UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NISKANEN CENTER, Plaintiff, v. FEDERAL ENERGY REGULATORY COMMISSION, Defendant.	)	Civil Action No. 19-0125 (JEB)

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendant Federal Energy Regulatory Commission ("FERC") respectfully moves for summary judgment in its favor. In support of this motion, Defendant submits the attached memorandum of law, statement of material facts, and agency declaration and the exhibits thereto. Also attached is a proposed order.

Dated: May 20, 2019

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NISKANEN CENTER,	)	
	)	
Plaintiff,	)	
	)	Civil Action No. 19-0125 (JEB)
v.	)	
	)	
FEDERAL ENERGY REGULATORY COMMISSION,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This case arises from Plaintiff's Freedom of Information Act ("FOIA") request directed to FERC. Defendant has reasonably complied with the request for records submitted by Plaintiff under FOIA. Having completed its search for responsive records subject to FOIA and released all nonexempt information, Defendant respectfully moves the Court to grant summary judgment, pursuant to Rule 56(a), on all of Plaintiff's claims.

STATEMENT OF FACTS

Defendant incorporates herein the attached Defendant's Statement of Material Facts to Which There is No Genuine Issue.

STANDARDS OF REVIEW

I. Motion for Summary Judgment Under Rule 56

Under Rule 56 of the Federal Rules of Civil Procedure ("Rules"), a court will grant summary judgment when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" when it "might affect the outcome of the suit under the governing law." *Anderson* v.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

II. Discharge of FOIA Obligations

"FOIA cases are typically and appropriately decided on motions for summary judgment." *Ryan v. FBI*, 174 F. Supp. 3d 486, 490 (D.D.C. 2016) (internal quotation marks omitted). "When an agency moves for summary judgment on the grounds that it has discharged its FOIA obligations, all underlying facts and inferences are analyzed in the light most favorable to the FOIA requester, and only after the agency proves that it has fully discharged its FOIA obligations is summary judgment appropriate." *Id.*

"An agency will be granted summary judgment on the adequacy of its search if it 'show[s] beyond material doubt [ ] that it has conducted a search reasonably calculated to uncover all relevant documents.'" *Id.* "Adequacy 'is judged by a standard of reasonableness and depends, not surprisingly, on the facts of each case.'" *Id.* "[A] search may be reasonable if it includes all systems 'that are likely to turn up the information requested.'" *Id.* at 490-91.

"To meet its burden and show adequacy, 'the agency may rely on reasonably detailed, nonconclusory affidavits submitted in good faith.'" *Id*. at 491. "These declarations are accorded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence and discoverability of other documents." *Id.* (internal quotation marks omitted). "An agency can show reasonableness in its affidavit by setting forth the search terms and the type of search performed, and averring that all files likely to contain responsive materials (if such records exist) were searched." *Id.* (internal quotation marks omitted).

"The agency need not search every record in the system or conduct a perfect search." *Judicial Watch, Inc. v. U.S. Dep't of the Treasury*, Civ. A. No. 15-1776 (RMC), 2017 WL

1207414, at *2 (D.D.C. Mar. 31, 2017). "[T]he fact that a particular document was not found does not demonstrate the inadequacy of a search." *Andrews v. Dep't of Justice*, 212 F. Supp. 3d 109, 113 (D.D.C. 2015) (internal quotation marks omitted). Also, "the [m]ere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." *Id.* (internal quotation marks omitted).

ARGUMENT

Defendant has appropriately searched for and provided records responsive to the request at issue, subject to the withholding of certain information pursuant to the applicable FOIA Exemptions. The adequacy of Defendant's searches is not in dispute and therefore is not addressed in this motion. Defendant has disclosed all reasonably segregable information.

I. DEFENDANT PROPERLY APPLIED FOIA EXEMPTION 6 IN RESPONDING TO PLAINTIFF'S FOIA REQUEST.

Exemption 6 protects from disclosure records related to "personnel and medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." To determine whether Exemption 6 would protect the information in question from disclosure, the agency must determine whether (1) the information in question is contained in personnel, medical, or "similar" files, and (2) disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy by balancing the public's right to disclosure of the information against the individual's right to privacy. *See Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008); *News-Press v. DHS*, 489 F.3d 1173, 1196-97 (11th Cir. 2007).

The Supreme Court has ruled that the term "similar files" encompasses any government record that concerns a particular individual; the term is not limited to records contained in personnel or medical files. *See, e.g., Dep't of State v. Wash. Post*, 456 U.S. 595, 599-603 (1982). This broad construction of "similar files" was necessary in view of Congress's primary purpose in

enacting Exemption 6, which was "to protect individuals from the injury and embarrassment that can result from the necessary disclosure of personal information." *Id*. at 599. The D.C. Circuit has read the statute "to exempt not just files, but also bits of personal information such as names and addresses, the release of which would 'create[ ] palpable threat to privacy.'" *Carter, Fullerton & Hayes LLC v. FTC*, 520 F. Supp. 2d 134, 144 (D.D.C. 2007) (quoting *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 148 (D.C. Cir. 2006)).

It is well established that the names and personal home addresses of private landowners are protected from release under Exemption 6. *See, e.g., Bibles v. Or. Natural Desert Ass'n*, 519 U.S. 355 (1997); *Dep't of Defense v. FLRA*, 510 U.S. 487 (1994); *Carter, Fullerton & Hayes*, 520 F. Supp. 2d at 144-45; *National Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873 (D.C. Cir. 1989). FERC precedent recognizes the privacy interest of individual citizens in their names and addresses. *See Columbia Gas Transmission Corp.*, 128 FERC ¶ 61,050, at P 32 (2009) (determining that releasing the names and addresses of private citizens on a landowner list "implicate[s] a privacy interest, and their mandatory release would constitute an unwarranted invasion of individual privacy."). In light of unwarranted invasions of privacy from disclosure of landowner lists, FERC practice is to protect landowner names and addresses unless the landowner has consented to or otherwise voluntarily submitted that information in the proceeding. *See* Tao Decl., Ex. D at 3 (citing FERC Submission Guidelines (February 5, 2018) *available at* http://www.ferc.gov/help/submisson-guide/user-guide.pdf).

Public release of the redacted information would inherently expose the landowners to an unwanted invasion of privacy. *Yelder v. DOD*, 577 F. Supp. 2d 342, 346 (D.D.C. 2008) (noting that information such as names, addresses, and other personally identifying information creates a palpable threat to privacy); *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d

284, 304, 306 (D.D.C. 2007) (stating that "[f]ederal courts have previously recognized a privacy interest in a person's name and address" and concluding that "[g]enerally, there is a stronger case to be made for the applicability of Exemption 6 to phone numbers and addresses"); *Associated Press v. DOJ*, 549 F.3d 62, 65 (2d Cir. 2008) ("Personal information, including a citizen's name, address, and criminal history, has been found to implicate a privacy interest cognizable under the FOIA exemptions) (Exemptions 6 and 7(C)).

Furthermore, the individuals' privacy interest in the information contained in the records outweighs any minimal public interest in the disclosure of the information. Plaintiff has not articulated a sufficient public interest or public need to justify release of this information. Plaintiff contends that disclosure is in the public interest in order to shed light on FERC and the Atlantic Coast Pipeline's ("ACP's") compliance with notification and public participation laws. *See* Tao Decl., Ex. D at 3. FERC determined that, in balancing the privacy interests of the individual landowners with the alleged public interest in disclosure, the balance "favors protecting the significant privacy interest of the landowners." *Id.* at 5; *see also, e.g., Odland v. FERC*, 34 F. Supp. 3d 3, 21 (D.D.C. 2014) ("No public interest is served by 'disclosure of information about private citizens that is accumulated in various governmental files [when disclosure] reveals little or nothing about an agency's own conduct.'") (quoting *Dep't of Justice v. Reporter's Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)); *Horner*, 879 F.2d at 879 ("even a modest privacy interest[ ] outweighs nothing every time").

In its administrative appeal, Plaintiff relied on *Columbia Riverkeeper v. FERC*, 650 F. Supp. 2d 1121 (D. Or. 2009), *see* Tao Decl., Ex. D at 3-4, in which the magistrate judge ordered FERC to release a mailing list of people in the path of a proposed pipeline, and the court found that disclosure was in the public interest where it would reveal whether FERC had complied with

its public notice mandate. In *Columbia Riverkeeper*, there were several distinguishing facts that do not exist here: FERC had previously disclosed comparable information on its eLibrary database; there were possibly multiple examples of lack of notice to landowners; and FERC had not conducted an adequate search for responsive documents in view of apparent inconsistencies and omissions identified through discovery. 650 F. Supp. 2d at 1126-31; *see also* Tao Decl., Ex. D at 3-4.

Here, the facts more closely resemble those in *Odland*, where the court upheld FERC's application of Exemption 6 to protect landowners' names and addresses. 34 F. Supp. 3d at 22. The plaintiff in *Odland* also relied on *Columbia Riverkeeper*, but the *Odland* court rejected plaintiff's argument that Exemption 6 should not apply, instead holding that "[p]laintiffs do not seek the landowner names and addresses in order to 'shed light' on whether FERC sent notice; instead, [p]laintiffs seek to determine whether notice was received. Whether notice was received is irrelevant to FERC's conduct and thus is not a matter of public interest." *Id.* Like the names and addresses at issue in *Odland*, here Plaintiff "ha[s] not shown that releasing the landowners' names and addresses would reveal anything about the workings of FERC," and there is no interest in public disclosure. *Id.*; *see also* Tao Decl., Ex. D at 4-5.

II. DEFENDANTS COMPLIED WITH FOIA'S SEGREGABILITY REQUIREMENT

Under FOIA, if a record contains information exempt from disclosure, any "reasonably segregable," non-exempt information must be disclosed after redaction of the exempt information. 5 U.S.C. § 552(b). Non-exempt portions of records need not be disclosed if they are "inextricably intertwined with exempt portions." *Mead Data Cent., Inc. v. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977). To establish that all reasonably segregable, non-exempt information has been disclosed, an agency need only show "with 'reasonable specificity'" that the information it

has withheld cannot be further segregated. *Armstrong v. Exec. Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. Dep't of Justice*, 567 F. Supp. 2d 104, 110 (D.D.C. 2008). "Agencies are entitled to a presumption that they complied with the obligation to disclose reasonably segregable material," which must be overcome by some "quantum of evidence" by the requester. *Sussman v. U.S. Marshals Serv.*, 494 F.3d 1106, 1117 (D.C. Cir. 2007).

With respect to the records that were released, all information not exempted from disclosure pursuant to the FOIA exemptions specified herein was correctly segregated, and non-exempt portions were released. FERC did not withhold any non-exempt information on the grounds that it was non-segregable. Tao Decl. ¶ 7.

Defendant has thus established, with reasonable specificity, that responsive documents were released in full or in part after a careful determination that there were no further reasonably segregable portions appropriate for release. Therefore, the Court should find that Defendant has properly complied with its duty to segregate exempt from non-exempt information.

CONCLUSION

For the foregoing reasons, the Court should conclude that Defendant complied with its FOIA obligations and grant summary judgment in its favor.

Dated: May 20, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of May 2019, service of the foregoing motion has been made on counsel of record through the Court's ECF system.

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