

**COMMENTSOFTHEREPORTERSCOMMITTEEFORFREEDOMOFTHEPRESS
ANDTHESOCIETYOFENVIRONMENTALJOURNALISTS**

RE:PUBLICACCESSTOCRITICALENERGYINFRASTRUCTUREINFORMATION

November13,2002

Givento:

TheDEPARTMENTOFENERGY
FederalEnergyRegulatoryCommission

Inresponseto:

18CFRParts375and388
DocketNos.RM02-4-000,PL02-1-000
CriticalEnergyInfrastructureInformation
September5,2002
Noticeofproposedrulemakingandrevisedstatementofpolicy

COMMENTSOFTHEREPORTERSCOMMITTEEFORFREEDOMOFTHEPRESS ANDTHESOCIETYOFENVIRONMENTALJOURNALISTSTOPROPOSEDRULES

RE:PUBLICACCESSTOCRITICALENERGYINFRASTRUCTUREINFORMATION

TheReportersCommitteeforFreedomofthePressandtheSocietyofEnvironmentalJournalists submittheseviewstotheFederalEnergyRegulatoryCommissioninresponsetotheSeptember 5,2002,invitationforcomments.Ourremarksconcernitsconsiderationofrulesrevisions regardingpublicaccesstoCriticalEnergyInfrastructureInformation(CEII)thatwouldeliminate unfetteredgeneralpublicaccesstothatinformation.

TheReportersCommitteeisavoluntary,unincorporatedassociationestablishedin1970bynews editorsandreporterstodefendtheFirstAmendmentandfreedomofinformationrightsofthe printandbroadcastmedia. TheReportersCommitteepublishesaquarterlymagazine, *TheNews MediaandTheLaw*,aswellasabi-weeklynewsletter, *NewsMediaUpdate*. Weproduceseveral FreedomofInformationpublicationsincludingguidestouseofthefederalFreedomof InformationAct,touseofeachoftheopenrecordslawsinthe50statesandtheDistrictof Columbia,andaguidetostatelawsonaccesstoelctronicrecords.TheReportersCommittee alsosponsors,asaspecialproject,theFOIServiceCenter,whichadvisesreportersonissuesof accesstogovernmentalrecordsandproceedings.

TheSocietyofEnvironmentalJournalistsistheoldestandlargestorganizationofindividual workingjournalistsdedicatedtoimprovingthequality,accuracyandvisibilityofenvironmental reporting.Foundedin1990andbasedinJenkintown,Penn.,SEJconsistsofmorethan1,200 journalists,educatorsandstudents.SEJ'sprogramsincludeannualandregionalconferences;a dailyenvironmentalnewsservice;aquarterlymagazine;abiweeklystorytipsheet;anannual journalismcontest;eighte-mailistservsandamentoringprogram.WorkingthroughitsFirst AmendmentTaskForce,SEJaddressesfreedom-of-information,right-to-knowandothernews gatheringissuesofconcerntojournalistsreportingonenvironmentaltopics.

Purposeofthesecomments

WeareveryconcernedthattheCommissionisconsideringtheremovalofblocksofinformation itlabelsasCEIIfromthepublic,andthatitwilloveruseexemptionstotheFreedomof InformationActtoblockoffcategoriesofinformation.Weopposethechangessuggestedhere.

Webelievethattheproposalsherecouldinterferewiththepublic'ssaccesstoinformationthat willalertittotheexistenceofvulnerabilitiesinthecriticalinfrastructure.Webelievethatby removingaccessissuesfromtheFreedomofInformationActfunction,theagencywillbeunable tocapturetheexpertiseofitsownaccessprofessionalsinjudgingwhoshouldhaveinformation; thatseparateprocessingwillleadtodelaysinresponse;thatexistingFOIAActexemptionssuffice toprotectagainstlegitimateharmfromdisclosure.Wearegreatlyconcernedthattheagency willdeterminewhoneedstoknowinformationbasedsolelyonbusinessconsiderationswhen

there are others who have strong, legitimate needs to know that will not be addressed.

We address the concerns more fully in our comments below. We also comment specifically on the enumerated proposals.

The tragic event of September 11, 2001 certainly justifies an examination by the federal government of both the quantity and kind of information that it makes public. But decisions to now keep secret the types of information that have previously been available to the public should be made only after conscientious deliberation. The government should withhold information only after a careful, case-by-case determination that identifiable, not speculative, harms could occur from particular disclosures.

Judge Damon Keith of the Sixth Circuit United States Court of Appeals pointed out in a recent decision, "Democracies die behind closed doors." In his decision prohibiting the government from holding deportation hearings in secret, Judge Keith wrote, "When government begins closing doors, it selectively controls information rightfully belonging to the people. Selective information is misinformation... a government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the framers of the constitution." *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002).

The public needs information on the existence of vulnerabilities

The threat of terrorism is real, but the possibility that terrorists will study government records and take advantage of perceived weaknesses is speculative. This is not how they have operated in the past.

However, there exists a definite need for the public to be able to recognize vulnerabilities in order to avert them. Public demand for reliable infrastructure is possibly the greatest assurance that measures will be taken to strengthen them.

Safety of citizens from accidents involving the nation's pipelines and energy facilities is critical. Between 1985 and 1994, 209 people were killed and 1,056 injured due to gas pipeline accidents. Given the vast system of pipelines crisscrossing this country, such accidents are hardly surprising. As one study notes, there are "roughly 1,800,000 miles of gas and liquid pipelines carry hazardous products, including crude oil, refined petroleum, liquefied natural gas, carbon dioxide, and anhydrous ammonia in urban areas and through environmentally sensitive regions across the country."

In August 2000, twelve people were killed when a natural gas pipeline exploded beneath their campsite near the scenic Pecos River near Carlsbad, N.M.. The explosion created a 50-story high flames so strong that it melted paint off firefighting trucks that were only able to come to within half a mile of it.

Records unearthed after the explosion revealed that El Paso Natural Gas, the company that owned the pipeline, had not broken any laws but that the pipeline running under the Pecos River campsite had not been checked for corrosion since it was installed in 1950.

The news media have presented similar tragic stories involving exploded pipelines and hundreds of deaths over the past decade. The public's ability to monitor weaknesses is undoubtedly a factor in any preventative measures that are taken to avoid these accidents.

These proposed guidelines would inhibit the public's and media's ability to see pipeline inspection reports and other information on infrastructure vulnerabilities.

Media organizations have used freedom of information law extensively to expose defects in pipelines and pipeline management. For example, records obtained by the *Austin-American Statesman* after a 1994 pipeline explosion near Corpus Christi, Texas showed that Koch, a large utility company entrusted with keeping its pipelines in proper working order, increased pressure in its pipeline "after being warned about corrosion and weaknesses in the steel." They also showed that the company underestimated the amount of oil spilled, "a miscalculation of some 70,000 gallons" for nine days, an error that probably hindered cleanup efforts.

It is precisely this kind of information that would be closed to the general public under the proposed CEI rules. Whether that information would be useful to terrorists is uncertain, but its usefulness in explaining to the public what did go wrong is inestimable.

375.313 Delegation to the Critical Energy Infrastructure Information Coordinator

We object to this provision. A two-tier system is not adequate for public information needs or necessary to protect information. First, the delegation removes decisions about information access from access professionals. Second, it sets up a structure that can defeat the legally required time limits imposed on agencies that process FOI requests. Third, it misinterprets exemptions available for withholding information. Fourth, it rejects the well-established information rule that information in the public domain is not subject to exemptions from the FOIA Act.

1. FOI staff should be making information access decisions

Release of requested information is presently governed by the time-tested Freedom of Information Act, which has been regularly amended to address shortcomings, has been extensively interpreted by the courts, and has served as a vehicle for release of information and protection of information under its nine exemptions for nearly three decades.

The FOIA Act requires that only the head of agency or his designated representative can deny FOI requests. While there are numerous FOI officials in agencies who hold denial power, it is clear that Congress did not intend for the duty to be lightly assigned.

Trained and experienced FOI officers and specialists who understand complex FOI law grant and deny requests. For instance, they are experienced in determining what constitutes agency records subject to disclosure, what segregable portions of records must be released and what business notification procedures are necessary to give submitters of information full opportunity to challenge disclosures to which they object. They have learned to identify permissible and impermissible uses of the exemptions under the law. They are aware of the requirements of the Electronic FOI Act and the mandate by Congress to post on the Internet information that is released to FOI requesters and that will be of interest to subsequent FOI requesters. Hopefully they are also experienced in dealing one-on-one with FOI requesters so that both requester and agency can be satisfied with the government's responses. Adhering to the mandates of the FOI Act is not simple. Duties of FOI staff cannot be switched to some other agency officer or employee whose first responsibilities are not the fulfillment of the requirements of the act but in catering to the business community's need for assurance that exempt material will be kept secret.

Under these rules, the Federal Energy Regulatory Commission is proposing to create a two-tier system that will have FERC's newly appointed Critical Energy Infrastructure Information Coordinator choose who can have access to information the agency determines is CEII. Access by the general public to certain documents on existing and proposed energy facilities, as well as pipeline and electric grid flow information would probably not be allowed under the system that FERC envisions.

FERC's notice states that the agency has "no intention" of adopting an approach that would ignore the agency's obligations under the FOI Act. However, by removing decisions about access to information from the professional FOI staff and placing them with an employee whose mission is to keep the secrets that businesses want kept, the agency will intentionally skew the operation of the FOI Act.

2. These separate processing could further delay response to FOI requests

The FOI Act requires agencies to process requests within 20 working days except in certain specific instances such as when voluminous materials need to be collected or there is a need to collect records from many sources or to consult with other agencies.

The act does not provide additional times so that another office of the agency can consult with submitters of information. The Executive Order on Business Notification is qualified by the phrase "to the extent provided by law," specifically recognizing that the Executive Branch cannot set aside a mandate of Congress. There is no similar caveat here limiting the procedures of processing CEII information to the time limits required by law.

3. FOI Act exemptions do not justify full closure under these proposed rules

a. Exemption 7(f) has limited application

FERC claimsthatunderFOIAitcanchoosetodenyrequestsforCEIIunderExemption7(f) whichprovidesforexemptingrecordswhendisclosurecould"reasonablybeexpectedto endangerthelifeorphysicalsafetyofanindividual."5U.S.C.552(b)(7)(f)

However,agenciesgenerallyinvoke7(f)toavoidthereleaseofnamesoflawenforcement officersorothermentionedincriminalinvestigationfiles.Thecourthaverecognizedthis, whichinturnmakestheexemptionoflimitedrelevancy.Itisdifficulttoimaginethatageneral fearthatterroristsmightexploitweaknessesrevealedinCEIIwouldmerituseoftheexemption. ItdoesnotgiveFERC abroadrighttorejecttheFOIAcrequests thatseekCEIIinformation. See Marosciav. Levi569F.2d1000,1002(7thCir.1977) ; Durhamv.UnitedStatesDep'tof Justice,829F.Supp.428,433(D.D.C.1993).

b.FOIstaffcanalreadyinvokeExemption2asnecessarytoprotectCEII

Exemption2totheFOIAallowsanagencytoavoiddisclosureofinformationthatwould reasonablyallowindividualsto"circumvent"agencyrulesorfurther"unlawfulactionsby outsiders." *DOJFOIAUpdateSummer1989* .

TheDepartmentofJusticeguidance,writtenlongbeforetheeventsofSeptember11,2001, advisesagenciesshatExemption2is"fullyavailabletoprotect"vulnerabilityassessments whereveritisreasonablydeterminedthat,bydisclosingtheinformation,thereisareasonable riskthattheinformationmaybeusedtocircumvent"thelaworsomelawfulrequirement." *Ibid.* Thusinformationthatwouldgivegraphicguidancetoterroristsonpointsofdestructionmight wellbeexemptwhilerecordsevaluatingtheactualvulnerabilitieswouldbeoflessuseto terrorist sandofgreatutilitytocitizensexercisingoversightoftheirgovernment.

TheDepartmentofJusticeconsidersthisprovisiontobeofprimaryimportance."Inprocessing anyFOIArequestforsuchrecords,agenciesshouldcarefullyapplythefullmeasureofprotection affordedbyExemption2wherevernecessarytoprevent'circumvention'harm." *Ibid.* Theother sideofthecoin,ofcourse,isthatwhereitisunnecessarytowithholdinformationbecause "circumvention"isunlikely,informationwouldbedisclosedundernormalFOIAActprocedures.

c.Exemption4protectsconsiderableproprietaryinformationundertheFOIAAct.

Exemption4isdiscussedbelowinregarding"privileged"informationinthe proposedlanguage tobeincorporatedat18CFR388.112.

4.Makinginformationpublicto"some"waivesFOIAActexemptionsevenforCEII

FERCclaimsthatmaintainingthecurrentpublicaccesslevelsthatexistundertheFreedomof InformationAct(FOIA),whileestablishingaparallel'private'systemforrecipientswhomFERC findstrustworthy,wouldmakethesystemmore"efficient."

The agency rejects use of the FOIA Act because release to some traditionally has meant release to anyone who requests the information. But the concept of "waiver" of exemption would not be affected by whether information is released under the FOIA or under general disclosure to persons who in FERC's estimation "need" the information. Courts have held that when records are in the public domain, there is a waiver of FOIA Act exemptions.

FERC apparently assumes that if the employee charged with preserving the secrecy of some FERC records chooses not to release them, except to persons she or she deems as having a "need," there has been no waiver of the FOIA Act exemptions. We suspect that is not the case. It would certainly not be the case for records that have already been in the public domain and now are considered non-disclosable because of the events of September 11, 2001. Records that once were public in the course of an agency's (or submitter's) business would not now enjoy the protection. Herrick v. Garvey, 298 F.3d 1184 (2002). Records that are routinely released to groups of people other than an FOI requester would surely be considered "waived" and not subject to the protections of exemption to the FOIA Act.

Prior to 1966, when the FOI law was first enacted, agencies had great discretion in choosing who could receive government information. In enacting the FOIA, Congress intended "to curb this apparently unbridled discretion" by "clos[ing] the loopholes which allow agencies to deny legitimate information to the public." GTE Sylvania, Inc. v. Consumers Union, 445 U.S. 375, 385 (1980), EPA v. Mink, 410 U.S. 73, 79 (1973). Toward this end, "Congress formulated a system of clearly defined exemptions to the FOIA's otherwise mandatory disclosure requirements. An agency must disclose agency records to any person under § 552(a), 'unless they may be withheld pursuant to one of the nine enumerated exemptions listed in § 552(b).' Department of Justice v. Julian, 486 U.S. 1, 8 (1988).

Thus, the courts have clearly stated that information requested under the FOIA must be disclosed to all, regardless of who requests them. If an agency chooses to limit information, then it must do so under the nine enumerated FOIA exemptions, and it cannot dictate who receives what.

Should these FERC proposals be adopted, the CEI alternative to the FOIA would not only diminish the citizenry's access to government information, it would also make information about energy and energy transport companies, entities that are regulated by the government, less accessible to the public.

It is our view that the current FOIA Act with its nine exemptions is sufficient to keep truly sensitive information within government vaults. FERC need not create a second tier that circumvents the FOIA Act and allows it to handpick who is entitled to government information. It is FERC that will decide who "has a need for the information." We assert that in the normal course of agency activity, the FOIA Act requires that information given to some should be given to all. Information kept from the public cannot advance the public good, and ultimately the secrecy itself makes the government, and the entities it regulates, less accountable.

Proposed rule 18 CFR 388.112: Exemption 4 is adequate

Exemption 4 is designed to protect "trade secrets," such as customer lists and secret formulae, and sensitive internal commercial information about a company which, if disclosed, would cause the company substantial competitive harm. The exemption covers trade secrets and commercial or financial information obtained from a person and privileged or confidential ."

Agencies make frequent and successful use of Exemption 4's broad protections. The agency here even acknowledges that it is the perception that Exemption 4 might not be invoked that discourages industry from providing information, not the experience of industry in having agencies refuse to invoke applicable exemptions. However, we believe FERC's energies are better directed to educating industry on the operation of the FOIA, than on making broad pronouncements that could lead to the categorical protection of information that may clearly not be privileged under Exemption 4.

FERC argues that the parallel system needs to be created outside the FOIA structure in part because this would make industry more forthcoming with information released to the commission. If industry believes information it provides to FERC would be made publicly available through the FOIA, then it will be less willing to provide information that may be critical in protecting the nation's infrastructure, FERC contends.

Moreover, FERC asserts that since it has the duty to ensure the "effectiveness of [its own] programs," which include overseeing energy industries "in the economic and environmental interest," its mission would suffer should companies restrict the flow of information to the agency. If that happened, FERC could be information-starved and the nation's pipeline system more vulnerable to attack, the agency says.

It is important to note that FERC, like other federal agencies, already has rules requiring business notification. This regulation provides companies with assurance that the information they submit as confidential will not be routinely disclosed. Under existing regulations pursuant to Executive Order 12,600, a FOIA request for information submitted by businesses enjoys great protection, particularly while the government notifies businesses that information they provided is requested and gives them opportunity to object to disclosure.

The decision to provide or deny business information under the FOIA can be made by the FOI officer with comprehension of the factors that should be considered in the decision. The Department of Transportation gives companies a checklist of considerations to help make their case that information should be withheld. These appear at 49 CFR §§ 512.4(b)(3):

- (i) That the information claimed to be confidential is a trade secret, or commercial or financial information that is privileged or confidential.
- (ii) Measures taken by the submitter of the information to ensure that the information has not been disclosed or otherwise made available to any person, company, or organization other than the submitter of the information.
- (iii) Insofar as is known by the submitter of the information, the extent to which the information has been disclosed, or otherwise become available, to persons other than the submitter of the information, and why such disclosure or availability does not compromise the confidential nature of the information.
- (iv) Insofar as is known by the submitter of the information, the extent to which the information has appeared publicly, regardless of whether the submitter has authorized that appearance or confirmed the accuracy of the

information. The submitter must include citation to such public appearances, and an explanation of why such appearances do not compromise the confidential nature of the information.

(v) Prior determination of NHTSA or other Federal agencies or Federal courts relating to the confidentiality of the submitted information, or similar information possessed by the submitter including class determinations under this part. The submitter must include any written notice or decision connected with any such prior determination, or a citation to any such notice or decision, if published in the Federal Register.

(vi) Whether the submitter of the information asserts that disclosure would be likely to result in substantial competitive harm, what the harmful effects of disclosure would be, why the effects should be viewed as substantial, and the causal relationship between the effects and disclosure.

(vii) If information is voluntarily submitted, why disclosure by NHTSA would be likely to impair NHTSA's ability to obtain similar information in the future.

Under the current administration's government openness policy, if companies submitted at the above stated information, it seems more than likely that sensitive information would be kept secret. Under the FOIA Act Memorandum of October 12 from U.S. Attorney General John Ashcroft, the Department of Justice promised to back any government agency in denial of FOIA requests if there was any "sound legal basis" to do so. Read together with the March 19 memorandum to federal agencies from Andrew Card Jr., the White House chief of staff, seeking protection of "sensitive but unclassified information," agencies seem to have been given a greater latitude to deny information they consider sensitive under Exemption 4.

CEI under proposed rule 18CFR388.113 provides no real definition.

FERC defines information on critical infrastructure as information that (1) relates to the production, generation, transportation, transmission, or distribution of energy, (2) could be useful to persons in planning an attack on critical infrastructure, (3) is exempt from mandatory disclosure under the FOIA, and (4) does not simply give the location of the critical infrastructure. The term "critical infrastructure" is defined as "systems and assets, whether physical or virtual, that are so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on the security, national economic security, national public health or safety, or any combination of those matters." 18CFR388.113

FERC proposes to limit precisely the kind of critical information that the public needs in order to hold large energy and energy transport companies accountable. Under the proposed rule the condition of the Corpus Christi and Carlsbad pipelines would probably be kept secret. As such, it would be impossible for the media, environmentalists or other citizens to know of the dangers that might exist.

Unfortunately, by defining CEI in an ambiguous manner, FERC wants to maintain maximum discretion in defining what critical infrastructure is. It would then have great discretion in keeping large amounts of information secret. By defining CEI in a way that can have all major energy infrastructure fall under the CEI rubric, FERC maximizes the control it maintains over information.

It also gives special privileges on access to information to the business community when it is clear that other kinds of requesters may have legitimate needs for information. Under these

proposed rules we suspect that those needs would never be recognized by FERC.

Conclusion

As organizations representing journalists who cover government activities on behalf of the public, we urge FERC to abandon or significantly revise these rules so that existing freedom of information principles can continue to govern public disclosure of information. We firmly believe that exemptions to the FOIA that already provide government agencies with the authority to protect information that, if disclosed, would cause harm. We also believe that by transferring decisions on access to information to an employee charged with maintaining secrecy rather than with effecting disclosure, FERC will set up a system that will deny requesters information guaranteed them by the FOIA.

We are grateful for the opportunity to comment on these proposals.

Respectfully Submitted.

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