

Re: FOIA FY20-43
Appeal Response

VIA U.S. MAIL AND EMAIL

Michael Mabee



CivilDefenseBook@gmail.com

Dear Mr. Mabee:

This letter responds to your correspondence dated May 3, 2020, in which you appealed the then-Director of External Affairs Leonard Tao's (the Director) Response Letter dated February 19, 2020, concerning your request filed pursuant to the Freedom of Information Act and the Federal Energy Regulatory Commission's (Commission) FOIA regulations.¹

Background

Your request, filed on January 6, 2020, sought the NERC Notice of Penalty (NOP) versions which include the name of the registered entities associated with the following dockets: NP19-16-000; NP19-17-000; NP19-18-000; NP20-2-000; NP20-3; NP20-6-000. By letter dated February 19, 2020, the Director protected this information under FOIA for two reasons: First, the FAST Act prohibits the release of the requested information and specifically exempts it from FOIA release under Exemption 3.² Second, even prior to the enactment of the FAST Act, the information sought was historically protected from disclosure by Exemption 7(F), which exempts from disclosure records of 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 your appeal, you assert, among other arguments, that: 1) there is no valid FOIA exemption that would prevent release of the information sought; 2) even with an applicable exemption, the Commission should exercise its discretion to release the information because "it is in the public interest to do so"; and 3) it would enhance the

¹ 5 U.S.C. § 552 (2018); 18 C.F.R. 388.108 (2019).

² Fixing America's Surface Transportation Act, Pub. L. No. 118-94, § 61003 (2015) (FAST Act); *see* 18 C.F.R. § 388.113(c) (setting forth the definition of CEII).

security of critical infrastructure to release the information because it would encourage compliance, notwithstanding efforts by foreign governments to infiltrate the grid.

Discussion

Exemption 3

The Director correctly invoked Exemption 3 to protect the information from disclosure. The non-public NOPs contain detailed information concerning cyber-related violations, including, among other information, background violations, facts concerning the violations themselves, and an explanation of the impact of the violations on the bulk power system. Disclosure of the NOPs would result in the disclosure of specific engineering, vulnerability, and/or detailed design information about existing “critical infrastructure” that relates details about the production, generation, transportation, transmission, or distribution of energy and would be useful in planning an attack on critical infrastructure. *See* footnote 2, *supra*; 18 C.F.R. § 388.113. Furthermore, the same risks are present with respect to the disclosure of the identity of the Unidentified Registered Entities (URE) only. In this regard, the disclosure of the names of the UREs, combined with the significant detail contained in the already redacted public version of the NOPs, including the Critical Infrastructure Protection (CIP) standard and requirement, would result in the possibility of harm to critical infrastructure that FOIA Exemption 3 is meant to preclude.

Exemption 7(F)

The Director also correctly invoked Exemption 7(F). Courts have routinely upheld the application of Exemption 7(F) in circumstances similar to those at hand. *See Public Employees for Environmental Responsibility v. U.S. Section, Int'l Boundary and Water Com'n, U.S.-Mexico*, 740 F.3d 195, 205-206 (D.C. Cir. 2014) (“The inundation maps fall within Exemption 7(F).”); *Greenpeace, Inc. v. Dep’t of Homeland Security*, 311 F. Supp. 3d 110, 129 (D.D.C. 2018) (granting motion for summary judgment in favor of DHS as to assertion of Exemption 7(F) as to the identity of the “tiered” and “detiered” chemical facilities under CFATS.”).

You also assert that FERC’s application of Exemption 7(F) is undermined because the violations have been mitigated and that FERC’s assertion of risk is “amorphous and vague.” Your arguments are not persuasive. *See EPIC v. DHS*, 777 F.3d 518, 524 (D.C. Cir. 2015) (“The language of Exemption 7(F), which concerns danger to the life or physical safety of any individual, suggests Congress contemplated protection *beyond a particular individual who could be identified before the fact.*”) (emphasis added). While the exact risk and impact associated with a cyber attack may be unknown, the risk and

potential consequences that flow from that risk are no less real. *See id.* (noting Exemption 7(F)'s expansive text and the generally deferential posture courts take when it comes to assessing national security harms) (quotations and citations omitted). Here, based on staff's assessment, disclosure of the information could be of significant value to a person in planning and executing a cyber intrusion attack against the UREs within the relevant regions. As such, disclosure is not appropriate. *See Pinson v. DOJ*, 2019 WL 4142165, 10 (D.D.C. Aug. 30, 2019) ("The Court finds that there is a reasonable expectation of danger and defers to [the agency's] expertise in assessing the possible danger."); *see also Public Employees for Environmental Responsibility*, 740 F.3d at 205-206 ("[In]...cases involving documents relating to critical infrastructure, it is not difficult to show that disclosure may endanger the life or physical safety of any individual.").³

Based on our assessment of various factors, including some that may not be available to the public, disclosing the requested information would result in an unacceptable risk to the bulk electric system. *See, e.g., Greenpeace*, 311 F. Supp. 3d at 130 (granting summary judgment as to Exemption 7(F) in favor of government as to the identity of various chemical facilities and noting that "[plaintiff] does not have the information from the intelligence community to inform its assessment of the risks involved."). In this regard, your argument that disclosure would enhance the security of the bulk electric system is speculative, and in staff's view, incorrect. In this regard, it is notable that you acknowledge the efforts of foreign governments to gain access to the nation's grid. It is unreasonable to assume that disclosing *more* information to potential bad actors will improve the security of the bulk electric system. In sum, the decision of whether to release URE-related information is a highly fact-dependent, case-by-case inquiry, as demonstrated by the fact that there are instances in which the Director has released the identities of UREs in some FOIA requests and withheld them in others. Based on the law and circumstances of this request, 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 207 40- 6001; email

³ FERC has endeavored to make as much information as possible available in its public files. Moreover, with respect to your contention that FERC should exercise its discretion to disclose the requested information, Exemption 7(F) "is not a 'balancing test' that requires the agency to weigh the danger against possible benefits of releasing the information." *Greenpeace, Inc.*, 311 F. Supp. 3d at 130.

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

Sincerely,

DAVID MORENOFF

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David Morenoff
Acting General Counsel