



**ANDREW M. BATEMAN**  
**Deputy Executive Director**

Office of Regulatory Staff  
1401 Main Street  
Suite 900  
Columbia, SC 29201  
(803) 737-0800  
ORS.SC.GOV

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**VIA U.S. AND ELECTRONIC MAIL**

Matthew Christiansen  
General Counsel  
Federal Energy Regulatory Commission  
Room 10A-01  
888 First Street, NE  
Washington, DC 20426  
FOIAAPPEALS@ferc.gov

David Morenoff  
Acting General Counsel  
Federal Energy Regulatory Commission  
Room 10A-01  
888 First Street, NE  
Washington, DC 20426  
david.morenoff@ferc.gov

RE: June 18, 2023, Freedom of Information Act Request filed by the South Carolina  
Office of Regulatory Staff;  
FOIA No. FY23-100

Dear Messrs. Christiansen and Morenoff:

Pursuant to the Freedom of Information Act, 5 U.S.C.A. § 552 *et seq.* (“FOIA”) and 18 C.F.R. § 388.110(a)(1), and in accordance with instructions set forth in the Federal Energy Regulatory Commission’s (“FERC”) letter dated August 1, 2023, the South Carolina Office of Regulatory Staff (“ORS”) appeals FERC’s decision to deny the disclosure of certain requested public documents and information. As discussed herein, FERC improperly redacted certain public documents and entirely declined to produce other public documents that are responsive to ORS’s request. The redacted information must be disclosed pursuant to FOIA because the claimed exemptions relied upon by FERC are unjustified and inapplicable.

**INTRODUCTION**

On May 23, 2023, the Environmental Protection Agency (“EPA”) published in the Federal Register a proposed rule entitled “New Source Performance Standards for Greenhouse Gas emissions From New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units,

Emission Guidelines for Greenhouse Gas Emissions From Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule” (“EPA Proposed Rule”).<sup>1</sup> By e-mail dated June 16, 2023, ORS requested, pursuant to FOIA, that FERC produce any and all documentation and correspondence related to consultation between the EPA and FERC regarding the EPA Proposed Rule.

On August 1, 2023, FERC responded to ORS’s request stating that it “identified 29 email communications and other documents that may be responsive to [its] request.”<sup>2</sup> However, FERC advised that it had redacted six of these documents pursuant to FOIA Exemption 5<sup>3</sup> and 6,<sup>4</sup> and was withholding 23 documents in full pursuant to Exemption 5. ORS submits that the stated Exemptions are inapplicable to the documents requested and that FERC’s reliance on these Exemptions is erroneous and misplaced. Accordingly, ORS appeals this decision to request FERC revise its FOIA response and produce the documents in full as requested.

### **EXEMPTION 5**

FERC’s decision to withhold certain requested public information is premised upon Exemption 5, 5 U.S.C.A. § 552(b)(5), also known as the “deliberate process privilege,” which exempts from FOIA disclosure of any “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.” Based on FOIA’s statutory language and intent, however, Exemption 5 does not apply to these documents for several reasons.

#### **A. Lack of Information to Support Finding of Intra/Inter Agency Communication**

To qualify under Exemption 5, the agency must first establish the communication is intra-agency or inter-agency.<sup>5</sup> ORS is unable to verify if this element has been met because a substantial number of email addresses have been redacted in the documents provided and other documents have been withheld entirely. Thus, it is impossible for ORS to determine whether the documents responsive to its request actually are intra-agency or inter-agency as opposed to documents exchanged with entities external to FERC, in which case this element would not have been met.

#### **B. Materials are Not Privileged**

The information also must be considered “privileged” – meaning both pre-decisional and deliberate –to fall within Exemption 5.<sup>6</sup> Generally, factual information is not exempt because the

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<sup>1</sup> 88 Fed. Reg. 33,240 (May 23, 2023).

<sup>2</sup> Letter from Benjamin Williams, Acting Director, FERC Office of External Affairs to Andrew Bateman, Deputy Executive Director, South Carolina Office of Regulatory Staff (Aug. 1, 2023).

<sup>3</sup> 5 U.S.C.A. § 552(b)(5) (2023).

<sup>4</sup> 5 U.S.C.A. § 552(b)(6) (2023).

<sup>5</sup> *Id.*

<sup>6</sup> *Petroleum Info. Corp. v. United States Dep’t of Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992).

release of such information would not expose the deliberations or opinions of agency personnel, and<sup>7</sup> only information that expresses an opinion or recommendation on a legal or policy matter is exempt.<sup>8</sup>

As to the e-mails provided, some of the redacted information appears purely factual rather than deliberative. The e-mails appear to contain redacted information related to scheduling meetings between multiple agencies and purely factual updates influencing the scheduling of said meetings.<sup>9</sup> This information does not expose the opinions, advice, or recommendations by the agency in a decision-making context, which is required to be exempt from FOIA.<sup>10</sup> The remaining redacted information is contained in e-mails where FERC has redacted the entirety of the e-mail message, rendering the communications useless and providing the ORS with no context to discern the nature of such correspondences.<sup>11</sup>

As to the documents withheld in whole under Exemption 5, FERC relies upon *Russell v. Department of Air Force* to claim the documents were prepared in anticipation of the EPA Proposed Rule,<sup>12</sup> arguing release of the information would discourage officials from consulting with one another during the decision-making process.<sup>13</sup> In *Russell*, pages of a draft manuscript were withheld because they pertained to the deliberate intra-agency process of writing the Office of Air Force History's ("OAFH") Rachhand history.<sup>14</sup> Once finished, the OAFH's Rachhand history represented the Air Force's official statement concerning herbicide use in the Vietnam conflict.<sup>15</sup>

This information requested is distinguishable from *Russell* because the Office of Management and Budget ("OMB") and FERC – two external entities that engaged in discussions with the EPA about the EPA Proposed Rule – are not parties within the EPA's deliberate decision-making process. See *City of Virginia Beach v. United States Dep't of Commerce*, 995 F.2d 1247, 1253 (4th Cir. 1993) (emphasizing the need to view the documents in the context in which they were generated). Correspondence and draft documents shared between the OMB and FERC do not reflect any part of the EPA's own preliminary opinions or drafting thoughts as to the EPA's

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<sup>7</sup> *Vaugh v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975).

<sup>8</sup> *Id.*

<sup>9</sup> See email from redacted to Jignasa Gadani and David Ortiz dated April 18, 2023, 1:07 PM; Email from Sofie E. Miller to redacted and Ellen brown dated Tuesday, April 18, 2023, 10:48 AM; email from redacted to redacted, David Ortiz, David Morenoff, Jignasa Gadani, and redacted dated April 19, 2023, 9:59 AM.

<sup>10</sup> *Loving v. DOD*, 550 F.3d 32, 38 (D.C. Cir. 2008) (quoting *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001)).

<sup>11</sup> See email from Steph J. Tatham to Heidi Cohen et. al. dated April 13, 2023, 11:27 AM and email from Steph J. Tatham to Heidi Cohen et. al. dated March 15, 2023, 5:27 PM.

<sup>12</sup> See FOIA Response Letter to Andrew Bateman dated August 1, 2023, at 3:42 P.M.

<sup>13</sup> *Id.*

<sup>14</sup> *Russell v. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982).

<sup>15</sup> *Id.*

proposed rule. Nor it does not appear from the information provided that FERC is acting as a consultant to the EPA. The ORS has no indication that FERC's intra-agency documents were prepared for, or in furtherance of aiding the EPA in their rule making process. Neither were the documents prepared by FERC for purposes of FERC's own rulemaking. Furthermore, in a letter to the EPA, FERC conceded conversations between FERC staff and the EPA related to the EPA's proposed rule, were not privileged.<sup>16</sup> FERC petitioned the EPA to extend their comment period arguing "the opinion of Commission staff, however, does not and cannot constitute the opinion of the Commission." It follows that the withheld communications between "non-senior staff," as labeled by FERC,<sup>17</sup> do not constitute the opinions of the Commission and are not deliberative. Given these considerations, the documents withheld in their entirety do not meet the requirements needed to be exempt.

### C. Failure to Show No Reasonably Segregable Material in Withheld Documents

Beyond the applicability of Exemption 5, FERC must prove the non-exempt material in the withheld documents is not reasonably segregable from the exempt material.<sup>18</sup> FERC relies upon *STS Energy Partners LP v. FERC*, claiming the factual information contained within the withheld documents are inextricably intertwined with the deliberative material so that withholding the documents in their entirety is appropriate.<sup>19</sup> In *STS Energy*, FERC's explanation was almost identical to this fact pattern, stating "there [was] no additional segregable factual information that could be released without revealing protected information."<sup>20</sup> The Court rejected this explanation finding it conclusory and insufficient to justify withholding.<sup>21</sup> As a result, the Court denied FERC's motion for summary judgment and required the agency to either release segregable portions of the withheld documents or submit more specific information to justify withholding the entirety of the documents.<sup>22</sup>

In this instance, FERC fails to provide sufficient detail as to the ability to segregate the deliberative material from the factual information. *See Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. 1977) (finding "agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts"). FERC's one sentence explanation fails to describe the proportion of exempt to non-exempt material within the documents and how the exempt material is dispersed throughout. *See id.* (stating "in addition to a statement of its reasons, an agency should describe what proportion of the information in a document is non-exempt and how that material is dispersed throughout the document"). It is wholly unconvincing all 23 withheld emails and

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<sup>16</sup> Comments submitted by the Federal Energy Regulatory Agency, posted by the Environmental Protection Agency (Aug. 15, 2023) <https://www.regulations.gov/comment/EPA-HQ-OAR-2023-0072-0707>.

<sup>17</sup> *See* FOIA Response Letter to Andrew Bateman dated August 1, 2023, at 3:42 P.M.

<sup>18</sup> *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977).

<sup>19</sup> *See* FOIA Response Letter to Andrew Bateman dated August 1, 2023, at 3:42 P.M.

<sup>20</sup> *STS Energy Partners LP v. FERC*, 82 F.Supp.3d 323, 331 (D.D.C. 2015)

<sup>21</sup> *Id.*

<sup>22</sup> *STS Energy Partners LP v. FERC*, 82 F. Supp. 3d 323, 330 (D.C. Dist. 2015).

documents contain such an overwhelming amount of deliberative information dispersed evenly throughout so as to make withholding the documents in their entirety necessary.

Furthermore, the emails by FERC reference at least two attachments; yet, FERC failed to produce the documents, either in a redacted or unredacted form. *See* references to an “attached document” in email sent on April 20, 2023, at 2:36 p.m.; and “EPA CAA 111 call notes – 04 21 2023.04242023.docx” attachment to e-mail sent on April 24, 2023, at 4:54 p.m. Because these documents are referenced and incorporated in the documents, FERC was required to produce them as responsive to ORS’s Request but failed to do so or to explain why these documents were lawfully segregated from the remainder of the documents produced.

In sum, FERC must separate the allegedly exempt material from the non-exempt material. If after doing so, there are documents withheld in their entirety, FERC must provide ORS with a more detailed and sufficient response explaining how the remaining documents are still not segregable. FERC also must produce the referenced attachments or explain why those documents have been segregated from the rest of the production as required by FOIA.

### **EXEMPTION 6**

FERC’s reliance upon Exemption 6, 5 U.S.C. § 552(b)(6), to justify its redaction of various portions of the documents also is misplaced because such information does not contain “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Congress’s primary purpose in enacting this Exemption was to protect individuals from injury and embarrassment that can result from disclosure of personal information.<sup>23</sup> Again, it does not appear from the context of the documents that Exemption 6 provides a proper basis upon which FERC can protect the redacted information from disclosure.

#### **A. Redacted Information is Not Contained in Personal, Medical, or Similar Files**

The initial threshold question when applying Exemption 6 is whether the “requested information is contained in personnel, medical, or similar files.”<sup>24</sup> It cannot be disputed that the documents do not contain medical or other similar information; instead, FERC undoubtedly asserts that the redacted information somehow constitutes “personal” information. However, the redacted information at issue here is found in e-mail chains that presumably are stored on government agency work – not personal – accounts. By definition then, this information relates to the professional work of public employees and cannot be considered “personal.” And, the e-mails produced were sent to multiple recipients, in some instances as many as 16 different people.<sup>25</sup> It strains credulity that this redacted information is somehow “personal” or overly sensitive.

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<sup>23</sup> *United States Dep’t of State v. Wash. Post Co.*, 456 U.S. 595, 599 (1982).

<sup>24</sup> *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002).

<sup>25</sup> *See* email response sent from Steph J. Tatham on April 13, 2023, at 11:27 A.M.

### B. Release of Redacted Information Would Not Constitute an Invasion of Privacy

Even assuming the information is personal, which ORS does not concede, FERC has failed to satisfy its burden of proving the redacted information falls within the second prong of the Exemption 6 analysis – whether the disclosure of such information would constitute a clear invasion of personal privacy.<sup>26</sup>

In *United States Department of State v. Ray*, the Supreme Court upheld the redaction of names and other identifying information because disclosure would publicly identify the individuals as people who had cooperated with the Department of State in a confidential investigation, thus subjecting the individuals to possible embarrassment or retaliatory action, hence a clearly unwarranted invasion of personal privacy.<sup>27</sup> In *United States Department of Defense v. Federal Labor Relations Authority*, the Supreme Court found individuals were entitled to protect the privacy of their home; therefore, disclosure of employee home addresses, which could result in individuals receiving unsolicited and unwanted mail at home, would constitute a clearly unwarranted invasion of privacy.<sup>28</sup> In *National Archives & Records Administration v. Favish*, the Supreme Court also found a victim’s family held a privacy interest in withholding photographs of a suicide victim in order to prevent an intrusion upon their grieving process and memory of the deceased, again clearly an unwarranted invasion of personal privacy.<sup>29</sup>

The aforementioned examples all clearly fall within the scope of an unwarranted invasion of personal privacy Exemption 6 seeks to protect against. In contrast, there is no legitimate fear of an unwarranted invasion of privacy resulting from the release of the redacted information at issue here. The redacted information appears to relate to names and email addresses of employees and/or persons communicating and working with one another in a professional capacity. Identifying these individuals as employees of an agency or other employer tasked with working on the EPA’s proposed rulemaking would not subject the employees to possible embarrassment or retaliation. Nor would the release of the redacted information to ORS, which consists only of names and professional email addresses, result in undue harassment of the individuals at home, violating their right to privacy. Furthermore, FERC identifies some of the redacted information as names of non-senior staff, implying there is a distinction between upper and lower-level employees when disclosing information.<sup>30</sup> ORS is unaware of a statutory provision or case law that supports this distinction as a basis for failing to disclose under Exemption 6. Moreover, even if FERC could analogize a connection between professional names, emails, or phone numbers and privacy, Exemption 6 does not protect against disclosure of every incidental invasion of privacy.<sup>31</sup> Rather, only disclosures that constitute a “clearly unwarranted” invasion of privacy are justifiable under

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<sup>26</sup> *Nat’l Ass’n of Home Builders v. Norton*, 309 F.3d 26, 32 (D.C. Cir. 2002).

<sup>27</sup> *United States Dep’t of State v. Ray*, 502 U.S. 164 (1991).

<sup>28</sup> *United States Dep’t of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487 (1994).

<sup>29</sup> *Nat’l Archives & Records Admin. V. Favish*, 541 U.S. 157 (2004).

<sup>30</sup> See FOIA Response Letter to Andrew Bateman dated August 1, 2023, at 3:42 P.M. stating “the redacted portions of the documents concern names of non-senior staff.”

<sup>31</sup> *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 382 (1976).

Exemption 6, which is not the case presently.<sup>32</sup> Disclosing the redacted information, therefore, would not constitute a clearly unwarranted invasion of privacy and must be done to comply with FOIA's overarching goal of providing transparency of agency action.<sup>33</sup>

### **NO FORESEEABLE HARM**

As it pertains to both Exemptions 5 and 6, FERC also fails to connect release of the redacted information, withheld e-mails, and documents to a reasonably foreseeable harm in the future. An agency may withhold information only if "the agency reasonably foresees that disclosure would harm an interest protected by an exemption."<sup>34</sup> An agency cannot merely speculate harm that could potentially result,<sup>35</sup> but must connect the harms in a meaningful way to the information withheld and how they in particular would be harmed by the disclosure.<sup>36</sup>

As to the withheld materials under Exemption 5, the FERC's proffered "foreseeable harm" of discouraging Executive branch officials from consulting with one another during the decision-making process is too generalized.<sup>37</sup> It is unclear to what decision-making process, authority, or pre-decisional materials FERC is referencing as neither FERC nor OMB are parties to the EPA's rule-making process. FERC does not elaborate on how disclosing communications between it and OMB would discourage consultation in the decision-making process because, again, it is unclear in what capacity FERC is consulting with OMB about the EPA Proposed Rule.

As to the redacted information withheld under Exemption 6, release of such information would not result in the foreseeable harm of inviting unwanted or unwarranted invasions of personal privacy. Most of the redacted information appears to relate to names and email addresses of employees and/or persons communicating and working with one another in a professional capacity. FERC concedes that at least some portion of the redacted information relates to non-personal and instead professional information by identifying some of the information as "non-senior staff," implying this information is of lower-level *employees*. Identifying these individuals as employees of an agency or other employer would not result in the invasion of their personal privacy. Given these considerations, there is no reasonably foreseeable harm with the disclosure of the withheld and redacted information, and it must be released.

### **PUBLIC INTEREST**

Notwithstanding the applicability of FERC's claimed exemptions, the strong public interest in disclosure outweighs FERC's interests in withholding the redacted information and

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<sup>32</sup> *Id.*

<sup>33</sup> *United States Dep't of Defense v. Federal Labor Relations Auth.*, 510 U.S. 487, 495 (1994).

<sup>34</sup> 5 U.S.C. 552(a)(8)(A).

<sup>35</sup> *Id.*

<sup>36</sup> *See Ctr. for Investigative Reporting v. United States Dep't of the Interior*, 613 F. Supp. 3d 327, 335 (D.D.C. 2020).

<sup>37</sup> *Amadis v. United States Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020).

documents. Congress's expressed purpose in legislating FOIA is to facilitate public access to Government documents.<sup>38</sup> By doing so, FOIA's goal of informing the public's understanding of operations and activities of the government, as well as opening agency action to the light of public scrutiny, is accomplished.<sup>39</sup> As such, withholding documents or redacting information is only appropriate when the agency can prove its interest in doing so clearly outweighs this presumption of full agency disclosure.<sup>40</sup>

ORS requested any and all information related to the consultation between the EPA and FERC, as to the EPA's Proposed Rule, in order to better understand FERC's role in the EPA's Proposed Rule. Release of such information would shed light on FERC's involvement during the EPA's rulemaking process. Additionally, the information would inform the public as to the working relationship and/or collaboration between federal agencies in the administrative rulemaking process. It further would be consistent with FERC's guiding principles of due process and transparency ("Paramount in all of its proceedings is the Commission's determination to be open and fair to all participants.") and stakeholder involvement ("The Commission conducts regular outreach to ensure that interested parties have an appropriate opportunity to contribute to the performance of the Commission's responsibilities.").<sup>41</sup> FERC fails to present substantive arguments that outweigh this public interest and more broadly, FOIA's presumptive obligation of full agency disclosure. Therefore, the redacted and withheld materials must be disclosed.

### CONCLUSION

For the foregoing reasons, ORS respectfully requests FERC reconsider its decision to decline the production of unredacted documents as requested and to render its decision on this request within 20 business days as required by FOIA.<sup>42</sup>

Sincerely,



Andrew M. Bateman

cc: Charles A. Beamon, Esquire  
(via U.S. Mail)

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<sup>38</sup> *United States DOJ v. Repters Comm. For Freedom of Press*, 489 U.S. 749, 775 (1989).

<sup>39</sup> *Id.*; *United States Dep't of State v. Ray*, 502 U.S. 164, 175 (1991).

<sup>40</sup> *Avondale Indus. v. NLRB*, 90 F.3d 955, 958-959 (5<sup>th</sup> Cir. 1995).

<sup>41</sup> See <https://www.ferc.gov/what-ferc>

<sup>42</sup> 5 U.S.C. § 552(a)(6)(A)(ii)