

**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-3649

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 one FOIA request seeking certain described text messaging correspondence of a FERC Commissioner.
2. The request was prompted by public records showing that the aforementioned FERC Commissioner, Allison Clements, corresponded by text message with an activist-group with whom she was formerly employed to arrange a briefing by the Commissioner of the former employer’s “funder group,” on “FERC as an opportunity,” in which the activist initiated the arrangement by acknowledging the possible impropriety of such use of a public position. The request therefore sought the rest of that correspondence and certain potentially related records.

3. This suit follows the FERC's failure to produce the specifically described records and otherwise its failure comply with the express terms of FOIA, including but not limited to its failure to 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).

PARTIES

4. Plaintiff IER is a non-profit public policy institute organized under the laws of Texas. It has an office in the District of Columbia, and is 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.
5. 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. Its headquarters is located in the District of Columbia.

JURISDICTION AND VENUE

6. 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.
7. 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.

8. 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, and because IER has already exhausted the actual administrative appellate process.
9. 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

10. On November 3, 2022, by email to the address FERC identifies as its FOIA center at foia-ceii@ferc.gov, Plaintiff’s President Thomas Pyle submitted a request to Defendant seeking copies of certain described text messages sent between FERC Commissioner Allison Clements. These included text correspondence with the Energy Foundation’s Meredith Wingate over a two-month period of time, and any text messages using either “funder” or “SustainableFERC,” and text messages with certain White House officials over a particular period of time.
11. Public records indicate that Mr. Glick does not use his FERC-assigned phone for his FERC work, but instead uses a particular mobile device/number with a 202 area code that, the public record shows, he has taken with him and used as his work phone from job to job despite receiving FOIA and ethics training and despite his current position being one in which he is covered by federal recordkeeping laws.

12. At no time has Defendant acknowledged the request or provided Plaintiff IER with a reference number.
13. Defendant FERC did not inform IER of, e.g., the approximate number of potentially responsive records it was processing, by approximately when, or any other information about other potentially responsive records it was processing on a rolling basis.
14. 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).
15. Under the precedent of this Circuit, within the aforementioned statutory deadline, “a ‘determination’ under Section 552(a)(6)(A)(i) must be more than just an initial statement that the agency will generally comply with a FOIA request and will produce non-exempt documents and claim exemptions in the future. Rather, in order to make a “determination” and thereby trigger the administrative exhaustion requirement, the agency must at least: (i) gather and review the documents; (ii) determine and communicate the scope of the documents it intends to produce and withhold, and the reasons for withholding any documents; and (iii) inform the requester that it can appeal whatever portion of the ‘determination’ is adverse.” *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013).
16. 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 may 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). Agencies may also toll the statutory time limit if necessary to clarify with the requester issues regarding the assessment of fees. 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.

17. Defendant did not toll FOIA's 20-day requirement for a substantive response including, e.g., the number of potentially responsive records.
18. Defendant FERC has yet to provide IER the information required by *CREW v. FEC*, 711 F.3d 180, 188 (D.C. Cir. 2013), including but not limited to the approximate number of potentially responsive records it was processing, by approximately when it might process such records, etc. Nor did FERC provide any other information about other potentially responsive records.
19. Defendant FERC has yet to produce responsive records.
20. Defendant FERC has thereby failed to provide timely access to agency records in violation of FOIA. It is actually and/or constructively withholding records from the Plaintiff.

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.
- 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 – Injunctive Relief

- 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 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 6th day of December, 2022,

INSTITUTE FOR ENERGY RESEARCH
By Counsel:

/s/Matthew D. Hardin

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