

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

INSTITUTE FOR ENERGY RESEARCH)
 2186 Briarglen Drive)
 Houston, TX 77027,)
)
 Plaintiff,)
 v.)
)
 FEDERAL ENERGY REGULATORY)
 COMMISSION)
 888 First Street, NE)
 Washington, DC 20426,)
)
 Defendant.)

Case No. 22-cv-3003

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 a FOIA request by Plaintiff.
2. This suit follows FERC’s failure to search for, process or produce certain responsive information and/or records in violation of Defendant’s lawful obligations comply with the express terms of FOIA.

PARTIES

3. Plaintiff IER is a non-profit public policy institute organized under the laws of the State 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 which include broad dissemination of public information obtained under open records and freedom

of information laws. It operates as a domestic entity in Texas and as a foreign entity in jurisdictions other than Texas.

4. Defendant FERC is an independent commission of the federal government that regulates the interstate transmission of electricity, natural gas, and oil. FERC also reviews proposals to build liquefied natural gas terminals and interstate natural gas pipelines as well as licensing hydropower projects. FERC operates throughout the United States, including in the Southern District of Texas.

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 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).
8. IER is not required to further pursue administrative remedies with respect to its FOIA request before seeking relief in this Court because FERC 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 respond to the second request.

PLAINTIFF'S AUGUST 22, 2022 REQUEST

9. On August 22, 2022, Plaintiff submitted by fax and email a request to Defendant. The August 22, 2022 request sought copies of all text messages sent over a thirteen-month period to or from Chairman Richard Glick either on his FERC-provided mobile phone or his non-FERC phone which, public records indicate, he, other FERC staff and White House staff use for FERC-related correspondence, if also sent to or from one or more of seven named individuals. The request also sought text messages of one or more among five named FERC officials that were also sent over the same thirteen-month period to or from Chairman Glick, again at any mobile number.

10. Plaintiff's request noted, *inter alia*:

“We understand FERC’s practice is to ask the most conflicted parties (the FERC official at issue) to produce any potentially responsive records rather than conduct a non-conflicted search. We request a non-conflicted and lawful search which necessarily entails methods which do not provide the FERC custodians notice followed by the opportunity to remove messages.

Reasons for the propriety of this course, and that this course is the sole appropriate course, include not only that the non-FERC phone is a reasonably assumed location of potential responsive records given, e.g., Chairman Richard Glick not using his FERC-assigned phone for text messaging (and implausibly low telephonic use) and, e.g., Sarah Venuto using two phones for FERC business. We are confident we can establish FERC knowledge of these facts.”

11. On August 22, 2022, Defendant acknowledged this request, stating, *inter alia*, “This request has been assigned reference number FOIA-2022-0089.”

12. At no time did Defendant respond to Plaintiff's request in the alternative for fee reduction or waiver, on the bases of public interest and its status as a media outlet.
13. Defendant's response was due to this request by September 20, 2022.
14. On September 20, 2022, Defendant took its sole statutory extension of time to respond to IER's request, until October 4, 2022.
15. On the evening of October 4, 2022, FERC acknowledged again by telephone and email that October 4, 2022 was its extended deadline to respond, and stated that it intended to respond at some point outside of that extended statutory deadline.
16. As of the time of this filing, FERC has never provided a determination as that term is defined in relevant precedent of this Circuit.
17. This failure to respond to the August 22, 2022 FOIA request in a timely, proper, or lawful manner includes a failure to provide a timely or lawful "determination" within the meaning of the Freedom of Information Act and the precedents interpreting it.
18. 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).
19. 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.

20. 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

21. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

22. Plaintiff has sought and been denied production of responsive records reflecting the conduct of official business.

23. Plaintiff has a statutory right to the information it seeks, and Defendant has unlawfully withheld the information.

24. Plaintiff is not required to further pursue administrative remedies.

25. 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

26. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
27. Plaintiff is entitled to injunctive relief compelling Defendant to produce the records responsive to the FOIA request described herein.
28. Plaintiff is entitled to injunctive relief compelling Defendant to grant the Plaintiff's request for a fee waiver or injunctive relief prohibiting defendant from collecting any fees related to the FOIA request at issue.
29. 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.
30. 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

31. Plaintiff restates and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.
32. 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.

33. 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 information, by claiming certain records are not public records or are exempt from production under FOIA, by failing to grant Plaintiff's requests for fee waiver, and/or by failing to notify Plaintiff of a required "determination" 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 4th day of October, 2022,

INSTITUTE FOR ENERGY RESEARCH

By Counsel:

/s/ Matthew D. Hardin

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