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Description of document:	Federal Energy Regulatory Commission (FERC) Freedom of Information Act (FOIA) Staff Instructions (released record undated)
Requested date:	24-May-2022
Denial/Appeal date:	08-July-2022
Released on Appeal date:	19-August-2022
Posted date:	07-November-2022
Source of document:	FOIA Request Chief FOIA Officer 888 First Street, NE Washington, DC 20426 Email: foia-ceii@ferc.gov Electronic FOIA-Privacy Act Request Form

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FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

July 8, 2022

Re: FOIA No. FY22-47,
Response Letter

VIA ELECTRONIC MAIL ONLY

This is a response to your correspondence accepted on May 24, 2022, in which you requested information pursuant to the Freedom of Information Act (FOIA), and the Federal Energy Regulatory Commission's (Commission) FOIA regulations.¹ Specifically, you requested the following: "[a] copy of each (internal) FOIA Standard Operating Procedure (SOP) at the FERC FOIA Office."

A search of the Commission's non-public files identified one document responsive to this request. As explained below, the document is protected from disclosure pursuant to FOIA Exemption 5.² Nonetheless, FERC's website contains public FOIA reports, which may be of interest to you and can be found here: <https://www.ferc.gov/annual-reports-0>.

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 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.").

Here, the withheld document is an internal pre-decisional draft document about internal FOIA operation procedures that is currently being revised by agency staff. The document is precisely the type of information FOIA Exemption 5 was created to protect in

¹ 5 U.S.C. § 552 (2018); 18 C.F.R. § 388.108 (2022).

² 5 U.S.C. § 552(b)(5) (incorporating various privileges, including the deliberative process privilege).

order to avoid public confusion. *See Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (withholding draft manuscript because release could lead to “confusion of the public”). Furthermore, any factual portions of the document 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).

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 90 days of the date of this letter. If you decide to appeal, this appeal must be in writing, addressed to Matthew Christiansen, General Counsel, and emailed to FOIAAPPEALS@ferc.gov. If you do not have access to email, a hard copy may also be sent via traditional mail to Matthew Christiansen, General Counsel, with a copy to Charles A. Beamon, Associate General Counsel, General and Administrative Law, at Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426.

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,

**BENJAMIN
WILLIAMS**

Digitally signed by
BENJAMIN WILLIAMS
Date: 2022.07.08
15:35:28 -04'00'

Benjamin Williams
Deputy Director
Office of External Affairs

Federal Energy Regulatory Commission
Washington, D.C. 20426

August 19, 2022

Re: FOIA Appeal, FOIA No. FY22-47

VIA EMAIL

This letter is in response to your correspondence dated July 8, 2022, in which you appealed the July 8, 2022 denial of your request filed on May 24, 2022 pursuant to the Freedom of Information Act (FOIA) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations.¹ As explained below, your appeal is granted in part, and denied in part.

On May 24, 2022, you filed a FOIA request seeking: “[a] copy of each (internal) FOIA Standard Operating Procedure (SOP) at the FERC FOIA Office.” On July 8, 2022, the Director of the FERC's Office of External Affairs (Director) identified a draft document that may be responsive to your request pursuant to FOIA Exemptions 5.² The Director withheld the draft SOP in full and shared a link to FERC's annual FOIA reports.

You assert that FERC represented in its FERC Chief Officers Report (Report) that it had an SOP that was used by staff, and any existing procedure document could not be considered a draft document. See 2022 FERC Chief Officers Report, <https://cms.ferc.gov/media/2022-chief-foia-officer-report> (last visited August 16, 2022). In response to your appeal, staff has clarified that the document referenced in the Report as an SOP was an internal staff paper that informs the process, and that document is enclosed. The draft identified in the determination as potentially responsive to your FOIA request is a pending draft SOP that staff will finalize at some future date. The draft SOP is deliberative and protected under Exemption 5. See *Russell v. Dep't of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982) (withholding draft manuscript because release could lead to “confusion of the public”).

¹ 5 U.S.C. § 552 (2018); 18 C.F.R. § 388.108 (2022).

² 5 U.S.C. § 552(b)(5) (incorporating various privileges, including the deliberative process privilege).

For the reasons stated above, your 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 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,

MATTHEW
CHRISTIANSEN

2022.08.18
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Matthew Christiansen
General Counsel

Enclosure

**FEDERAL ENERGY REGULATORY COMMISSION
FREEDOM OF INFORMATION (FOIA) PROCESS OVERVIEW**

1. FOIA request submitted to FERC. Request must be clearly labeled 'FREEDOM OF INFORMATION ACT REQUEST'.

Requests can be submitted via:

- a. E-Mail: www.FOIA-CEII@ferc.gov
- b. Web online form: [Electronic FOIA-Privacy Act Request Form | Federal Energy Regulatory Commission \(ferc.gov\)](#)
- c. Fax – 202-208-2106
- d. Mail -U.S. Postal Service - ATTENTION: FOIA OFFICER - 888 First Street, Room 11H - Washington, DC 20426

2. Determine if requester has provided a valid request. Valid request must provide the following information:

- a. *Description of records being sought.*
- b. *Request must be for non public/privileged documents. (In instances when FERC elibrary accession numbers they should be reviewed to confirm that they are for non public material.*
 - i. *Special Note: FERC elibrary includes 4 security levels of material:*
 - 1. **Public** (No FOIA required. Most public material can be viewed on computer.)
 - 2. **Privileged** (FOIA request required).
 - *Exception: A copy of privileged material can be provided to the entity that filed document with FERC. Sometimes entities request material to replenish their office files).*
 - 3. **Protected** (FOIA request required)
 - 4. **Critical Energy/Electric Infrastructure Information (CEII)**
 - *A CEII request, along with Non Disclosure required)*
- c. *Documents are within FERC jurisdiction.*
- d. *Agreement to pay fees. Options available*
 - i. *Agree to pay all fees that may be incurred with the processing of the request*
 - ii. *identify maximum amount of fees willing to pay*

- iii. *Request a fee waiver.*
- e. *Contact information. (Name, entity, mailing address, email address and telephone number)*
- f. *Requester should be contacted if any of this information is omitted from the request. Requester may also be contacted to refine the scope of the request.*

3. Other information to identify during initial review.

- a. *Is requester seeking a waiver or reduction of fees?*
- b. *Is requester seeking expedited treatment?*
 - i. *Response must be provided within ten business days. Requesters have Appeal rights for denials for expedited treatment.*

4. Assign FOIA reference number.

- a. *Use FOIA-CEII tracker to obtain the next available reference number. This number identifies the fiscal year and sequential number of FOIA received during the year. (EX: FOIA-2021-1)*

5. Add pertinent FOIA information in FOIA-CEII Tracker. This information includes:

- i. *Date received*
- ii. *Due date of response – This date is 20 business after receipt of request. Note: Count begins the one day after receipt of request.*
 - 1. *OEA will monitor due dates and provide reminders to GAL staff regarding impending dates. In instances of unusual circumstances the Secretary's Office has authority to grant a ten day extension for FOIA responses. OEA staff will monitor issuance of extension letters to ensure that extension letters are issued before the due date expiration. When extensions are granted OEA will provide the requester with an electronic copy of the extension letter.*
- iii. *Name of requester*
- iv. *Affiliation*

- v. *Detailed description of the requested documents.*
- vi. *Name of program office (PO) that request will receive request. (See point of contact list for program office. Assignment of PO office is dependant upon subject matter of request. PO is given 3 business days from date of OEA notification email to provide responsive material to OEA. .*
- vii. *Track Number*
 - 1. ***Track 1-*** *This track identifies requests that involve documents that are readily available or have been previously cleared for release.*
 - 2. ***Track 2 –*** *This track identifies request that involve documents that are readily identifiable but are not voluminous and require limited review.*
 - 3. ***Track 3 –*** *This track identifies requests that involve complex or voluminous documents that require extensive search and review.*
- viii. *Add names of individuals in tracker to identify the PO, GAL attorney and Paralegal who are assigned to the FOIA.*

6. Add pertinent data to upper right hand corner of FOIA request.

- a. The FOIA reference number
- b. Due Date
- c. Track Number

7. Send FOIA notification e-mail to program office with ‘CC’ to General Administrative Law (GC13) and FOIA-CEII e-mail account. The submit line should reflect ‘New FOIA’ and the FOIA reference number. This e-mail should include an electronic copy of:

- a. *An electronic version of the FOIA request*
- b. *Search memo*
 - i. *This memo identifies the requester and the date that the program office must provide a response to the Office of External Affairs (OEA). The program office is given three business days to review records and identify pertinent FERC documents that may be responsive to*

request. Additional days may be provided for voluminous document.

c. Response memo

- i. This memo must be completed by the program office. It identifies the number of responsive documents that are being provided by the program office and a recommendation regarding the release of these documents.*

d. Determination of Fees

- i. This document reflects the number of hours the program office utilized to search for responsive documents. This information will be used to prepare for a bill for FOIA request.*

8. Acknowledgement e-mail should be sent to the requester within 2 business days after FOIA request is accepted:

- a. FOIA Number*
- b. Date requester should expect a response*
- c. FERC contact information for requester to check the status of the request or pose any questions.*
- d. Send 'cc' of acknowledgement e-mail to FOIA-CEII e-mail account.*

9. Create electronic folder on L:/FOIA drive

- a. The electronic folder should reflect the FOIA reference number.*
- b. Electronic documents are transferred from the FOIA-CEII mailbox to this folder when the FOIA request has been completed. Each file in folder includes a brief description of document and the date of the document.*
- c. This folder does not include non public/privileged documents.*
- d. *Note: Access to this folder is restricted to OEA staff who work on FOIAs.*

10. Create folder for official 'hard copy' file. (When in the office)

- a. This folder should reflect the FOIA reference number and the name of the requester.*
- b. A copy of all documents, including the non public/privileged documents, will be placed in this folder.*

11. Program office provides responsive documents to Office of External Affairs.

- a. OEA will review response memo and verify that accompanying documents have been provided from the program office.*
- b. OEA will provide responsive documents, a copy of response memo and search memo to appropriate Attorney and Paralegal in GAL.*
- c. Send e-mail to GAL Attorney, Paralegal, with 'cc' to FOIA-CEII account, confirming delivery of FOIA documents.*

12. GAL Staff will prepare submitter's rights letters:

- a. A submitter's rights letter must be prepared for each document that has been provided by the program office.*
- b. OEA Staff must review, sign and mail submitter's rights letters.*
- c. Submitters are provided five business days to provide a recommendation for releasing documents.*
- d. OEA provides responses from submitters to GAL staff.*

13. GAL staff will analyze responsive documents and submitter's rights responses and make a determination regarding the release of documents.

- a. Consultation with additional FERC staff and other agencies is required.*
- b. Documents should be released in full.*
- c. Documents should be released in part and provide Appeal rights. Identify exemptions that were applied.*
- d. Documents should be withheld and provide Appeal rights. Identify exemptions that were applied*
- e. No relevant records were located and provide Appeal rights.*

14. GAL returns responsive documents to OEA

- a. OEA reviews material and Office Director signs release letter.*
- b. OEA Calculates any necessary fees and prepares bill.*
- c. OEA mails package to requester and provides a electronic copy of cover letter to requester.*

TYPES OF FOIA LETTERS:

- Notice of Freedom of Information Act Request -Opportunity to Comment.
 - This is often referred to as the Submitter's Rights Letter.
- Notice of Intent to Release.
 - This letter is only required in instances when the submitter has provided comments objecting to the release of their non public material.
- Determination Letter.
 - Requests for large volumes of material may be processed on rolling basis and include numerous determination letters.