



Federal Energy Regulatory Commission  
Washington, D.C. 20426  
November 1, 2022

Re: FOIA Appeal, FOIA No. FY22-81

**VIA EMAIL**

Thomas Pyle  
Institute for Energy Research  
1155 15<sup>th</sup> Street NW  
Suite 525  
Washington, DC 20005  
[tpyle@ierdc.org](mailto:tpyle@ierdc.org)

Dear Mr. Pyle:

This letter is in response to your correspondence dated September 23, 2022, in which you appealed the Office of External Affairs (OEA) September 22, 2022 response to your request filed pursuant to the Freedom of Information Act (FOIA) and the Federal Energy Regulatory Commission's (Commission or FERC) FOIA regulations.<sup>1</sup> As explained below, your appeal is denied.

**I. BACKGROUND**

On August 9, 2022, you filed a FOIA request seeking text messages for: Commissioner Allison Clements from December 8, 2020 to August 9, 2022; Sarah Venuto from April 1, 2021 to August 9, 2022; and Elin Katz from October 1, 2021 to August 9, 2022. Specifically, you requested text messages that:

(1) include[] anywhere, one or more of the words a) FERC, b) GHG (in any form, e.g., including also in GHGs), c) FOIA, and/or d) methane, regardless of the identity of any other parties to the correspondence; or

(2) were sent to or from any of the following White House officials i) David Hayes, ii) Ali Zaidi, iii) Gina McCarthy iv) Philip Giudice, v) Arianna Menzelos, and/or vi) Jeff Marootian (again, which c) were sent/received at any time from September 1, 2021 through August 10, 2022, inclusive, regardless of the content of the correspondence.

On September 22, 2022, the Director of OEA (Director) issued a determination letter releasing sixty-nine (69) text messages. Forty-seven (47) text messages were released in full. Seven (7) text messages were released in part with redactions pursuant to

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<sup>1</sup> 5 U.S.C. § 552 (2018); 18 C.F.R. § 388.108 (2022).

FOIA Exemption 5.<sup>2</sup> Fourteen (14) text messages were released in part with redactions pursuant to FOIA Exemption 6.<sup>3</sup> One (1) text message was released with redactions pursuant to FOIA Exemptions 5 and 6. Finally, twenty-one (21) text messages were withheld in full pursuant to FOIA Exemption 5.

In your appeal, you challenge “the Commission’s process adopted in responding to this request, the Director’s withholdings in full, and the redactions made in the production of text messages totaling 69 pages.” Appeal at 1. Specifically, you claim FERC erred in the processing of your request because staff did not conduct an adequate search for responsive material. Appeal at 2-3. Additionally, you assert that the Director improperly redacted non-responsive information and instead should have produced all responsive “threads.” Appeal at 2. You also aver that the OEA Director improperly redacted information under FOIA Exemptions 5 and 6.<sup>4</sup> Appeal at 5-6.

## II. DISCUSSION

### A. The Search was Reasonably Calculated to Uncover Material and Complied with the FOIA

In your appeal, you claim that FERC staff did not search non-FERC phone devices, and you claim that the Commission did not search applications “such as Signal, WhatsApp, etc.” Appeal at 2. Your claims are without merit. Commission staff conducted an exhaustive search for records responsive to your request. Although employee’s text messages on their personal devices are generally not agency records,<sup>5</sup> the officials specified in your request searched their non-FERC phone devices for responsive material and responsive material was identified and produced consistent with FOIA. Moreover, the specified FERC officials did not use any of the other applications you

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<sup>2</sup> 5 U.S.C. § 552(b)(5) (incorporating various privileges, including the deliberative process privilege).

<sup>3</sup> 5 U.S.C. § 552(b)(6) (protecting certain files whose release would constitute a clearly unwarranted invasion of personal privacy).

<sup>4</sup> This determination does not address your concern about “redactions made to phone bills produced in response to this request,” Appeal at 7, because it is not relevant to this request, as no phone bills are responsive to this request.

<sup>5</sup> See *DOJ v. Tax Analysts*, 492 U.S. 136, 144-45 (1989) (agency record exists where the agency “either create[d] or obtain[d]’ the requested materials,” and is “in control of the requested materials at the time the FOIA request is made.”). As it relates to non-FERC devices, neither condition is met.

listed to conduct FERC business. Based on the manner and scope of the search, I find that it was reasonably calculated to identify responsive material and complied with the obligations of the FOIA. *See Weisberg v. U.S. Dep't. of Justice*, 745 F.2d 1476, 1485 (D.C. Cir 1984) (finding that the adequacy of a search is judged by a standard of reasonableness)

### **B. The Director Properly Identified Responsive Records**

In your appeal, you contend that the OEA Director withheld non-responsive material contrary to the FOIA. That was not the case. The OEA Director reviewed text messages and properly identified the distinct records responsive to your request. *See American Immigration Lawyers Association v. EOIR*, 830 F.3d 667 (D.C. Cir. 2016) (providing that while agencies can only withhold exempt material, there “are a range of possible ways in which an agency might conceive of a ‘record.’”). Those distinct records were then processed in response to your FOIA.

You, nonetheless, argue that the OEA Director should have taken a much more expansive view of what constitutes a record because your request sought all relevant “threads.”<sup>6</sup> Assuming *arguendo* that FERC staff should have interpreted the request to include “threads,” FERC captured all required agency records. Notably, an agency is only required to produce records within the thread which constitute agency records. *See, supra* n. 5.

Further, agencies may treat distinct text messages and emails as individual records. *See Citizens for Resp. & Ethics in Wash. v. DOJ*, No. 18-007, 2020 WL 2735570, at \*3-4 (D.D.C. May 26, 2020) (finding that agency appropriately “defined each single email and each single text as ‘a record,’” while rejecting plaintiff’s argument that “a record must constitute only ‘the full native form in which it is maintained by the agency’”); *see also Gellman v. DHS*, No. 16-635, 2020 WL 1323896, at \*3 (D.D.C. Mar. 20, 2020) (affirming agency approach that withheld all unique emails that it deemed non-responsive, including by redacting any non-responsive emails that appear on the same page as responsive ones).

Contrary to your assertion, treating wholly unrelated text discussions or “threads” on a range of topics as responsive to your request merely because they are among responsive agency records, “would do little, if anything, to further FOIA’s goal of enhancing transparency and confidence in the workings of government.” *Brady Ctr. to Prevent Gun Violence v. Dep’t of Justice*, 410 F. Supp. 3d 225, 237 (D.D.C. 2019)

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<sup>6</sup> I note that your request did not seek “threads;” instead, your request was for “copies of all text messages for officials named, below, whether person-to-person or as part of a “chat” ... which includes anywhere, one or more of the words ...”.

(finding that the agency decision to treat attachments as a separate document from the email “did not undermine the ‘integrity’ of the responsive records.”). Therefore, I find the Director’s determination letter appropriately identified responsive agency records.<sup>7</sup>

### C. The Director Properly Invoked FOIA Exemptions 5 and 6

#### 1. FOIA Exemption 5

The Director properly invoked FOIA Exemption 5 to protect text or portions of text messages that were deliberative. Exemption 5 incorporates various privileges, including the deliberative process privilege relied on here. The deliberative process privilege applies when documents are both deliberative and pre-decisional. Courts have consistently held that three policy purposes constitute the basis for the deliberative process privilege: (1) to encourage open, frank discussions on matters of proposed policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. *See Russell v. Dep’t of the Air Force*, 682 F.2d 1045, 1048 (D.C. Cir. 1982); *see also Environmental Protection Agency v. Mink*, 410 U.S. 73, 87 (1972) (recognizing that “[i]t would be impossible to have any frank discussions of legal or policy matters in writing if all such writings were to be subjected to public scrutiny”).

The withheld text messages and redacted text messages reflect deliberations on matters pending before the Commission. These text messages include advice from staff to Commissioners on pending matters before the Commission as well as discussions concerning other Commission actions. As such, they fall squarely within the scope of FOIA Exemption 5. *See, e.g., U.S. Dep’t of the Interior v. Klamath Water Users*

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<sup>7</sup> Your appeal also questions the lack of identifying information for disclosed text messages. Unlike an email, text messages do not always include a name or time stamp. Where it existed staff disclosed such information with each individual text message. Staff, however, are not required to create a document with the information that you seek. *See Krohn v. DOJ*, 628 F.2d 195, 197-98 (D.C. Cir. 1980) (finding that agency “cannot be compelled to create the [intermediary records] necessary to produce” information sought); *see also Bangoura v. U.S. Dep’t of the Army*, 607 F. Supp. 2d 134, 143 n. 8 (D.D.C. 2009) (finding that an agency is not required to create an index of responsive documents at the administrative level). Staff, nevertheless, confirmed, that pages 46 and 47 of disclosed text messages involve Ms. Katz; those with a black background involve Commissioner Clements; and those with a white background involve Ms. Venuto.

*Protective Ass'n*, 532 U.S. 1 (2001); *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 149 (1975); *Odland v. FERC*, 34 F.Supp.3d 3 (D.D.C. 2014) (protecting email and drafts); *Ctr. For Medicare Advocacy v. U.S. Dep't. of Health & Human Servs.*, 577 F. Supp. 2d 221, 236 (D.D.C. 2008) (protecting advice, recommendations, and suggestions). Disclosure would not only expose and harm the deliberative process, it would also create a disincentive for staff to frankly communicate with each other on pending matters, a detrimental consequence that the exemption is intended to preclude.

Moreover, your appeal asserts that the Director erred in withholding 21 text messages in full, including “the parties and dates/times” of such messages pursuant to FOIA Exemption 5. The Director’s approach was reasonable, as the disclosure of names, dates, and times in deliberative documents may undermine the total protection of the exemption. *See Mapother v. Dep’t of Justice*, 3 F.3d 1533, 1537-1538 (D.C. Cir. 1993) (explaining that deliberative process privilege “serves to protect the deliberative process itself, not merely documents containing deliberative material.”). Accordingly, I find that the Director correctly withheld the documents.

## 2. FOIA Exemption 6

Finally, the Director’s properly applied FOIA Exemption 6 to redact lower-level staff names, personal phone numbers, and other personal details.<sup>8</sup> FOIA Exemption 6 protects files that if disclosed would constitute a clearly unwarranted invasion of privacy, including the names, phone numbers, and personal information of private citizens. *See Dep’t of State v. Washington Post Co.*, 456 U.S. 595, 599-601 (1982) (noting Congress’ intent in drafting Exemption 6 provided for use beyond information contained in personnel or medical files); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 152 (D.C. Cir. 2006) (explaining FOIA Exemption 6 applicability to “bits of personal information, such as names and addresses, the release of which could create a palpable threat to privacy.”) (internal quotation omitted). The redactions were made to prevent the foreseeable harm of unwanted intrusions and unwarranted invasions of personal privacy.

## III. CONCLUSION

For the reasons stated above, your appeal is denied. Judicial review of this decision is available to you in the United States District Court for the judicial district in which you live, or in the United States District Court for the District of Columbia, which would be the location of the data that you seek.

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<sup>8</sup> Notably, you claim that “FERC took an affirmative step shielding the identity, e.g., on page 54 of 69 of ‘Neil.’” (Appeal at 5.). That is incorrect.

You may also seek mediation from the Office of Government Information Services (OGIS). Using OGIS services does not affect your right to pursue litigation. 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](mailto:ogis@nara.gov); telephone at 301-837-1996; facsimile at 301-837-0348; or toll-free at 1-877-684-6448.

Sincerely,

MATTHEW CHRISTIANSEN 2022.11.01 09:02:29 -04'00'

Matthew Christiansen  
General Counsel