

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

INSTITUTE FOR ENERGY RESEARCH)
1155 15th Street, NW)
Suite 900)
Washington, D.C. 20005)

Plaintiff,)

v.)

Case No. 1:22-cv-2756

FEDERAL ENERGY REGULATORY)
COMMISSION)
Federal Energy Regulatory Commission)
888 First Street, NE)
Washington, DC 20426)

Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff INSTITUTE FOR ENERGY RESEARCH for its complaint against Defendant
FEDERAL ENERGY REGULATORY COMMISSION (“FERC”), alleges as follows:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, *et seq.* for declaratory, injunctive, and other relief, seeking immediate processing and release of agency records responsive to Plaintiff’s request.
2. This suit follows the FERC’s failure to comply with the express terms of FOIA, including but not limited to its failure to fulfill its obligation to make a “determination” as that term is defined in *Citizens for Responsible Ethics in Washington v. Federal Election Commission*, 711 F.3d 180, 816 (D.C. Cir. 2013), its failure to respond to Plaintiff’s FOIA request, and its actual or constructive withholding of responsive information in violation of Defendant’s obligations.

PARTIES

3. Plaintiff IER is a non-profit public policy institute organized under the laws of Texas and recognized under section 501(c)3 of the tax code, with research, publication and other media functions, as well as a transparency initiative seeking public records relating to environmental and energy policy and how policymakers use public resources. All of the aforementioned missions include broad dissemination of public information obtained under open records and freedom of information laws.
4. Defendant FERC is an independent agency that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas (LNG) terminals and interstate natural gas pipelines as well as licensing hydropower projects.

JURISDICTION AND VENUE

5. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331 because the defendant is a federal agency and this case is filed in the District of Columbia.
6. Venue is proper in this Court under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e) because the defendant is a federal agency operating in the District of Columbia, because records are likely held or processed in the District of Columbia, and because this suit is filed in the District of Columbia.
7. IER is not required to further pursue administrative remedies before seeking relief in this Court because the Defendant has failed to make a timely “determination” as that term is defined in *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013) in response to the request.
8. IER has no obligation to further exhaust administrative remedies with respect to its FOIA request. See, e.g., *Citizens for Responsibility & Ethics in Wash. v. U.S. Dept. of Justice*, 436

F. Supp. 3d 354, 359 (D.D.C. 2020) (citing various other cases and holding that the statutory text of FOIA relieves plaintiffs of any exhaustion requirement).

INSTITUTE FOR ENERGY RESEARCH'S FOIA REQUEST

9. On August 12, 2022, Plaintiff submitted by fax and email a request to Defendant seeking copies of correspondence between FERC and the White House seeking or otherwise pertaining to consultation with the White House on FERC's processing of any Freedom of Information Act request, from January 21, 2021, through August 12, 2022.
10. Plaintiff's request noted, *inter alia*, that any records responsive to this request are of great public interest for reasons including, e.g., prior assertions to IER by FERC, an independent agency, that FERC's failure to comply with FOIA in its processing of other requests was due to the need for consultation with the White House on what an agency should release and/or consider not releasing. Records responsive to this request will inform the public about this practice generally, and this instance specifically. Close coordination with the White House by FERC Chairman Richard Glick has prompted substantial public, legislative and media interest. See, e.g., "Richard Glick's White House Chats," *Wall Street Journal*, June 12, 2022; Daniel Moore, "Threat of Summer Blackouts Looms Over FERC Chair's Renomination," Bloomberg.com, July 12, 2022; Catherine Morehouse, "GOP Probes FERC Chair Glick meetings with White House," Politico, June 29, 2022.
11. On August 15, 2022, Defendant acknowledged the request by email, assigning it reference number FOIA-2022-0085.
12. Defendant has not responded to the FOIA request that is at issue in this litigation in a timely, proper, or lawful manner. Defendant has yet to provide a timely or lawful "determination" within the meaning of the Freedom of Information Act and the precedents interpreting it.

13. The FOIA provides that a requesting party is entitled to a substantive agency response within twenty working days, including a determination of whether the agency intends to comply with the request. 5 U.S.C. § 552(a)(6)(A)(i). Within that deadline, the agency must also “determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents,” and “inform the requester that it can appeal whatever portion of” the agency’s “determination” is adverse to the requestor. *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).
14. 5 U.S.C. § 552(a)(6)(A) prescribes that the 20-day time limit shall not be tolled by the agency except in two narrow scenarios: The agency may make one request to the requester for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requester, 5 U.S.C. § 552(a)(6)(A)(ii)(I), and agencies may also toll the statutory time limit if necessary to clarify with the requester issues regarding fee assessment. 5 U.S.C. § 52(a)(6)(A)(ii) (II). In either case, the Commission’s receipt of the requester’s response to the Commission’s request for information or clarification ends the tolling period.
15. Defendant FERC has thereby failed to provide timely access to agency records in violation of FOIA.

FIRST CLAIM FOR RELIEF
Duty to Produce Records – Declaratory Judgment

16. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
17. Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

18. Plaintiff has a statutory right to the information it seeks, and Defendant has unlawfully withheld the information.
19. Plaintiff is not required to further pursue administrative remedies.
20. Plaintiff asks this Court to enter a judgment declaring that:
 - a. Plaintiff is entitled to records responsive to its FOIA request described above, and any attachments thereto, but Defendant has failed to provide the records;
 - b. FERC's processing of Plaintiff's FOIA request described above is not in accordance with the law, and does not satisfy FERC's obligations under FOIA;
 - c. FERC must now produce records responsive to Plaintiff's request, and must do so without cost to the Plaintiff.

SECOND CLAIM FOR RELIEF
Duty to Produce Records – Injunctive Relief

21. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
22. Plaintiff is entitled to injunctive relief compelling Defendant to produce the records responsive to the FOIA request described herein.
23. Plaintiff is entitled to injunctive relief compelling Defendant to grant the Plaintiff's request for a fee waiver.
24. Plaintiff asks the Court to enter an injunction ordering Defendant to produce to Plaintiff, within 20 business days of the date of the order, the requested records sought in Plaintiff's FOIA request described above, and any attachments thereto, at no cost to the Plaintiff.
25. Plaintiff asks the Court to order the Parties to consult regarding withheld documents and to file a status report to the Court within 30 days after Plaintiff receives the last of the produced

documents, addressing Defendant's preparation of a *Vaughn* log and a briefing schedule for resolution of remaining issues associated with Plaintiff's challenges to FERC's withholdings, if any, and any other remaining issues.

THIRD CLAIM FOR RELIEF
Costs And Fees – Injunctive Relief

26. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
27. Pursuant to 5 U.S.C. § 552(a)(4)(E), the Court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
28. This Court should enter an injunction or other appropriate order requiring the Defendant to pay reasonable attorney fees and other litigation costs reasonably incurred in this case.

PRAYER FOR RELIEF

Institute for Energy Research respectfully requests this Court:

1. Assume jurisdiction in this matter, and maintain jurisdiction until the Defendant complies with FOIA and every order of this Court;
2. Declare Defendant has violated FOIA by failing to provide Plaintiff with the requested records, by failing to grant Plaintiff's request for a fee waiver, and/or by failing to notify Plaintiff of final determinations within the statutory time limit;
3. Declare that the documents sought by the request, as described in the foregoing paragraphs, are public records under 5 U.S.C. § 552 *et seq.* and must be disclosed;
4. Order Defendant to expeditiously provide the requested records to Plaintiff within 20 business days of the Court's order;

5. Award Plaintiff's attorneys their fees and other litigation costs reasonably incurred pursuant to 5 U.S.C. § 552(a)(4)(E); and
6. Grant such other relief as this Court deems just and proper.

Respectfully submitted this the 12th day of September, 2022,

INSTITUTE FOR ENERGY RESEARCH
By Counsel:

/s/Matthew D. Hardin

Matthew D. Hardin, D.C. Bar No. 1032711

Hardin Law Office

1725 I Street NW, Suite 300

Washington, DC 20006

Phone: (202) 802-1948

Email: MatthewDHardin@protonmail.com