

Federal Energy Regulatory Commission
Washington, D.C. 20426

JUN 12 2019

Re: Freedom of Information Act
Appeal, FOIA No. FY19-19

VIA E-MAIL AND U.S MAIL

Michael Mabee

[REDACTED]

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Dear Mr. Mabee:

This letter responds to your correspondence received on April 17, 2019, in which you made an interim appeal of the Director's Second Response Letter dated April 2, 2019 concerning 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 (2019).¹ As discussed below, given the threat to the bulk electric system that would result from disclosure, your appeal is denied.

On December 19, 2018,² you requested information pertaining to various Notice of Penalty (NOP) dockets relating to Critical Infrastructure Protection (CIP) standards. Following a review of the request in its entirety and based on staff discussions with you via telephone, staff understands that your request is ultimately for the names of the UREs associated with the dockets.

On January 18, 2019, with general notice to you, Commission staff notified the relevant UREs of your request concerning NP14-29-000, NP14-30-000, NP14-32-000, NP14-37-000, NP14-39-000, and NP14-41-000, and provided them opportunity to comment pursuant to 18 C.F.R. § 388.112. NERC submitted comments on January 28, 2019, objecting to the release of the identity of the UREs generally. Additionally, a number of trade groups submitted comments also objecting to disclosure of the URE identities. Finally, some UREs also opposed disclosure of their identities.

On February 28, 2019, Leonard M. Tao, Director of the Office of External Affairs, issued a Notice of Intent to Release the identities of the UREs in NP14-32 and NP14-41,

¹ You granted the Agency an extension until June 7, 2019 in which to respond to your appeal.

² You subsequently amended your request on January 4, 2019.

which were subsequently provided to you. On April 2, 2019, Mr. Tao issued a denial with respect to NP14-30, NP14-37, and NP14-39. By letter dated April 17, 2019, you appealed that determination.

With respect to NP14-30, NP14-37, and NP14-39, the Director concluded that providing the identity of the UREs, in combination with the already publicly available NOPs on e-Library, would allow a bad actor to target a URE through a disclosed vulnerability. Invoking Exemption 3, he determined that the requested information qualified for protection as CEII, which is specifically exempt from disclosure under the Fixing America's Surface Transportation Act, Pub. L. No. 118-94, § 61003 (2015); see 18 C.F.R. § 388.113(c) (setting forth the definition of CEII). Additionally, the Director found that the identities of the UREs in these dockets were protected from disclosure under FOIA Exemption 7(F), which 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).

Discussion

The Director correctly invoked Exemptions 3 and 7(F). Regarding Exemption 3, the disclosure of the identities of the UREs in question, when combined with publicly disclosed portions 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 18 C.F.R. 388.113.

As to Exemption 7(F), the records here were compiled for law enforcement purposes. See, e.g., *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."). Secondly, the disclosure of the UREs "could reasonably be expected to endanger the life or physical safety of any individual." In this regard, I note that the D.C. Circuit has held that "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." *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).

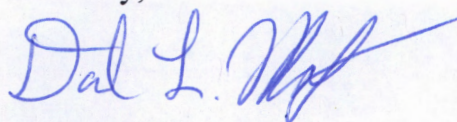
Here, disclosure of the identities of the UREs, when combined with the known public information, would provide a potential bad actor with information that could be used to target them for cyber intrusion attacks. See *Greenpeace, Inc. v. Dep't of*

Homeland Security, 311 F. Supp. 3d 110, 129 (D.D.C. 2018) (granting motion for summary judgment in favor of DHS regarding both the identity of “tiered” and “de-tiered” chemical facilities under CFATS, and noting that “[r]eleasing the lists would...allow terrorists to adjust their aim to focus on the very facilities that the government has decided are unlikely to be targeted.”); *see also 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.”).

Based on the Agency’s careful assessment of various factors – including some that are not in the public domain – disclosing the names of the UREs in concert with the publicly available information would result in an unacceptable risk to the bulk electric system. *See id.* (granting summary judgment as to Exemption 7(F) in favor of government regarding assertion of Exemption 7(F) 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.”). Thus, 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,



For James P. Danly
General Counsel

cc

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