

Federal Energy Regulatory Commission
Washington, D.C. 20426

JUN 24 2019

Re: FOIA FY19-69 (Rolling)
Initial Response Letter

VIA E-MAIL AND U.S MAIL

Thomas S. Popik
Chairman and President
Foundation for Resilient Societies
24 Front Street, Suite 203
Exeter, NH 03833
thomasp@resilientsocieties.org

Dear Mr. Popik:

This is an initial response to your correspondence received on April 24, 2019, in which you requested information pursuant to the Freedom of Information Act (FOIA), and the Federal Energy Regulatory Commission's (Commission) FOIA regulations, 18 C.F.R. § 388.108 (2019). Your request seeks “copies of the full and unredacted Notices of Penalty (NOP), including settlement agreements and corporate names of Unidentified Registered Entities (UREs), submitted by the North American Electric Reliability Corporation (NERC) under the following FERC dockets for fines assessed for violators of NERC Standard FAC-003-1 — Transmission Vegetation Management Program: NP12-20-000; NP11-137-000; NP11-128-000; and NP11-1-000.”

On June 6, 2019, Commission staff notified NERC, as well as the relevant UREs, of the request and provided an opportunity to comment pursuant to 18 C.F.R. § 388.112. NERC submitted comments on June 13, 2019, objecting to the release of the identity of the UREs generally and the requested documents. As explained below, the information is protected from disclosure pursuant to FOIA Exemptions 3 and 7(F), and therefore will not be disclosed.

Before determining whether the identity of a URE may be released, the Commission must consider a number of factors. Among other things, these factors include the nature of the Critical Infrastructure Protection (CIP) violation, including whether it involves a Technical Feasibility Exemption (TFE); whether mitigation is complete; the content of the public and non-public versions of the Notice of Penalty; the extent to which the disclosure of the pertinent URE identity would be useful to someone seeking to cause harm; whether an audit has occurred since the violation(s); whether the violation(s) was administrative or technical in nature; and the length of time that has elapsed since the filing of the public Notice of Penalty. An application of these factors will dictate whether a particular FOIA exemption, including 7(F) and/or Exemption 3, is appropriate. *See Garcia v. U.S. DOJ*, 181 F. Supp. 2d 356, 378 (S.D.N.Y. 2002) (“In

evaluating the validity of an agency's invocation of Exemption 7(F), the court should within limits, defer to the agency's assessment of danger.") (*citation and internal quotations omitted*).

Based on application of the various factors discussed above, I conclude that disclosing the identity of the UREs in NP11-137 and NP11-128, in combination with the information contained in the public versions of the Notices of Penalty, would create a risk of harm or detriment to life, physical safety, or security because the specified UREs could become the target of a potentially bad actor. *See* 5 U.S.C. § 552(b)(7)(F) (protecting law enforcement information where release "could reasonably be expected to endanger the life or physical safety of any individual."); *see also* the Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 61003 (2015) (specifically exempting the disclosure of CEII and establishing applicability of FOIA Exemption 3, 5 U.S.C. § 552(b)(3)). Similarly, I conclude that the non-public documents sought in your request relating to these dockets are protected by FOIA Exemptions 3 and 7(F). Accordingly, the names of the UREs associated with NP11-137 and NP11-128 and the associated non-public documents will not be disclosed.

Additional determinations addressing the remaining documents will follow on a rolling basis.¹ Commission staff will endeavor to provide you with another determination within twenty (20) business days of the date of this letter. 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.

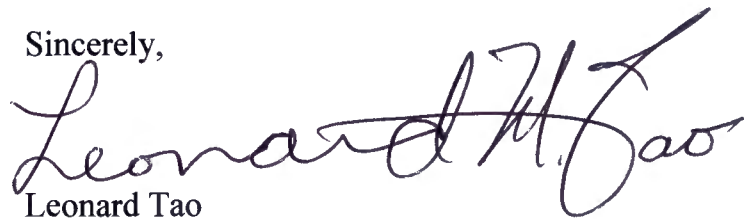
If you decide to appeal, this appeal must be in writing, addressed to James P. Danly, General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, and clearly marked "Freedom of Information Act Appeal."

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 voluminous material.).

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 that reads "Leonard M. Tao". The signature is written in a cursive style with a large, sweeping "L" and "T".

Leonard Tao
Director
Office of External Affairs

cc:

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bcc