The Free Market Environmental Law Clinic

FREEDOM OF INFORMATION ACT APPEAL

September 19, 2013

General Counsel
FERC
888 First Street, NE
Washington, DC 20426

BY ELECTRONIC MAIL: FOIA-CEII@ferc.gov

Re: Appeal of Initial Determination to Withhold Certain Information, FOIA FY13-78

Dear FERC General Counsel,

We appeal FERC's partial denial of the above-captioned FOIA request by the Independence Institute and Free Market Environmental Law Clinic, specifically FERC's decision, communicated in its letter dated September 16, 2013, that it is withholding 38 responsive records in whole or part for being pre-decisional/deliberative, for reasons detailed herein.

In sum, the Commission must offer specific justification or otherwise provide reason to conclude the redacted information is properly withheld within the cited exemption. However, FERC withheld information from responsive records without justifying these withholdings, providing requesters no information or means by which we could make a reasoned conclusion about the legitimacy of these redactions and partial denial. Further, FERC withheld records in full, apparently emails, which is a facially impermissible practice given the simplicity of redacting such records' factual information. Also, FERC improperly withheld discussions about media coverage or inquiry, and correspondence without outside parties, as privileged under b5.

Finally, FERC's own production indicates it did not produce attachments as required, and either did not search or otherwise did not produce records from the Office of the Chairman, as also required under the terms of our request.

I. JURISDICTIONAL STATEMENT

The underlying FOIA request was properly filed under 5 U.S.C. § 552. In response, FERC denied our request in part by withholding information in numerous records about which FERC provides no identifying information to substantiate or allow us to assess the withholding, and failed to perform the required b6 balancing test. Pursuant to 18 C.F.R. § 388.110, you have jurisdiction because "A person whose request for records, request for fee waiver or reduction, or request for expedited processing is denied in whole or part may appeal that determination to the General Counsel or General Counsel's designee within 45 days of the determination." 18 C.F.R. § 388.110 (a)(1). Further, all procedural rules have been complied with as this is: (1) in writing, (2) properly addressed, (3) clearly identified as an "Freedom of Information Act Appeal" and includes a copy of the underlying Request, (4) sets forth grounds for reversal, and (5) was filed within 45 days of the date of FERC's September 16, 2013 partial denial.

II. PROCEEDINGS BELOW

This appeal involves one FOIA request, sent by electronic mail on August 2, 2013 to FERC at FOIA-CEII@ferc.gov, seeking (bold in original):

> "copies of 1) all **emails, text messages, or instant messages** (and any attachments thereto), 2) which were sent to or from any employee in FERC's Office of External Affairs, and/or Office of the Chairman (all including also as cc: or bcc:), 3) on their

FERC-provided account(s) and/or any account used for work-related correspondence, 4) to, from or referencing Ron or Ronald Binz."

FERC assigned this request identification number FY13-78.

FERC took its maximum statutory extension of time to respond, by email dated September DATE, 2013. On September 16, 2013, FERC produced records and wrote, in pertinent part:

> "A search of the Commission's non-public files identified 251 documents responsive to your request. The documents consist of 229 emails and 22 news articles covering the relevant time period. After review of the responsive material and relevant law, the agency has determined to grant your request in part and deny it in part pursuant to FOIA Exemptions 2, 5, 6, 7(E) and 7(F), for the reasons stated below...Under FOIA Exemption 5, 36 internal emails between or among FERC staff [sic] are being withheld in their entirety, and small portions of 15 other internal emails are being redacted because they contain staff opinions and analyses that are deliberative...In sum, of 251 responsive documents, the agency is releasing 213 documents in whole or in part." (FERC September 16 partial denial letter, pages 1, 2 and 3; footnotes and citations omitted).

FERC provided requesters no other information by which we could make a reasoned conclusion about the legitimacy of these redactions, and also failed to explain the other shortcomings identified herein.

Relevant to this appeal, in our original request II and ELC wrote, i*nter alia*:

> "Background to the Request Illustrating Public Interest, Governmental Operations/Activities
>
> Related to this request we note a story stating, in pertinent part, 'Clean energy advocates have hired a Washington, D.C.-based public relations firm to advocate for President

Obama's pick to head the Federal Energy Regulatory Commission and thwart increasing attacks from Colorado's coal industry and free market groups. Green Tech Action Fund, a San Francisco group that describes itself as a nonpartisan grant-making organization, has hired VennSquared Communications to advocate for Ron Binz as the next chairman of FERC. (Hannah Northey, *Clean energy group taps PR firm to advocate for Binz amid mounting attacks*, Energy & Environment Daily, July 23, 2013).

This represents a private organization engaging public advocacy for hire to influence a confirmation process for a senior position in the federal government, apparently because of possible opposition due to the nominee's controversial record. Rumors of this engagement emerged even before the nominee was publicly announced, hence the time period covered by this request. The principals of this private firm have longstanding ties to the Senate Majority Leader. This and other indications reflect a possible effort to politicize what had been a non-political independent agency (similar to the effort at the National Labor Relations Board which has proved to be of great public, media, congressional and judicial interest).

As such, this matter is inherently of public interest and responsive records will significantly inform the public on the same.

Further, we are informed that FERC arranged and/or otherwise facilitated and/or participated in dozens of meetings for Mr. Binz with various third parties at the July NARUC conference in Denver. This is somewhat unique and appears to be another element in this campaign to obtain support for the controversial nominee's confirmation,

possibly in collaboration with the above-described campaign by privately financed political operatives.

All of this, and correspondence reflecting the relationship with Mr. Binz, pre-nomination, relates to our concern over apparent politicization of a heretofore largely non-ideological independent agency whose decisions carry significant economic impacts."

These same factors and the public interest in this matter, which has substantially grown since our request, are relevant to the instant appeal.

The public, congressional and media interest in this matter is remarkable and growing. *See, e..g*, Coral Davenport, *Obama's Stealth Climate Army: Stymied by Congress, President Obama is staffing his administration with appointees ready to take aggressive action on climate change*, National Journal, September 2, 2013, (title later changed to *Obama's Stealth War on Global Warming*) http://www.nationaljournal.com/magazine/obama-s-stealth-war-on-global-warming-20130829. discussing President "Obama's nomination of Ron Binz to chair the Federal Energy Regulatory Commission, a relatively obscure panel that nonetheless wields significant regulatory muscle in implementing energy policy. ...The Wall Street Journal called him 'the most important nominee you've never heard of.' As the drumbeat of opposition to Binz has increased, a group of environmental activists hired a Washington PR firm, VennSquared Communications, to campaign for him as he heads into what looks like a tough and testy Senate confirmation process. (Binz declined a request for an interview with National Journal, saying he intends to

refrain from speaking to the press until after his Senate confirmation.)"[1]

Also relevant to the increased weight that should be given to the public interest in this information, FERC can not properly involve itself, as it appears it has, in the Binz/VennSquared *et al*. lobbying campaign central to these responsive (including withheld) records. (Requesters note, as they did in their request, that they need not demonstrate that the records would contain any particular evidence, such as of misconduct. Instead, the question is whether the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, period. *See Judicial Watch v. Rosotti*, 326 F. 3d 1309, 1314 (D.C. Cir. 2003)).

For example, if the redacted information relates to, for example, this lobbying campaign as seems to be the case, that would obviously be of public interest and thus not exempt from disclosure. *See Electronic Frontier Foundation v. Office of the Dir. of Nat. Intelligence*, 639 F.3d 876, 887-89 ("obtaining information about the effects of lobbying on government decision

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[1] See also Vincent Carroll, *Carroll*: *Binz might head FERC? Say it ain't so*, DENVER POST, Jun. 19, 2013, http://www.denverpost.com/carroll/ci_23487652/carroll-binz-might-head-ferc-say-it-aint?IADID=Search-www.denverpost.com-www.denverpost.com; Cathy Proctor, *Colorado Mining Association wants 2 PUC commissioners out of Xcel coal-plan decision*, DENVER BUSINESS JOURNAL, Oct. 12, 2010; Editorial, *Ron Binz's Rules for Radicals*, WALL STREET JOURNAL, Jul. 29, 2013, http://online.wsj.com/article/SB10001424127887323829104578621993851688734.html; Editorial, *The Friends of Ron Binz*, WALL STREET JOURNAL, Aug. 25, 2013, http://online.wsj.com/article/SB10001424127887323610704578628181505999690.html; Stephen Dinan, *Obama energy nominee Ron Binz faces rocky confirmation hearing*, THE WASHINGTON TIMES, Sept. 17, 2013, http://www.washingtontimes.com/news/2013/sep/17/obama-energy-nominee-ron-binz-faces-rocky-confirma/; Stephen Dinan, *Top Obama energy nominee Ron Binz asked oil company employees for confirmation help*, THE WASHINGTON TIMES, Sept. 17, 2013, http://www.washingtontimes.com/news/2013/sep/17/top-obama-energy-nominee-ron-binz-asked-oil-compan/; Stephen Dinan, *Obama energy nominee in danger of defeat*, THE WASHINGTON TIMES, Sept. 18, 2013, http://www.washingtontimes.com/news/2013/sep/18/obamas-energy-nominee-danger-defeat/, the latter three referencing FERC emails requesters obtained in this and/or a prior request.

making," and "the methods through which well-connected" lobbyists use to wield that influence are of great public interest).

Regardless, the level of public interest in this matter affirms the clear nature of the, for these purposes, public's interest in disclosure, which as a matter of law compels disclosure.

III. Standards of Review: All Doubts Must be Resolved in Favor of Disclosure

It is blackletter law that an agency cannot rely on "boilerplate" privilege claims, or simply recite that the withholding of a document meets statutory standards without tailoring "the explanation to" each "specific document," and with a "contextual description" of how those standards apply to "the specific facts" of each document. *King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987) ("[c]ategorical description[s] of redacted material coupled with categorical indication of anticipated consequences of disclosure" was "clearly inadequate."); *Vaughn v. Rosen,* 484 F.2d 820, 826 (D.C. Cir. 1973) ("generalized" or conclusory exemption claims are insufficient); *Wiener v. FBI,* 943 F.2d. 972, 977–79 (9th Cir. 1991) ("boilerplate" explanations without an effort to "tailor the explanation to the specific document withheld" were insufficient); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999) (agency's *Vaughn* Index must apply statutory standards for exemption "to the specific facts of the documents at hand," giving a "contextual description" of "the documents subject to redaction" and "the specific redactions made to the various documents."); *ACLU v. Office of the Director of Nat. Intelligence,* No. 10-449, 2011 WL 5563520, *6 (S.D.N.Y. Nov. 15, 2011) (improper for an agency to submit a *Vaughn* Index "proffering conclusory and nearly identical justifications for" withholding each document); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009)

(agency must "'disclose as much information as possible" in its Vaughn Index,'" and not merely "parrot" or "recite the statutory standards'").

But that is exactly what FERC has done here and the presumption toward disclosure requires that FERC's withholding be reversed as improper.

FERC must provide requesters sufficient specificity "to permit a reasoned judgment as to whether the material is actually exempt under FOIA" pursuant to *Founding Church of Scientology v. Bell*, 603 F.2d 945, 959 (D.C. Cir. 1979), and should "describe each document or portion thereof withheld, and for each withholding it must discuss the consequences of supplying the sought-after information." *King v. DoJ*, 830 F.2d at 223-24.

It is also well-settled that Congress, through FOIA, "sought 'to open agency action to the light of public scrutiny.'" *DOJ v. Reporters Comm. for Freedom of Press*, 498 U.S. 749, 772 (1989) (*quoting Dep't of Air Force v. Rose*, 425 U.S. 353, 372 (1976)). The legislative history is replete with reference to the, "'general philosophy of full agency disclosure'" that animates the statute. *Rose*, 425 U.S. at 360 (*quoting* S.Rep. No. 813, 89th Cong., 2nd Sess., 3 (1965)). Accordingly, when an agency withholds requested documents the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. 136, 142 n. 3 (1989); *Consumer Fed'n of America v. Dep't of Agriculture*, 455 F.3d 283, 287 (D.C. Cir. 2006); *Burka*, 87 F.3d 508, 515 (D.C. Cir. 1996).

These disclosure obligations are to be accorded added weight in light of the Presidential directive to executive agencies to comply with FOIA to the fullest extent of the law specifically

cited in the underlying request to FERC to produce responsive documents. *Presidential Memorandum For Heads of Executive Departments and Agencies*, 75 F.R. § 4683, 4683 (Jan. 21, 2009). As the President emphasized, "a democracy requires accountability, and accountability requires transparency," and "the Freedom of Information Act . . . is the most prominent expression of a profound national commitment to ensuring open Government." Accordingly, the President has directed that FOIA "be administered with a clear presumption: In the face of doubt, openness prevails" and that a "presumption of disclosure should be applied to all decisions involving FOIA." Similarly, FERC's withholdings are not consistent with statements by the President and Attorney General, *inter alia*, that "**The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over, starting today" (President Barack Obama**, January 21, 2009), and "**Under the Attorney General's Guidelines, agencies are encouraged to make discretionary releases. Thus, even if an exemption would apply to a record, discretionary disclosures are encouraged**. Such releases are possible for records covered by a number of FOIA exemptions, including Exemptions 2, 5, 7, 8, and 9, but they will be most applicable under Exemption 5." (Department of Justice, Office of Information Policy, OIP Guidance, "Creating a 'New Era of Open Government'").

IV. FERC Improperly Withheld Information as Deliberative, Without Showing it is Directly Related to Actual Policy Formulation of the Kind Contemplated by Exemption 5

Citing FOIA's deliberative-process privilege FERC improperly relies on a boilerplate justification for withholding many emails in full, majority part or otherwise in part. FERC's rationale for withholding this information sheds no light whatsoever on the information it is withholding, and

thus fails to meet FERC's burden of showing that the material is privileged. *See King v. United States Dep't of Justice*, 830 F.2d 210, 219–25 (D.C.Cir.1987); *Vaughn v. Rosen,* 484 F.2d 820, 826 (D.C. Cir. 1973); *Defenders of Wildlife v. U.S. Border Patrol*, 623 F.Supp.2d 83, 90-91 (D.D.C. 2009); *Wiener v. FBI,* 943 F.2d 972, 977–79 (9th Cir. 1991); *Halpern v. FBI*, 181 F.3d 279, 293-94 (2d Cir. 1999).

Regarding the examples challenged herein, FERC has failed to *show* (as opposed to merely allege) that the information is protected. The withheld information appears on its face to be at best "peripheral to actual policy formulation", and therefore is not properly withheld. *Ethyl Corp. v. EPA*, 25 F.3d 1241, 1248 (4th Cir. 1994). It has no discernible connection to any identifiable agency policy or proposal, *compare Vaughn v. Rosen,* 523 F.2d 1136, 1143 (D.C.Cir. 1975) (finding an agency's efforts to evaluate and change its personnel policies, rules and standards too amorphous to qualify as a process for the purposes of the deliberative process privilege), and even if it did somehow indirectly affect agency policy, that would not be sufficient to justify withholding it. To be privileged, communication must not only be "antecedent to the adoption of an agency policy," *Jordan v. U.S. Dept. of Treasury*, 591 F.2d 753, 774 (D.C. Cir. 1978); *see Houser v. Blank,* No. 10-3105, Slip Copy, 2013 WL 873793, *3 (S.D.N.Y. March 11, 2013) (communications that "mostly . . . reflect decisions that had already been made" are not protected); *Badhwar v. U.S. Dept. of Justice*, 622 F.Supp. 1364, 1372 (D.D.C. 1981) ("There is nothing predecisional about a recitation of corrective action already taken"), but also must be deliberative, *i.e.*, "a *direct* part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Vaughn v. Rosen*, 523 F.2d 1136, 1143-44 (D.C. Cir. 1976) (emphasis added).

*"*In determining whether a given document is predecisional, courts have considered whether the agency can 'pinpoint the specific agency decision to which the document correlates ... and ... verify that the document precedes, in temporal sequence, the `decision' to which it relates.' [citing *Ethyl Corp. v. U.S. Envtl. Prot. Agency,* 25 F.3d 1241, 1248 (4th Cir. 1994)] (quoting *Providence Journal Co. v. U.S. Dep't of the Army,* 981 F.2d 552, 557 (1st Cir. 1992))." *Fox News Network, LLC v. U.S. Dept. of Treasury*, 911 F.Supp.2d 261, 278 (S.D.N.Y. 2012). *accord In re Delphi Corp.*, 276 F.R.D. 81 (S.D.N.Y. 2011). An agency *"*needs to identify the particular policy decisions to which the various documents correspond. ...[I]n [*Tigue v. U.S. Dep't of Justice,* F.3d 70, 76 (2d Cir.2002)] the Second Circuit also stated that, 'while the agency need not show ex post that a decision was made, it must be able to demonstrate that, *ex ante*, the document for which ... privilege is claimed related to a specific decision facing the agency.' *Tigue,* 312 F.3d at 80 (discussing *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1094 (9th Cir. 1997))." *Fox News*, 911 F.Supp.2d at 278. The agency "needs to identify the particular decisions to which the documents correspond. In the alternative, if a decision was not made based upon the document, [the agency] must identify the specific issue facing the agency that the document addressed and note that a decision was not made." *Id*. Regarding this standard, FERC's production failed on all withholdings identified herein, which we challenge.

The *Fox News* court also detailed how, "[t]o be deliberative, a document must actually be 'related to the process by which policies are formulated.' *Grand Cent. P'ship, 166 F.3d at 482. ...* [The agency] must actually identify and explain the role that a given document has played in the decisionmaking process. *See, e.g., Coastal States Gas Corp. v. Dep't of Energy,* 617 F.2d 854, 868 (D.C.Cir.1980) ('agency has the burden of establishing what deliberative process is

involved, and the role played by the documents in issue in the course of that process')." *Fox News*, 911 F.Supp.2d at 279.

Moreover, not every report or memorandum qualifies as deliberative, even when it reflects the author's views on policy matters. *See Hennessey v. U.S. Agency for Int'l Development*, No. 97-1133, 1997 WL 437998, *5 (4th Cir. Sept. 2, 1997) (determining that "report does not bear on a policy-oriented judgment of the kind contemplated by Exemption 5," *citing Petroleum Info. Corp. v. Dept. of Interior*, 976 F.2d 1420, 1437 (D.C. Cir. 1992)); *Judicial Watch v. Reno*, 154 F.Supp.2d 17, 18 (D.D.C. 2001) ("It is not enough to say that a memorandum 'expresses the author's views' on a matter [because the] role played by the document in the course of the deliberative process must also be established").

These analyses apply to all withholdings identified below.

a. FERC Improperly Withholds as Deliberative Non-Exempt Material in the Form of Discussions of Media Inquiry or Coverage, and Information That is Not "Inter-Agency" or "Intra-Agency" Communication (Shared with Non-Privileged Parties)

FERC improperly withheld discussions about media coverage or inquiry,[2] and correspondence without outside parties,[3] as privileged deliberative information under b5. Taking the former first, by all contextual appearances FERC merely redacted internal discussion regarding PR, or promotion of or media inquiry about the above-cited lobbying campaign, without explaining how producing the communication would reveal any deliberations about developing agency policies. Also, discussion about, *e.g.*, possible responses to press inquiries that contain agency rationales

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[2] *See, e.g.*, document ## 169 (*see* release Part 2, p. 260), 169 (Release Part 2, p. 260), 174 (what we assume to be but is not labeled and so otherwise #174 is not accounted for; Release Part 2, p. 269), 234 (Release Part 3, p. 26).

[3] *See, e.g.*, document ## 85 (Release Part 1, p. 212), 129 (Release Part 1, pp. 324, 326), 130 (Release Part 1, pp. 329, 331), 138 (Release Part 1, p. 343), 214 (Release Part 2, p. 383).

are not protected by Exemption 5 when they do not pertain directly to identified, developing agency policies. *See* discussion of *Fox News, Ethyl Corp. et al., supra.*

While it may be true that such communications regarding or in response to media inquiries reveal agency officials' "discussion of issues and approaches to communicating with the press," and inherently reflect "a decision about public representation of the Agency," those are not a sufficient ground for withholding them, since what Exemption 5 aims to protect is discussion of policy, not PR, not managing a nomination, not participating in a lobbying campaign to gain a nominee's Senate confirmation, which the withheld information appears to be.

The subject FERC seeks to withhold information on – a public affairs/lobbying firm's campaign that FERC is participating in, and subsequent media inquiry, about a recent nominee to chair FERC – have at best precisely such a peripheral relationship (and probably none at all).

This is fatal to FERC's position, because the burden of proof is on the agency to prove both elements of the deliberative process privilege. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980). The agency must identify the larger policy-making process to which the document contributes. *See Access Reports v. Dept. of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1991).

As to the latter class of withheld records addressed here, FERC improperly withholds documents that are not "Inter-Agency" or "Intra-Agency" communications as required by Exemption 5. It is axiomatic that privilege does not survive the inclusion of parties not subject to the privilege.

Instead, regardless of whether they would otherwise be privileged, communications are not protected by Exemption 5 unless they are between, or within, agencies covered by FOIA, *i.e.,* "inter-agency" or "intra-agency" communications. 5 U.S.C. § 552(b)(5)(Exemption 5 protects only "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.") If a sender or recipient is not employed by a covered executive-branch agency, the communication is not covered by Exemption 5, even if it would otherwise be covered by the deliberative-process privilege. *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001); *Center for Int'l Envtl. Law v. Office of the U.S. Trade Rep.,* 237 F. Supp. 2d 17, 25-27 (D.D.C. 2002).

Yet FERC frequently improperly withholds communications under Exemption 5 even when they are exchanged with outside parties, specifically Ron Binz who despite his nomination remains at relevant times the principal of Public Policy Consulting (as his own emails produced by FERC attest).[4] Any privilege has been waived by sharing it with people outside the agency. That does not satisfy FERC's burden of proving that each element of the deliberative process privilege applies. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

[4] *See* FN 4, *supra*. This communication with a self-interested outside party cannot be privileged. *See Merit Energy v. Dept. of Interior*, 180 F.Supp.2d 1184, 1191 (D. Colo. 2001).

b. FERC Improperly Withheld Records in Full Without Explaining Why it Could Not produce the Records in Redacted Form, Given its Manifest Ability to Redact and Produce Even the Minimal Information When it Wishes to Do So.

Unfortunately, FERC decided to withhold more than two dozen emails, text messages or instant messages in full,[5] although the law was very clear even before the ostentatious claims of this being "the most transparent administration, ever", and vows to err on the side of disclosure as never before: all factual information must be released unless it is simply impractical to segregate it, including, *e.g.*, To, From, Date, and Subject information. Withholding these (apparently) emails in full is also a facially impermissible practice given the simplicity of redacting such records' factual information.

FERC does not provide any individualized justification for withholding the fully-withheld documents in their entirety. Under 5 U.S.C. § 552(b), any "reasonably segregable" information must be disclosed—that is, information that can be separated from the rest of a document—even if the document is otherwise exempt from disclosure, unless the exempt and non-exempt portions are "inextricably intertwined with exempt portions." *Trans–Pacific Policing v. U.S. Customs Serv.*, 177 F.3d 1022, 1028 (D.C.Cir.1999) (court has "an affirmative duty to consider the segregability issue *sua sponte*."); *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C.Cir.1977). An agency must provide a "detailed justification," not just "conclusory statements" to demonstrate that it has released all reasonably segregable information. *Mead Data*, 566 F.2d at 261. "The government must show with reasonable specificity why a document cannot be further segregated." *Marshall v. F.B.I.*, 802 F.Supp.2d

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[5] *See, e.g.*, document ## 26, 27, 29, 30, 31, 70, 100-02, 104, 106, 108, 111, 112, 114, 116, 118-123, 127, 131, 132, 134, 142, 147, 150-153, 157, 161, 171, 176, 178, 180, 251.

125, 135 (D.D.C. 2011); *see Quinon v. FBI*, 806 F.3d 1222, 1227 (D.C. Cir. 1996) ("reasonable specificity" required). FERC has done nothing of the sort.

Further odd is that, when it wishes to do so, FERC releases even the tiniest bits of documents, eliminating all substantive discussion among FERC employees, and leaving in nothing but the sender and recipients, date and time of transmission, and subject line, or portions thereof.[6] Similarly, it withheld almost everything in many other messages (see, *infra*). Yet despite FERC's ability to redact any conceivably sensitive material, it chose to withhold more than two dozen documents in their entirety. This is improper and must be overturned on appeal.

c. FERC Improperly withheld entire blocs of discussion without explaining why it could not produce portions of the fully withheld (in substance) text in redacted form, given its manifest ability to redact and produce even the minimal information when it wishes to do so.

FERC also decided to withhold many more emails *substantively* in full, or majority/major part,[7] and again without providing any individualized justification for withholding the fully-withheld documents in their entirety. We repeat our discussion from immediately above as well as

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[6] *See, e.g.*, document # 46 (Release Part 1, p. 133, titled, "My favorite Ron Binz-related Questions so far"), the entire substance of which non-deliberative email is implausibly withheld in full as "deliberative process antecedent to the adoption of an agency policy." *See also* document ## 143 (claiming an exemption under b5 although where the redaction is is not clear), 144 (several pages with substantial redactions), 214 (Release Part 2, p. 382).

[7] *See* FERC withholding most or great parts of document ## 10 (Release Part 1, p. 48, see near "Quoted text hidden"), 32 (Release Part 1, p. 101), 32, 46, 48 (Part 1, p. 136; due to FERC not including document ## 48-50, Part 1 pp. 136-140, it is unclear whether this is part of document # 48 or a continuation of document 47; we presume from the available evidence is it document 48), 70, 85, 99 (Release Part 1, pp. 279-80), 105, 129 (Release Part 1, pp. 324, 326), 130 (Release Part 1, p. 330 ["Quoted text hidden"], 331 [redaction b5]), 138, 143, 179 (Release Part 2, p. 279), 182 (Release Part 2, p. 291), 191 (Release Part 2, p. 350).

discussion of the requirement that FERC show it is directly related to actual policy formulation of the kind contemplated by Exemption 5, pp. 10-12, *supra*.

d. FERC Failed to Produce Attachments, Search or Produce from the Office of the Chairman

FERC's own production indicates it did not produce attachments as required,[8] and either did not search or otherwise did not produce records from the Office of the Chairman,[9] as also required under the terms of our request.

As regards the latter, there is no evidence FERC in fact searched or produced from the Chairman's office and evidence it did not. FOIA requires an agency to make a reasonable search of records, judged by the specific facts surrounding each request. *See, e.g., Itrurralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003); *Steinberg v. DOJ*, 23 F.3d 548, 551 (D.C. Cir. 1994). The term "search" means to "review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request." 5 U.S.C. § 552(a)(3). *See also Iturralde*, 315 F.3d at 315; *Steinberg,* 23 F.3d at 551.

A search must be "reasonably calculated to uncover all relevant documents." *See, e.g., Nation Magazine v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995). In determining whether or not a search is "reasonable," courts have been mindful of the purpose of FOIA to bring about the broadest possible disclosure. *See Campbell v. DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1999) ("reasonableness" is assessed "consistent with congressional intent tilting the scale in favor of

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[8] *See, e.g.*, document ## 69, 201, 209, 214, 219, 221, 230, 231.

[9] *See, e.g.*, document ## 11, 12, 24, 69, 139, 145, 155, 234, showing in their threads correspondence with FERC Chairman Jon Wellinghoff, which email did not turn up in the document production. In fact, no responsive emails apparently produced by Mr. Wellinghoff appear in the production.

disclosure"). The search must be "'adequate'" on the "'facts of this case.'" *Meeropol v. Meese*, 790 F.2d 942, 951 (D.C. Cir 1986) (internal citations omitted).

The reasonableness of the search activity is determined ad hoc but there are rules, including that it cannot be cursory. *See Citizens For Responsibility and Ethics in Washington v. U.S. Department of Justice*, 2006 WL 1518964 *4 (D.D.C. June 1, 2006) ("CREW") ("The Court is troubled by the fact that a mere two hour search that started in August took several months to complete and why the Government waited [for several months] to advise plaintiff of the results of the search."). Reasonable means that "all files likely to contain responsive materials . . . were searched." *Cuban v. SEC*, 795 F.Supp.2d 43, 48 (D.D.C. 2011).

Courts inquire into both the form of the search *and* whether the correct record repositories were searched. "[T]he agency cannot limit its search to only one record system if there are others that are likely to turn up the information requested." *See e.g., Oglesby v. Department of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). An unsupervised search allowing for abuses is not reasonable and so does not satisfy FOIA's requirements. See *Kempker-Cloyd v. Department of Justice*, W.D. Mich. (1999). An agency must search "those files which officials expec[t will] contain the information requested." *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 30 n. 38 (D.D.C. 1998). Agencies cannot structure their search techniques so as to deliberately overlook even a small and discrete set of data. *See Founding Church of Scientology v. NSA*, 610 F.2d 824, 837 (D.C. Cir. 1979) (agency cannot create a filing system which makes it likely that discrete classes of data will be overlooked).

Accordingly, and in consideration of FOIA's purposes and prejudices toward full disclosure, when an agency withholds or denies the existence of requested documents that it is reasonable to

believe exist, the burden of proof is placed squarely on the agency, with all doubts resolved in favor of the requester. *See, e.g., Federal Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 352 (1979). This burden applies across scenarios and regardless of whether the agency is claiming an exemption under FOIA in whole or in part. *See, e.g., Tax Analysts*, 492 U.S. at 142 n.3; *Consumer Fed'n of America,* 455 F.3d at 287; *Burka*, 87 F.3d at 515.

Among the burdens are the agency's burden to demonstrate that it has complied fully with its obligations to conduct an adequate search, to release all nonexempt records, and to justify its withholding of responsive records. *See* 5 U.S.C. § 552(a)(4)(b); *U.S. Dept. of Justice v. Reporters Committee for Freedom of Press*, 489 U.S. 749, 755 (1989).

Agencies must satisfy this burden by submitting declarations that demonstrate "beyond material doubt . . . that it has conducted a search reasonably calculated to uncover all relevant documents." *CREW v. National Archives and Records Administration*, 583 F.Supp. 2d 146, 167 (D.D.C. 2008) (quoting *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). Moreover, "if a review of the record raises substantial doubt, particularly in view of 'well-defined requests and positive indications of overlooked materials,' summary judgment is inappropriate." *Iturralde v. Comptroller of the Currency*,315 F.3d 311, 314 (D.C. Cir. 2003) (quoting *Valencia-Lucena*, 180 F.3d 321, 326 (D.C. Cir. 1999)). "To prevail on summary judgment, then, the defending 'agency must show beyond material doubt [] that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Morley v. CIA*, 508 F.3d 1108, 1114 (D.C. Cir. 2007) (quoting *Weisberg v. U.S. Dept. of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983)).

FERC's own production turns up records amid email threads from employees not in the Office of the Chairman, the original of which would also rightly be produced from the Office of

the Chairman, yet were not. This establishes sufficient for these purposes, where the Commission nonetheless has the burden of establishing that it conducted a reasonable search, that it did not do so. On its face, therefore, and for the reasons stated, these factors also make the production improper and requires its reversal on appeal.

e. Other Problems with FERC's Production

Finally, in addition to problems with FERC's numbering or production of certain documents (see FN ## 2, 7, *supra* and several appearances of "Quoted text hidden", *each such example of both of which* we challenge as evidence of an improper production and for which we request an explanation as to why these do not indicate an improper production, we also note certain traits about Doc # 105 (Release Part 1, p. 288) indicating the document is being withheld in great part with no indication of redaction. This is in fact merely an excellent exemplar of many such examples, where the provided text begins half-way or more down the page; in this case, the document also reveals in the lower right hand corner that only half of page 3 of 4, and page 4 of 4, of that thread have been provided. We challenge this and each such instance in FERC's production request an explanation of how each is not as it appears, of parts of responsive records being provided without indication of redaction(s) being applied or claimed.

FERC Must Establish it Used Reasonable Methods in Searching for Responsive Records

Regarding these explanations required to establish that the above-described defects are not each evidence of an insufficient production, in order to demonstrate it satisfied its burden, for example in order to obtain summary judgment in an action seeking records in a case such as the instant matter, an agency's declarations ordinarily must identify the types of files that an agency maintains, state the search terms that were employed to search through the files selected for the

search, and contain an averment that all files reasonably expected to contain the requested records were, in fact, searched. *Oglesby v. United States Dept. of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990).

FERC must show "that the search method was reasonably calculated to uncover all relevant documents." *Id*. ("[A]t the very least, [the agency] was required to explain in its affidavit that no other record system was likely to produce responsive documents.") The description of a search is inadequate when it fails to describe in any detail what records were searched, by whom, and through what process. *Steinberg v. U.S. Dept. of Justice*, 23 F.3d 548, 552 (D.C. Cir. 1992). *See The Nation Magazine, Washington Bureau v. United States Customs Service*, 71 F.3d 885, 890-891 (D.C. Cir. 1996) (affidavit that described more than 113 systems of records in detail, explained the methodology for determining which systems would be searched, and the terms of search held sufficient to support adequacy of search claim). Moreover, an agency declaration that merely states which offices were contacted in an attempt to locate responsive records, but that does not describe the searches undertaken or the file systems searched is inadequate. *Antonelli v. Bureau of Alcohol, Tobacco & Firearms*, 2005 U.S. Dist. LEXIS 17089 (D.D.C. 2005). *See CREW v. National Archives*, 583 F. Supp. 2d 146, 168 (D.D.C. 2008) (holding that agency conducted reasonable search based on declaration which described search methods used, location of specific files, description of files containing responsive information, and names of personnel conducting search). This plainly applies to FERC's sorting and editing, as well.

The initial burden for demonstrating an adequate production rests with the government and its supporting declarations are entitled to a presumption of good faith. *SafeCard Services, Inc. v.*

SEC, 926 F.2d 1197, 1200 (D.C. Cir. 1991). FERC has provided no demonstration of the sort required to dispense with actions such as this request.

Further, "The court applies a 'reasonableness' test to determine the 'adequacy' of a search methodology, consistent with congressional intent tilting the scale in favor of disclosure." *Morley*, 508 F.3d at 1114 (quoting *Campbell v. United States DOJ*, 164 F.3d 20, 27 (D.C. Cir. 1998)). The District Court for the District of Columbia has held that it "will evaluate the search's reasonableness based on what it knows at the conclusion of the search rather than on the agency's speculation at the initiation of the search." *Institute for Policy Studies v. CIA*, 885 F. Supp. 2d 120, 139 (D.D.C. 2012).

Despite all of this, we see do not see emails produced from the Chairman's office, yet at least one email that would had been produced had FERC searched and produced from that Office appears in an email thread in document # 243, and only there. On its face, therefore, FERC has created a presumption that it failed to search the Chairman's office as requested. Accordingly, on appeal we challenge the adequacy of FERC's search -- and FERC's response or failure to address such concerns during the initial determination stage -- should be considered in your analysis.

These withholdings do not satisfy FERC's burden of proving that each element of the deliberative process privilege applies. *Coastal States Gas Corp. v. Dept. of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

VI. CONCLUSION

FERC's Initial Determination improperly denied in part II's and ELC's request by improperly withholding information, without demonstrating or otherwise supporting the withholding, on the grounds of deliberative process. By statute and regulation FERC is obligated to reverse this

initial determination, and provide non-exempt content of responsive records unless withholding is justified by an express exemption from FOIA, justifying any redactions.

We request the Commission proceed on this appeal with the required bias toward disclosure, consistent with the law's clear intent, judicial precedent affirming this bias, and President Obama's directive to all federal agencies on January 26, 2009. Memo to the Heads of Exec. Offices and Agencies, Freedom of Information Act, 74 Fed. Reg. 4683 (Jan. 26, 2009) ("The Freedom of Information Act should be administered with a clear presumption: in the face of doubt, openness prevails. The government should not keep information confidential merely because public officials might be embarrassed by disclosure, or because of speculative or abstract fears").

If you have any questions please do not hesitate to contact the undersigned.

Respectfully submitted,

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