” My request is specifically for the emergency action plan and *not* inundation maps. Accordingly, FERC is incorrect to withhold the documents I seek under Exemption 7(F).

But, assuming for arguendo, that FERC cited the proper exemption in denying my request, the decision to withhold all documents responsive to my request is improper because not all parts of an emergency action plan should be classified as Critical Energy Infrastructure Information (CEII), defined at 18 CFR 388.113(c)(1).

Under the law, there are four elements that must be met in order for information to be classified as CEII:

- (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, 5 U.S.C. 552; and
- (iv) Does not simply give the general location of the critical infrastructure.



While parts of an emergency action plan may meet the requirements set forth in the statute, I do not believe the entirety of an EAP does. Specifically, I am seeking access to parts of Alcoa's EAP that discusses what residents should do in the event of a dam failure. While one could argue that the information I seek could be useful to a person in planning an attack on critical infrastructure, that argument is akin to saying all maps showing the roads surrounding a dam and in an inundation zone should also be protected because a potential attacker would want to know possible routes of escape. More simply put, knowing what the effect of an attack on a dam would not assist a would-be culprit in planning the attack and does not appear to meet the 'useful' requirement set forth in the applicable statute.

Moreover, FERC itself recognizes that some parts of an EAP are more sensitive than others. In its guidance on preparing emergency action plans, FERC addresses "document control and protection of critical information" (Chapter 6-3.1.5). The advice in Chapter 6 advises agencies to prepare various versions of an EAP—one containing sensitive information to be shared on a limited, need-only basis and other versions that omit sensitive information to be shared with a wider group of stakeholders.

In its denial letter, FERC also cites the non-disclosure process by which one may request a copy of CEII material. However, that process excludes individuals such as journalists, who may be seeking the information to warn the public. Such an exclusion would be a violation of the First Amendment right to freedom of the press. Additionally, the requirement also restricts residents who hold licenses that would require them to disclose such information if they had knowledge of the facts, such as real estate agents. Does the requirement to protect the entirety of a document meant to assist the public in responding to a catastrophic event outweigh the need to warn the very public that such a document is intended to warn and protect?

FOIA Exemption 6

I have no problem with personal contact information of emergency responders being withheld and request the EAP be provided with that information redacted.

In conclusion, I request access to an appropriately redacted copy of the EAP in order to share potentially life-saving information with those who have a need to know the safety procedures. Additionally, I request that FERC make available a redacted copy of the emergency action plan developed by Alcoa for its Yadkin Project (P-2197) without requiring the signing of a non disclosure agreement.

Thank you for considering my request.

Sincerely,

Nick Ochsner | Investigative Reporter

nochsner@wbtv.com

W: 704.374.3941 | C: 704.641.7538

cc: Charles A. Beamon, Associate General Counsel, General and Administrative Law, FERC

Federal Energy Regulatory Commission
Washington, D.C. 20426

DEC 11 2015

Re: FOIA No. FY16-10
Response Letter

VIA E-MAIL AND REGULAR MAIL

Mr. Nick Ochsner
WBTV News
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nochsner@wbtv.com

Dear Mr. Ochsner:

This is a response to your correspondence received on October 28, 2015 in which you requested information pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2015). Specifically, you requested a copy of "the emergency action plan (EAP) compiled by Alcoa Power Generating Inc (AGPI) for its dams on the Yadkin River in North Carolina (Yadkin Project)."

A search of the Commission's files identified thirty-six documents that may be responsive to your request. A list of the documents, as identified from a search of the Commission's eLibrary database, is enclosed for your reference. All of the documents were submitted to the Commission by Alcoa Power Generating, Inc. (Alcoa) with a request to be treated as Critical Energy Infrastructure Information (CEII).

In response to notice provided in accordance with 18 C.F.R. § 388.112(d), Alcoa objected to the public release of the documents because they contain CEII, the release of which could compromise public safety. As explained below, the documents are protected from disclosure pursuant to FOIA Exemptions 6 and 7 and will not be released.¹

FOIA Exemption 7

Here, the requested documents are considered Critical Energy Infrastructure Information (CEII), as defined in 18 C.F.R. § 388.113(c),² and are exempt from

¹ See 5 U.S.C. § 552(b)(6), (7)(F)

² 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

mandatory 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).

Specifically, the documents consist of the Emergency Action Plan (EAP) and subsequent updates to the EAP. The documents describe the procedures and process used in the event of an emergency like a dam failure for the Yadkin Project. The documents also include detailed maps and designs about the project. Public release of the requested documents through FOIA could allow that information to be used in an attack or to subvert the emergency response process, thereby endangering lives and safety of citizens in the vicinity of the project. Accordingly, the requested material is being withheld under FOIA Exemption 7(F). See *Public Employees for Environmental Responsibility v. U.S. International Boundary & Water Commission*, 740 F.3d 195 (D.C. Cir. 2014) (concluding that the emergency action plans and the inundation maps were properly withheld because "the release of the records could lead to the harms listed in Exemptions 7(E) and 7(F).")

You may seek access to the CEII material by completing a CEII request form online at: <http://www.ferc.gov/legal/ceii-foia/ceii/eceii.asp>. The CEII process was designed to make information available to members of the public, 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). Under the CEII process, a person that demonstrates a legitimate need may be able to obtain CEII subject to a non-disclosure agreement.³

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 and (2) critical infrastructure means existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters."

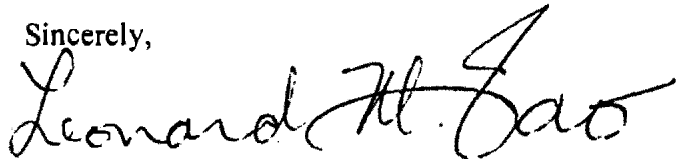
³ Additionally, there is a considerable public record available in FERC Docket No. P-2197 that may be helpful to you. That docket, which includes filings spanning over two decades, currently contains over 4,000 publicly available documents.

FOIA Exemption 6

In addition, aspects of the documents contain information protected from release pursuant to FOIA Exemption 6. Under FOIA Exemption 6, an agency should not disclose "personnel . . . and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." 5 U.S.C. § 552(b)(6). In this case, the documents provide the personal contact information of emergency response personnel. Those parts of the documents are being withheld under FOIA Exemption 6. *See e.g., Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100 (D.D.C. 2005); *see also Cofield v. City of LaGrange, GA*, 913 F. Supp. 608, 616 (D.D.C. 1996).

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 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.

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

**PARR BROWN
GEE & LOVELESS**

ATTORNEYS AT LAW

JONATHAN R. SCHOFIELD
Attorney at Law
jschofield@parrbrown.com

February 18, 2016

VIA EMAIL AND REGULAR MAIL

Max Minzner, General Counsel
FEDERAL ENERGY REGULATORY COMMISSION
888 First Street, NE
Washington, D.C. 20426
foia-ceii@ferc.gov

Re: Freedom of Information Act Appeal

Dear Mr. Minzner:

Pursuant to the Freedom of Information Act, this letter represents a formal appeal of FERC's denial of our FOIA request. Enclosed for your reference is a copy of our December 4, 2015 FOIA Request ("Request"), as well as FERC's January 5, 2016 Response Letter ("Response").

While the precise reasons for FERC's denial of the Request is unclear from the Response, other than what may be interpreted as a *Glomar* response, it does not appear that the documents sought in the Request, including communications between PacifiCorp and FERC should be entirely withheld. Notwithstanding FERC neither denying nor confirming the existence of the documents sought, we are aware that FERC conducted an investigation into PacifiCorp's potential role in causing the Wood Hollow Fire. PacifiCorp has produced a number of documents to us in the course of litigation, including its responses (though partially redacted) to certain data requests propounded by FERC Enforcement Staff on August 27, 2013. Given that the events subject to FERC's investigation occurred on or before June 23, 2012, and FERC's investigation took place several years ago, and has likely concluded, there appears to be no reason for information related to an investigation that is no longer ongoing to remain nonpublic.

We believe that the relevant statutes and regulations weigh in favor of producing the requested documents, including any conclusions that were reached from FERC's investigation. Accordingly, we respectfully request that FERC reconsider the position taken in its Response and provide the documents pursuant to the Request. Please feel free to contact me if you wish to discuss this matter further.

Sincerely,



Jonathan R. Schofield

Enclosures

cc: Charles A. Beamon
Associate General Counsel

4842-5818-0654



Kathy Spencer

From: Jon Schofield
Sent: Friday, December 04, 2015 11:16 AM
To: foia-ceii@ferc.gov
Cc: Robert Jackson; Brett Parkinson; mmr@scmlaw.com
Subject: Freedom of Information Act Request - FERC

We represent many of the victims of the 2012 Wood Hollow Fire in litigation currently pending in Utah State and Federal District Courts adverse to PacifiCorp dba Rocky Mountain Power ("PacifiCorp"). As alleged in our Complaints, the Wood Hollow Fire ignited in Central Utah on June 23, 2012 as a result of electrical arcing that occurred between RMP's 345 kV transmission lines and an adjacent 138 kV line support structure, which due to inadequate clearance were being operated in violation of the National Electric Safety Code and other applicable safety standards ("Wood Hollow Fire").

Pursuant to the Freedom of Information Act, please produce any and all documents in FERC's possession or control concerning or related to the following:

1. The cause and origin of the Wood Hollow Fire;
2. The condition of PacifiCorp's electrical facilities (at or near the intersection of PacifiCorp's 345 kV Mona/Huntington Line and its 138 kV Nebo/Jerusalem Line), including line clearance, electrical loading, and/or arcing/faulting that may have occurred at the time of the Wood Hollow Fire;
3. FERC's or WECC's investigation into whether PacifiCorp's electrical facilities and/or actions may have contributed to the cause of the Wood Hollow Fire;
4. Any violation or noncompliance issue that occurred in the last ten years concerning or related to the operation, maintenance, compliance, or safety of PacifiCorp's electrical-transmission lines or equipment (at or near the intersection of PacifiCorp's 345 kV Mona/Huntington Line and its 138 kV Nebo/Jerusalem Line);
5. Any communications between FERC, WECC, PacifiCorp, or any other parties concerning the above-stated topics.

If the records can be delivered via email, please forward them to me. I hereby authorize any reasonable processing or copying fees up to \$100. If processing or copying fees will exceed this amount, or if you have any questions or need any additional information, please contact me directly.

Thank you for your attention to this request.

Jonathan R. Schofield | Attorney | **Parr Brown Gee & Loveless** | A Professional Corporation
101 South 200 East, Suite 700 | Salt Lake City, Utah 84111
D: 801.257.7955 | T: 801.532.7840 | F: 801.532.7750 | jschofield@parrbrown.com | www.parrbrown.com

Information in this message (including any attachments) is confidential, may be legally privileged, and is intended solely for the use of the person(s) identified above. The sender did not intend to waive any privilege by sending this message. If you are not the intended recipient of this message, please notify the sender by replying to this message and delete the original and any copies of the message. Any duplication, dissemination or distribution of this message by unintended recipients is prohibited.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426
January 5, 2016

Re: FOIA No. FY16-19
Response Letter

VIA EMAIL AND REGULAR 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:

On December 4, 2015, you 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 (Commission or FERC) FOIA regulations, 18 C.F.R. § 388.108 (2015). Specifically, you requested documents concerning or related to:

- (1) The cause and origin of the Wood Hollow Fire;
- (2) The condition of PacifiCorp's electrical facilities (at or near the intersection of PacifiCorp's 345 kV Mona/Huntington Line and its 138 kV Nebo/Jerusalem Line), including line clearance, electrical loading, and/or arcing/faulting that may have occurred at the time of the Wood Hollow Fire;
- (3) FERC's or WECC's investigation into whether PacifiCorp's electrical facilities and/or actions may have contributed to the cause of the Wood Hollow Fire;
- (4) Any violation or noncompliance issue that occurred in the last ten years concerning or related to operation, maintenance, compliance, or safety of PacifiCorp's electrical-transmission lines or equipment (at or near the intersection of PacifiCorp's 345 kV Mona/Huntington Line and its 138 kV Nebo/Jerusalem Line);
- (5) Any communications between FERC, WECC, PacifiCorp, or any other parties concerning the above-stated topics.

The Commission neither confirms nor denies the existence of the documents you seek. See *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976). Your request is therefore denied.

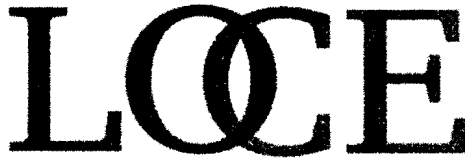
As provided by the Freedom of Information Act and 18 C.F.R. § 388.110(a)(1) of the Commission's regulations, any appeal from this determination must be filed within 45 days of the date of this letter. This appeal must be in writing, addressed to Max Minzner, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 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.

Sincerely,

A handwritten signature in black ink, appearing to read 'L. Tao', with a stylized flourish extending to the right.

Leonard M. Tao
Director
Office of External Affairs

LAW OFFICES OF CAROLYN ELEFANT PLLC



First Impression | Last Resort

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alexander.english@lawofficesofcarolynelefant.com

VIA CERTIFIED MAIL

Mr. Max Minzner
General Counsel
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

March 7, 2016

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

Mr. Minzner -

The above-referenced Freedom of Information Act ("FOIA") request, Request No. FY16-26 (the "Request"), in general, asked the Federal Energy Regulatory Commission (the "Commission") for records associated with the Commission's Dispute Resolution Division ("DRD").¹ Specifically, the Request sought records pertaining to the DRD's operational procedures and its involvement with landowner/pipeline disputes. As the primary purpose of FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society ... and to hold the governors accountable to the governed,"² it is inappropriate that the Commission would withhold records addressing the working law of the Commission from the public, as the Commission did in this case. Please consider this letter to be an administrative appeal (1) of the

¹ See Exhibit 1, the Request.

² *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

Commission's decision to withhold records, in whole or in part, in its February 3, 2016, response to the above-referenced FOIA request; (2) of the Commission's decision to withhold records under Exemption 3 of the FOIA;³ and (3) of the Commission's decision to withhold records under Exemption 5 of the FOIA⁴ by claiming of the deliberative process privilege. The primary objections of the Law Offices of Carolyn Elefant ("LOCE") to the Commission's decision to improperly withhold records are set forth in greater detail below.

Background

On January 8, 2016, LOCE submitted the Request pursuant to the FOIA, 5 U.S.C. § 552, as implemented by the Commission at 18 C.F.R. § 388.108, in order to uncover information regarding the alternative dispute resolution programs that the Commission has established by regulation.⁵ The Request sought, *inter alia*, aggregate data for the past five (5) years' worth of pipeline-related cases in which the DRD was involved; the names and dispositions of the cases which DRD had referred for enforcement actions; and information regarding the DRD's operational procedures.

By letter dated February 3, 2016 (the "Denial"), the Commission "identified 911 non-public records that may be responsive to" the Request.⁶ Of these records, 910 were withheld pursuant to Exemption 3 of the FOIA, 5 U.S.C. § 552(b)(3), as being statutorily exempt from disclosure. The Commission withheld the final document, which it characterized as "DRD's draft standard

³ 5 U.S.C. § 552(b)(3)

⁴ 5 U.S.C. § 552(b)(5)

⁵ See 18 C.F.R. §§ 385.601-385.606.

⁶ Ex. 2, Denial, at 2.

operating procedure,” (“Draft SOP”) under the deliberative process privilege encompassed by Exemption 5, 5 U.S.C. § 552(b)(5).

1. The Commission improperly classified records withheld as being statutorily exempt from disclosure under Exemption 3, 5 U.S.C. § 552(b)(3)

In the Denial, the Commission claimed that all 910 documents identified as being (a) potentially responsive and (b) dealing with DRD’s cases were exempt from disclosure. In support, the Denial cited 5 U.S.C. § 574(j), implemented by the Commission at 18 C.F.R. §§ 385.604 and 385.606. However, 5 U.S.C. § 574(f) provides that “[n]othing in this section shall prevent the discovery or admissibility of any evidence that is otherwise discoverable, merely because the evidence was presented in the course of a dispute resolution proceeding.” The Commission’s regulation implementing rules for confidentiality in dispute resolution proceedings, 18 C.F.R. § 385.606, is largely identical to the statute. Specifically, Section 385.606(f) is almost word-for-word identical to 5 U.S.C. § 574(f).⁷

In addition, 5 U.S.C. § 574(j) and its regulatory equivalent, 18 C.F.R. § 385.606(l), only exempt “dispute resolution communications” from disclosure under 5 U.S.C. § 552(b)(3). The Commission has defined the term “dispute resolution communications” by regulation, at 18 C.F.R. § 385.604(b)(3). Specifically, the Commission has decided that the phrase “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, parties or non-party participant.” However, the phrase “dispute resolution communication” expressly does *not* include any “written agreement to enter into a dispute resolution proceeding, or a final

⁷ The only difference is that the phrase “in this section” from the statute is replaced by “in Rule 606” in the regulation. Compare 5 U.S.C. § 574(f) with 18 C.F.R. § 385.606(f).

written agreement or arbitral award reached as a result of a dispute resolution proceeding.”⁸

Exemption 3 of the FOIA provides that the statute’s disclosure requirements “do not apply to matters that are ‘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.’”⁹ LOCE does not dispute that 5 U.S.C. § 574 is a “withholding statute” for purposes of FOIA.¹⁰ However, under the plain words of the statute and its own implementing regulations, at least some of the records which the Commission seeks to withhold pursuant to Exemption 3 have been specifically excluded from the category of documents which might otherwise be exempt from disclosure. Accordingly, its decision to withhold any such records was improper, and such records must be released.

2. The Commission improperly claimed the deliberative process privilege under Exemption 5, 5 U.S.C. § 552(b)(5), in order to withhold the DRD’s “draft standard operating procedure” in full.

As a preliminary matter, the deliberative process exemption of FOIA contained within Exemption 5 allows agencies to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a

⁸ *Id.* In addition, the Commission has defined the term “dispute resolution proceeding” as “any alternative means of dispute resolution that is used to resolve an issue in controversy in which a neutral may be appointed and specified parties participate.” 18 C.F.R. § 385.604(b)(4).

⁹ *Public Citizen, Inc. v. Rubber Manufacturers Ass’n*, 533 F.3d 810 (D.C. Cir., 2008) (quoting 5 U.S.C. § 552(b)(3)) (alterations in original).

¹⁰ See, e.g., *Reporters Comm. for Freedom of the Press v. United States Dep’t of Justice*, 816 F.2d 730, 734 (D.C.Cir.1987), *rev’d on other grounds*, 489 U.S. 749 (1989) (“Records sought to be withheld under authority of another statute thus escape the release requirements of FOIA if--and only if--that statute meets the requirements of Exemption 3, including the threshold requirement that it specifically exempt matters from disclosure.”).

party other than an agency in litigation with the agency.”¹¹ To qualify for the (b)(5) exemption, a document must “satisfy two conditions: its source must be a Government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds it.”¹² LOCE does not dispute that the source of the withheld documents is a Government agency. However, it vigorously disputes the Commission’s claim that the withheld records are “documents which a private party could not discover in litigation with the agency.”¹³ The Commission’s position that these documents are deliberative is contrary to well-established administrative and evidentiary law.

There are two longstanding exceptions “to the non-disclosability under FOIA of intra-agency deliberative memoranda [. . .] for (1) those parts of such memoranda that are purely factual in nature and (2) memoranda adopted by the agency as the basis of its decision.”¹⁴ Moreover, even if a document was pre-decisional or otherwise privileged at the time it was prepared, “it can lose that status if it is adopted, formally or informally, as the agency position on an issue *or is used by the agency in its dealings with the public.*”¹⁵

¹¹ 5 U.S.C. § 552(b)(5)

¹² *DOI v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 8 (2001)

¹³ *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 148 (1975) (citing *EPA v. Mink*, 410 U.S. 73, 85-86 (1973))

¹⁴ *National Courier Asso. v. Board of Governors of Federal Reserve System*, 516 F.2d 1229, 1242 (D.C. Cir. 1975) (citations omitted)

¹⁵ *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (emphasis supplied); accord *County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 75 (D.D.C. 2008) (“an otherwise protected document loses protection if ‘the agency used the document in its dealing with the public’”)

In addition, the D.C. Circuit has repeatedly affirmed that “an agency is not permitted to develop ‘a body of secret law,’ used by it in the discharge of its regulatory duties and in its dealings with the public, but hidden behind a veil of privilege because it is not designated as ‘formal,’ ‘binding,’ or ‘final.’”¹⁶ That is; “[d]ocuments qualify as predecisional and deliberative only if they ‘reflect [] advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are formulated, [or] the personal opinions of the writer prior to the agency’s adoption of a policy.’”¹⁷ Conversely, “[a]n agency action is deemed final if it ‘marks the ‘consummation’ of the agency’s decision making process’ and determines ‘rights or obligations.’”¹⁸ Furthermore, “[t]he mere possibility that an agency might reconsider [...] does not suffice to make an otherwise final agency action nonfinal.”¹⁹

Here, as noted by the Commission’s Denial, the Request sought “records regarding the DRD’s operational procedures.” The Denial admits that there is a document, characterized as DRD’s “draft standard operating procedure.”²⁰ The

¹⁶ *Elec. Frontier Found. v. United States DOJ*, 739 F.3d 1, 7 (D.C. Cir. 2014) (quoting *Schlefer v. United States*, 702 F.2d 233, 244 (D.C. Cir. 1983)) (some internal punctuation omitted); see also *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d at 866.

¹⁷ *Public Citizen, Inc. v. OMB*, 569 F.3d 434, 443 (D.C. Cir. 2009) (quoting *Taxation With Representation Fund v. IRS*, 646 F.2d 666, 677 (D.C. Cir. 1981)) (alterations in original).

¹⁸ *AT&T v. EEOC*, 270 F.3d 973, 975 (D.C. Cir. 2001) (quoting *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

¹⁹ *Sackett v. EPA*, 132 S. Ct. 1367, 1372 (2012); accord *Nat’l Envtl. Dev. Ass’n’s Clean Air Project v. EPA*, 752 F.3d 999, 1006 (D.C. Cir. 2014) (“An agency action may be final even if the agency’s position is ‘subject to change’ in the future.”); *GE v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) (“If the possibility (indeed, the probability) of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule ... would ever be final as a matter of law.”).

²⁰ Denial, at 2.

D.C. Circuit has expressed marked skepticism that there could exist a situation where “information which is in effect substantive law ... could not be segregated from other material and isolated in a form which could be disclosed.”²¹ Similarly, “[a] document that does nothing more than explain an existing policy cannot be considered deliberative.”²²

DRD’s express purpose is engaging with members of the public in order to avert litigation, if possible.²³ The Commission therefore strains credibility when it effectively asserts that DRD’s Draft SOP has never been used, referenced, relied upon, or otherwise influenced DRD’s casework or other interactions with the public. If DRD has used, referenced, or otherwise relied on its Draft SOP in dealing with any member of the public, or in determining the rights and responsibilities thereof, then the Draft SOP necessarily constitutes the “working law” of the agency. Thus, the Commission is apparently attempting to maintain a body of “secret law,” notwithstanding that such records have been used by the agency in its dealings with the public.²⁴

²¹ *Cuneo v. Schlesinger*, 484 F.2d 1086, 1092 (D.C. Cir. 1973).

²² *Public Citizen, Inc. v. OMB*, 569 F.3d at 444.

²³ See <http://www.ferc.gov/about/offices/oaljdr/drd.asp> (stating that DRD has two purposes:

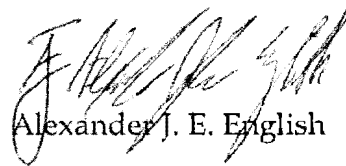
- “1. To provide services such as mediation and facilitation in disputes involving entities subject to the Commission’s jurisdiction including environmental disputes. All communications with DRD representatives are privileged and confidential, unless otherwise agreed. DRD staff is not involved in the Commission’s decisional processes, does not advocate positions, or conduct investigations. Its goal is to resolve issues in a manner that is satisfactory to all parties to a dispute.
2. To promote the use of alternative dispute resolution (ADR) both within and outside of the Commission through activities such as consultation, workshops, collaboration, training, and coaching.”)

²⁴ *Coastal States*, 617 F.2d at 866.

Conclusion

As stated earlier, the purpose of FOIA is to promote disclosure of an agency's records in order to allow the public to decipher the agency's rationale behind agency decisions and to understand "what their government is up to."²⁵ Moreover, "[e]xemption 5 is to be construed 'as narrowly as consistent with efficient Government operation.'"²⁶ The same holds true for all of FOIA's enumerated exemptions.²⁷ If a statute exempts a certain category of records from disclosure, such exemption plainly does not and cannot apply to records expressly excluded from that category. Likewise, even assuming for the sake of argument that the Draft SOP was properly within the scope of § 552(b)(5) when it was created, it lost such status insofar as it was used in dealing with the public, or otherwise adopted as the working law of the agency. Thus, it was inappropriate for the Commission to withhold such documents, in whole or in part, from the public. Please contact the undersigned if you have any questions regarding the claims or assertions made in this appeal.

Respectfully submitted,



Alexander J. E. English

²⁵ *Am. Civil Liberties Union v. United States Dep't of Justice*, 655 F.3d 1, 12 (D.C. Cir., 2011) (records which "would shed light on government conduct... fall[] within FOIA's scope because it advances 'the citizens' right to be informed about what their government is up to.'" (quoting *Reporters Committee v. DOJ*, 489 U.S. at 773)).

²⁶ *Petroleum Info. Corp. v. United States Dep't of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992) (quoting *EPA v. Mink*, 410 U.S. 73, 87 (1973)).

²⁷ *Public Citizen, Inc. v. Rubber Manufacturers Ass'n*, 533 F.3d at 813 ("FOIA's exemptions are to be narrowly construed."). See also *National Ass'n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002) ("Although Congress enumerated nine exemptions from the disclosure requirement, 'these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act.'" (quoting *Department of the Air Force v. Rose*, 425 U.S. 352, 361 (1976))).

Enclosures:

Exhibits 1-2

CC:

Charles Beamon

Associate General Counsel, General and Administrative Law

LAW OFFICES OF CAROLYN ELEFANT PLLC



First Impression | Last Resort

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7315 Wisconsin Avenue, Suite 400, Washington D.C. 20814
LawOfficesofCarolynElefant.com | licensed in MD, DC, NY
alexander.english@lawofficesofcarolynelefant.com

January 8, 2016

Via Email

Mr. Leonard Tao
Director, Chief FOIA Officer
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

**Re: Freedom of Information Act Request for Records Relating to the
Federal Energy Regulatory Commission's Dispute Resolution Division**

Mr. Tao -

This is a request for a public records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as implemented by the United States Federal Regulatory Commission ("FERC" or "Commission") at 18 C.F.R. Part 388. For purposes of this request, the definition of "records" includes, but is not limited to, documents, letters, memoranda, notes, reports, e-mail messages (whether from official or personal accounts), policy statements, data, technical evaluations or analysis, and studies, whether in physical or electronic format. The definition of "records" is specifically limited to such documents, *et al.*, which are already in the possession of the Commission, and does not imply a need to create any new studies, analyses, etc., in response to this request.

Background

The Commission has established alternative dispute resolution programs, 18 C.F.R. §§ 385.601-385.606, in an effort to avoid litigation when possible. One of the main groups within FERC overseeing such programs is the Dispute Resolution

Division ("DRD" or "Division"). On FERC's website, the Division is described as having two major functions:

1. Providing services such as mediation and facilitation in disputes involving entities subject to the Commission's jurisdiction; and
2. Promoting the use of ADR both within and outside of the Commission through activities such as consultation, workshops, collaboration, training, and coaching.

The Commission's website further states that the "DRD can become involved in a dispute either when the Commission assigns a case to the DRD or when entities contact the DRD for help to initiate ADR processes."

Request

This request seeks records regarding the DRD's casework in the last five (5) years (*i.e.*, from January, 2011, to the present) that specifically deals with both landowners and pipelines (of any type). In particular, this request seeks any and all records regarding:

1. Any and all such cases in which DRD was or became involved during the relevant time period, including, but not limited to, case
 - a. Names;
 - b. Summaries;
 - c. Dispositions; and
 - d. Any agreement(s) or award(s) that resulted from the dispute resolution proceedings;
2. The total number of such cases referred to DRD by the Commission, regardless of whether or not such referral resulted in initiation of an ADR process, including, but not limited to, the names, docket numbers, and current disposition of such cases; and
3. Any and all persons or entities which contacted the Division to initiate ADR processes concerning landowners and pipelines during the relevant time period, including
 - a. Persons or entities whose dispute resolution proceedings involving landowners and pipelines were ongoing at any point during the relevant time period; and
 - b. The agreement(s) or award(s) that resulted from any such dispute resolution proceedings.

This request also seeks records regarding the DRD's operational procedures, including but not limited to records describing any and all standing orders, processes, methods, guidance, practices, manuals of procedure, or other records which govern, advise, instruct, or otherwise influence DRD's casework, regardless of whether or not such records are formal declarations of Divisional policy.

Please contact the undersigned if the associated search and duplication costs are anticipated to exceed three hundred dollars (\$300.00). Please duplicate the records that are responsive to this request and send it to the undersigned at the above address. If possible, please transmit such records in electronic format. If a requested record is withheld based upon any asserted privilege, please identify the basis for the non-disclosure.

If you have any questions regarding this request, please do not hesitate to contact this office so as to ensure that only the necessary documents are duplicated.

Respectfully,

/s/

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

Federal Energy Regulatory Commission
Washington, D.C. 20426

FEB 3 2016

Re: FOIA No. FY16-26

ELECTRONIC AND REGULAR MAIL

Mr. Alexander J.E. English
Associate Attorney
The Law Offices of Carolyn Elefant
2200 Pennsylvania Ave, NW
Fourth Floor East
Washington, DC 20037
alexander.english@lawofficesofcarolynelasant.com

Dear Mr. English:

This letter responds to your request dated January 8, 2016, 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) regulations, specifically 18 C.F.R. § 388.108 (2015). You requested information regarding the Commission's Dispute Resolution Division (DRD) casework in the last five years concerning landowners and pipelines. Specifically you seek:

1. Any and all such cases in which DRD was or became involved during the relevant time period, including, but not limited to, case
 - a. Names;
 - b. Summaries;
 - c. Dispositions; and
 - d. Any agreement(s) or award(s) that resulted from the dispute resolution proceedings;
2. The total number of such cases referred to DRD by the Commission, regardless of whether or not such referral resulted in initiation of an ADR process, including, but not limited to, the names, docket numbers, and current dispositions of such cases; and
3. Any and all persons or entities which contacted the Division to initiate ADR processes concerning landowners and pipelines during the relevant time period, including
 - a. Persons or entities whose dispute resolution proceedings involving landowners and pipelines were ongoing at any point during the relevant time period; and

- b. The agreement(s) or award(s) that resulted from any such dispute resolution proceedings.

You also seek "records regarding DRD's operational procedures."

A search of the Commission's files identified 911 non-public records that may be responsive to your request. After carefully reviewing your request and the documents, I have determined to withhold the records pursuant to FOIA Exemptions 3 and 5.¹

Section 5 U.S.C. § 574(j) of the Administrative Dispute Resolution Act of 1996, states that a "dispute resolution communication which is between a neutral and a party and which may not be disclosed under this section shall also be exempt from disclosure under section 552(b)(3)." Landowner complaints are handled by the DRD where neutrals are selected to guide parties to resolve disputes between such as landowners and energy companies. The 910 records pertaining to these specific matters are confidential and will be withheld pursuant to FOIA Exemption 3. The Commission's regulations at 18 C.F.R. § 385.604 and 18 C.F.R. § 385.606 also provide protections on dispute resolution communications.

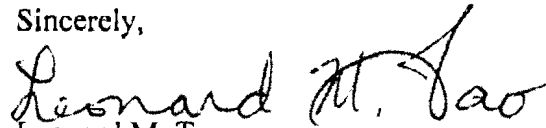
One record is DRD's draft standard operating procedure and will be withheld in its entirety. The document contains information that may be withheld from disclosure pursuant to FOIA Exemption 5, which protects "intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). FOIA Exemption 5 encompasses the deliberative process privilege, and is "designed to protect the 'consultative functions' of government by covering inter- and intra-agency communications that are part of the deliberative process preceding the adoption and promulgation of an agency policy." *Jowett, Inc. v. Dep't of Navy*, 729 F.Supp. 871, 874 (D.D.C. 1989); see *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975). The draft document does not reflect the Commission's final decision and release may result in confusion about the rationales for agency decisions that do not form part of the final agency action. None of the withheld material is appropriate for discretionary release.

As provided by 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. The appeal must be in writing, addressed to Max Minzner, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC

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

20426, and clearly marked "Freedom of Information Act Appeal." Please include a copy to Charles Beamon, Associate General Counsel, General and Administrative Law, at the same address.

Sincerely,

A handwritten signature in cursive script that reads "Leonard M. Tao". The signature is written in dark ink and is positioned above the printed name.

Leonard M. Tao

Director

Office of External Affairs