

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

AUG - 2 2018

OFFICE OF THE GENERAL COUNSEL

Re: Freedom of Information Act
Appeal, FOIA No. FY18-75

VIA E-MAIL AND CERTIFIED MAIL

Michael Mabee (without enclosures)



CivilDefenseBook@gmail.com

Dear Mr. Mabee:

This letter responds to your correspondence received on June 16, 2018, in which you appealed the May 25, 2018 denial of your request filed pursuant to the Freedom of Information Act (FOIA) and the Federal Energy Regulatory Commission's (Commission) FOIA regulations. 5 U.S.C. § 552, *as amended* by the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538 (2016); 18 C.F.R. § 388.108 (2018).

On April 13, 2018, you requested the following:

1. correspondence between FERC and the North American Electric Reliability Corporation (NERC) identifying the 'Unidentified Registered Entity' described in the document: 'NERC Full Notice of Penalty regarding Unidentified Registered Entity' filed with FERC on February 28, 2018.¹
2. correspondence between FERC and NERC laying out any purported rationale for withholding the identity of the 'Unidentified Registered Entity' from public view.

On April 23, 2018, Commission staff notified NERC of your request and provided an opportunity to comment pursuant to 18 C.F.R. § 388.112. NERC submitted comments on April 30, 2018, objecting to "the FOIA Request because [FERC] has instructed NERC not to divulge the identity of entities that have violated NERC Critical Infrastructure Protection ('CIP') Reliability Standards." In support of the foregoing, NERC cited certain Commission orders.

¹ Your request was not construed to seek the February 28, 2018 NERC Full Notice of Penalty itself.

On May 25, 2018, Leonard M. Tao, Director of the Office of External Affairs (Director), determined that the seven (7) responsive documents² were protected from disclosure in their entirety pursuant to FOIA Exemptions 3 and 7(F), and therefore, denied your request. By letter dated June 16, 2018, you appealed that determination. Specifically, you argue that you are not seeking Critical Energy/Electric Infrastructure Information (CEII) and that you “simply ask for disclosure of the identity of the ‘Unidentified Registered Entity’ [URE] and why this information has been withheld.”

FOIA Exemption 3 protects information “specifically exempted from disclosure by statute.” Here, CEII is specifically exempted from disclosure under the Fixing America’s Surface Transportation Act, Pub. L. No. 118-94, § 61003 (2015). I conclude that the responsive documents contain sensitive cyber security-related information that qualifies for protection as CEII, and thus, was appropriately withheld. See 18 C.F.R. § 388.113(c). 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).³ In this regard, the requested documents contain information regarding cyber security and risks to the URE, as well the techniques used to resolve the incident and associated possible vulnerabilities, the disclosure of which could provide a potential bad actor with information that may assist it in targeting the entity for cyber intrusion attacks. See *Public Employees for Environmental Responsibility, U.S. Section, Int’l Boundary and Water Comm.*, 740 F.3d 195, 206 (D.C. Cir. 2014) (Exemption 7(F) protects “the many potential threats posed by the release of sensitive agency information.”). Therefore, the Director also correctly invoked FOIA Exemption 7(F) to withhold the relevant documents.

While it is possible that the name of a URE may constitute CEII under 18 C.F.R. 388.113 and qualify for protection under Exemption 7(F), under the circumstances and facts presented in this particular case, I conclude that the name of the URE can be disclosed. However, other information contained in the documents which I conclude should remain protected under Exemptions 3 and 7 has been redacted. Additionally, the names of lower-level employees have been redacted pursuant to FOIA Exemption 6. See

² These documents consist of various email correspondence between FERC and NERC regarding questions concerning details relative to the incident resulting in the Notice of Penalty.

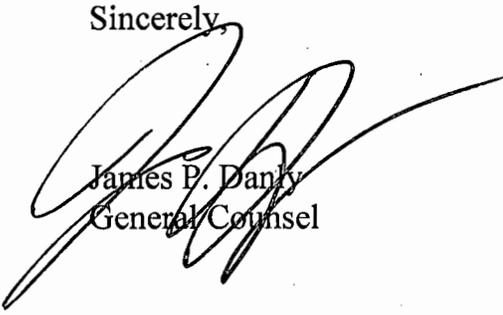
³ I note that Exemption 7(F) applies to civil, as well as criminal law enforcement matters. See *Vento v. IRS*, 714 F. Supp. 2d 137, 148 (D.D.C. 2010) (holding that distinguishing between civil and criminal enforcement is incorrect because there “is no warrant in the law for that distinction and the federal courts have rejected it.”)

Judicial Watch, Inc. v. Bd. of Governors of Fed. Reserve System, 773 F. Supp. 2d 57, 62 (D.D.C. 2011); *see also Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 384 F. Supp. 2d 100 (D.D.C. 2005) and *Cofield v. City of LaGrange, Ga.*, 913 F. Supp. 608, 616 (D.D.C. 1996).

Accordingly, your appeal is granted in part and denied in part. This letter also constitutes notice to NERC 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 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,


James P. Dandy
General Counsel

Via Email

Edwin G. Kichline (with enclosures)
Senior Counsel and Director of
Enforcement Oversight
North American Electric Reliability Corporation
1325 G Street N.W. Suite 600
Washington, D.C. 20005
edwin.kichline@nerc.net