UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Energy & Environment Legal Institute, et al., Plaintiffs,	)	
v.	)	**Civil Action No. 14-1743 (TSC)**
Federal Energy Regulatory Commission, Defendant.	)	

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

This case involves a Freedom of Information Act request Plaintiffs made for emails with six specified terms (or named variants thereof) in the subject field or the email's body that were sent to or received by former FERC Chairman, Jon Wellinghoff, or former Director of FERC's Office of Enforcement, Norman Bay, during a five month period in early 2012. *See* Tao Decl. Ex A (request designated FY 14-93 by FERC). FERC undertook appropriate efforts to search for and provide all reasonably segregable records, and has withheld only that information that is properly exempted from release under FOIA Exemptions 4, 5, 6 and 7(E). As explained herein, in the attached Statement of Facts ("DSOF"), declaration, the exhibits thereto, and the *Vaughn* index, no material questions of fact remain, and FERC is entitled to judgment as a matter of law.

FACTUAL BACKGROUND

FERC hereby incorporates its Statement of Facts; the declaration prepared by Leonard M. Tao (attached), as well as exhibits referenced therein; and the attached *Vaughn* index.

By way of further background, Plaintiffs are Energy & Environment Legal Institute, which is "dedicated to advancing responsible regulation and in particular economically sustainable environmental policy," Compl. ¶ 21; *see also* http://eelegal.org, and the Free Market Environmental Law Clinic, which is "dedicated to advancing responsible regulation and in particular economically sustainable environmental policy," Compl. ¶ 22; *see also* http://fmelawclinic.org. Defendant is the Federal Energy Regulatory Commission, "an

independent agency that regulates the interstate transmission of electricity, natural gas, and oil." Tao Decl. ¶ 2.

Plaintiffs' FOIA request specifically sought "copies of all emails" sent or received between January 1, 2012 through May 31, 2012 by the then-Chairman, Mr. Wellinghoff, and the then-director of the Office of Enforcement, that including in their "Subject field" or "body" the terms "Constellation" *or* "Exelon", *and* "approve", "merge" (which also included "merger"), "consent", and/or "settle" (which also included "settled" and "settlement"). *Id.* ¶ 12.

The final settlement with Constellation Energy Commodities Group, Inc. adopted by the Commission already was a matter of public record and the investigation that led to it was extensively described in the Commission's Order. *See Constellation Energy Commodities Grp. Inc.*, 138 FERC ¶ 61,168, 61,715 (Mar. 9, 2012). That investigation *inter alia* had found that Constellation ("CCG") had "violated the Anti-Manipulation Rule by entering into virtual transactions and DA [day-ahead] physical schedules without regard for their profitability, but with the intent of impacting DA prices in the NYISO and ISO-NE to the benefit of certain significant CFD [contract for differences] positions held by CCG" and that "this manipulation of the physical and virtual markets and the respective DA prices resulted in widespread economic losses to market participants who bought and sold energy in the DA markets . . . ." *Id.* at 61,716-17; *see also* FERC Office of Enforcement, *2012 Report on Enforcement* at 7-8 (2012), *available at* http://www.ferc.gov/legal/staff-reports/11-15-12-enforcement.pdf (describing origins of investigation, FERC findings of regulatory violations, and resulting settlement consisting of $135 million in civil penalties, "the largest civil penalty the Commission has assessed to date," and $110 million in disgorgement). Word of this settlement received national publicity and its contents were published, as noted. *See* Tao Decl. at 6 n.1.

As a result of a settlement with the Commission, Constellation paid $135 million in civil penalties and disgorged $110 million. *Id.* at 61,617. $104 million of the disgorged funds were "deposited into a fund for electric energy consumers in the affected states" under a process overseen by an Administrative Law Judge. FERC Office of Enforcement, *2013 Report on Enforcement* at 7 (2013). In a separate Order, the Commission also approved the merger of Constellation with Exelon Corp. *Exelon Corp. and Constellation Energy Grp., Inc.*, 138 FERC ¶ 61,167 (2012).

In response to Plaintiffs' FOIA request, FERC diligently searched the locations likely to contain responsive records and ultimately found 63 such emails, most of which were withheld in full, but many of which also were released in full or in part, including through a discretionary release in February 2015 during the course of this litigation. *See* Statement of Facts (SOF) ¶¶ 2, 3; *see also Vaughn* index. Withholdings were attributed to FOIA Exemptions 4, 5, 6, and 7(E). 5 U.S.C. §§ 552(b)(4), (5), (6), 7(E). *See Vaughn* index.

Plaintiffs' Complaint observes that this suit has "substantial overlap with another case" brought by the same Plaintiffs, *EELI v. FERC*, No. 14-502 (ABJ). They allege here – similar to their allegations in that prior suit – that FERC has "a practice of broad overwithholding of records relating to its putative Chairman, Mr. Bay . . . ." Compl. ¶ 5. They further assert that documents provided pursuant to the FOIA request at issue in No. 14-502 "led plaintiffs to file the FOIA request at issue in this matter." *Id.* ¶ 11. Notably, notwithstanding similar such allegations in No. 14-502, this Court granted FERC summary judgment, finding that FERC's withholdings were justified under FOIA Exemptions 5 and 6. *See EELI v. FERC*, No. 14-502 (ABJ), -- F. Supp. 3d --, 2014 WL 5570619, at *5 (D.D.C. Nov. 5, 2014). Plaintiffs elected not to appeal. *See generally* Docket, No. 14-502 (ABJ).

LEGAL STANDARDS

Summary judgment may be granted if "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); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986); *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006). FOIA claims are premised on an agency's improper withholding of records. *See McGehee v. CIA*, 697 F.2d 1095, 1105 (D.C. Cir. 1983). To obtain summary judgment in a typical FOIA action, an agency must satisfy two elements. First, the agency must demonstrate that it has made "a good faith effort to conduct a search for the requested records, using methods which can reasonably be expected to produce the information requested." *Oglesby v. Dep't of the Army*, 920 F.2d 57, 68 (D.C. Cir. 1990). To satisfy this element, "an agency must set forth sufficient information in its affidavits for a court to determine if the search was adequate." *Nation Magazine, Wash. Bureau v. U.S. Customs Serv.*, 71 F.3d 885, 890 (D.C. Cir. 1995), citing *Oglesby*, 920 F.2d at 68. Such agency affidavits attesting to a reasonable search "are afforded a presumption of good faith," *Defenders of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004), and "can be rebutted only 'with evidence that the agency's search was not made in good faith.'" *Id.* (citation omitted).

Second, "materials that are withheld must fall within a FOIA statutory exemption." *Leadership Conference on Rights v. Gonzales*, 404 F. Supp. 2d 246, 252 (D.D.C. 2005). A court may grant summary judgment based solely on information in an agency's declarations if they "describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either evidence in the record nor by evidence of agency bad faith." *Military Audit Project v. Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981). After asserting exemptions, an

agency must release "[a]ny reasonably segregable portion of a record" and provide it to the requesting party "after deletion of the portions which are exempt." 5 U.S.C. § 552(b).

Once a FOIA request has been processed, a plaintiff is required to exhaust all administrative remedies before bringing an action to compel disclosure of documents. *See* 28 C.F.R. § 16.9(c) (2012); *Wilbur v. CIA*, 355 F.3d 675, 677 (D.C. Cir. 2004); *Oglesby*, 920 F.2d at 65. Failure to exhaust such remedies bars the lawsuit. *See Banks v. DOJ*, 813 F. Supp. 2d 132, 138-39 (D.D.C. 2011) (granting agency's motion for summary judgment in FOIA action where plaintiff failed to file an administrative appeal before filing the lawsuit); *Schwaner v. Dep't of Army*, 696 F. Supp. 2d 77, 81 (D.D.C. 2010) (same).

The district court reviews the agency's action *de novo*, and "the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(4)(B); *accord Casey*, 656 F.2d at 738. Once the case comes to court, "FOIA cases are typically and appropriately decided on motions for summary judgment." *Moore v. Bush*, 601 F.Supp.2d 6, 12 (D.D.C. 2009). In deciding any motion for summary judgment, the Court "must view the evidence in the light most favorable to the nonmoving party, draw all reasonable inferences in his favor, and eschew making credibility determinations or weighing the evidence." *Montgomery v. Chao*, 546 F.3d 703, 706 (D.C. Cir. 2008); *see also Liberty Lobby, Inc.*, 477 U.S. at 255. However, where a plaintiff has not provided evidence that an agency acted in bad faith, "a court may award summary judgment solely on the basis of information provided by the agency in declarations." *Moore*, 601 F. Supp. 2d at 12. The declarations must describe "the documents and the justifications for non-disclosure with reasonably specific detail, [and] demonstrate that the information withheld logically falls within the claimed exemption. . . ." *Casey*, 656 F.2d at 738.

ARGUMENT

Plaintiffs submitted a FOIA request seeking to look behind FERC's substantial published records disclosing the final settlement agreement with Constellation, FERC's description of the basis of and findings from its investigation, its formulation of the civil penalty and disgorgement sums resulting from Constellation's violations, the manner of monitoring Constellation's future conduct to ensure it complies in the future, *see* 138 FERC ¶ 61,168, as well as the detailed bases for its approval of the merger of Exelon Corp. with Constellation Energy Group, Inc., *see* 138 FERC ¶ 61,167. Although Plaintiffs' interest in FERC's internal deliberations is understandable, the public interest prevents the disclosure of certain materials, including those about settlement talks, agency deliberations, and law enforcement techniques. In settlement talks, for example, "the parties [should be able] to drop their guard and to talk freely and loosely without fear that a concession made to advance negotiations will be used" against them later. *E.E.O.C. v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1546 (10th Cir. 1991) (quoting Steven A. Saltzburg & Kenneth R. Redden, *Federal Rules of Evidence Manual* at 286 (4th ed. 1986)) (discussing Fed. R. Evid. 408). Similarly, if agency deliberations were revealed, "officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news," and thus they must be shielded under FOIA in order to "protect[] open and frank discussion among those who make them within the Government." *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8-9 (2001) (internal quotation marks and citations omitted) (construing Exemption 5). Moreover, law enforcement techniques and procedures likewise must be shielded in order to safeguard their continuing usefulness, and the exemption is broadly applied in order to prevent "not just [] circumvention of the law, but [] a risk of circumvention." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (construing Exemption 7(E)).

As explained below, in the attached Declaration of Leonard Tao ("Tao Decl.") and in the *Vaughn* index, FERC has undertaken a thorough search for responsive records, and has made appropriate releases, including discretionary releases. But the reality is that, given the nature of Plaintiffs' request, which so plainly seeks to probe deeply into FERC's law enforcement techniques and settlement negotiation deliberations, much of the responsive information had to be and was properly withheld. That was necessary *inter alia* to maintain FERC's ability to undertake future investigations effectively, as well as to undertake settlement negotiations in the future with counterparties secure in the knowledge that the information they provide during settlement talks and the staff's non-final deliberations about such information will not later be exposed for all the world to see. Plaintiffs' apparent frustration with FERC's more assertive recent enforcement activities does not provide a basis for deviating from the well-established FOIA exemptions that are designed to enable agencies to do important work such as was at issue in the Constellation investigation and settlement. *See* Compl. ¶ 9 (quoting email characterizing Constellation matter as a "'game chang[er]'" for FERC); *id.* ¶ 11 (noting FERC's "substantial regulatory, policy and enforcement powers"); *id.* ¶ 12 (seeking details about "the methods of conducting the FERC" as to "issues raised, above" – principally enforcement).

FERC has provided what it reasonably can without harming the public interest, and most especially the public's interest that future enforcement activities can be performed effectively. "It is self-evident that information revealing [such] procedures could render those procedures vulnerable and weaken their effectiveness." *Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) (refusing to be "overly formalistic" and finding that withholding of documents that "provide insight" into an agency's investigatory or procedural techniques is also proper under Exemption 7(E)). Thus, as further explained below, summary judgment should be entered for FERC.

I. FERC Conducted Searches Reasonably Calculated to Uncover Responsive Records

A. Applicable standards

Under the FOIA, an agency must undertake a search that is "reasonably calculated to uncover all relevant documents." *Weisberg v. DOJ*, 705 F.2d 1344, 1351 (D.C. Cir. 1983). A search is not inadequate merely because it failed to "uncover[] every document extant." *SafeCard Servs., Inc. v. S.E.C.*, 926 F.2d 1197, 1201 (D.C. Cir. 1991); *see Judicial Watch v. Rossotti*, 285 F. Supp. 2d 17, 26 (D.D.C. 2003) (noting that "[p]erfection is not the standard by which the reasonableness of a FOIA search is measured"). It is appropriate for an agency to search for responsive records in accordance with the manner in which its records systems are indexed. *Greenberg v. Department of Treasury*, 10 F. Supp. 2d 3, 13 (D.D.C. 1998).

Where agency affidavits assert that a reasonable search was conducted, the agency is entitled to a presumption of good faith. *Defenders of Wildlife v. U.S. Dep't of Interior*, 314 F. Supp. 2d 1, 8 (D.D.C. 2004). "An agency fulfills its obligations under FOIA if it can demonstrate beyond material doubt that its search was 'reasonably calculated to uncover all relevant documents.'" *Valencia-Lucena v. U.S. Coast Guard*, 180 F.3d 321, 325 (D.C. Cir. 1999) (quoting *Truitt v. Dep't of State*, 897 F.2d 540, 542 (D.C. Cir. 1990)). The FOIA does not require that an agency search every division or field office on its own initiative in response to a FOIA request if responsive documents are likely to be located in one place. *Kowalczyk v. Department of Justice*, 73 F.3d 386, 388 (D.C. Cir. 1996); *Marks v. Department of Justice*, 578 F.2d 261, 263 (9th Cir. 1978). Nor does the FOIA require that an agency search every record system. *Oglesby*, 920 F.2d at 68.

"To meet its burden, the agency may submit affidavits or declarations that explain in reasonable detail the scope and method of the agency's search." *Defenders of Wildlife v. U.S.*

Border Patrol, 623 F. Supp. 2d 83, 91 (D.D.C. 2009). However, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the search for those documents was adequate." *Weisberg v. DOJ*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). The process of conducting an adequate search for documents requires "both systemic and case-specific exercises of discretion and administrative judgment and expertise," and it is "hardly an area in which the courts should attempt to micromanage the executive branch." *Schrecker v. DOJ*, 349 F.3d 657, 662 (D.C. Cir. 2003) (internal quotation marks and citation omitted).

"[T]he sufficiency of the agency's identification or retrieval procedure" must be "genuinely in issue" in order for summary judgment in the agency's favor to be inappropriate based on the adequacy of the search. *Weisberg v. DOJ*, 627 F.2d 365, 370 (D.C. Cir. 1980) (quoting *Founding Church of Scientology v. NSA*, 610 F.2d 824, 836 (D.C. Cir. 1979)). A plaintiff "cannot rebut the good faith presumption" afforded to an agency's supporting affidavits "through purely speculative claims about the existence and discoverability of other documents." *Brown v. DOJ*, 724 F. Supp. 2d 126, 129 (D.D.C. 2010) (quoting *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991)); *accord Steinberg v. U.S. DOJ*, 23 F.3d 548, 552 (D.C. Cir. 1994) (a plaintiff's "mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them").

Moreover, in responding to a FOIA request, an agency looks to the "reasonabl[e] descri[ption]" of the records sought. 5 U.S.C. § 552(a)(3)(A). That is, a professional agency employee familiar with the subject area must, in light of the FOIA request framed by the requestor, be able to locate the requested records with a "reasonable amount of effort." H.R. Rep. No. 93-876, at 6 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6271. The agency must be able to

determine "precisely" which records are being requested. *Tax Analysts v. IRS*, 117 F.3d 607, 610 (D.C. Cir. 1997) (citation and internal quotation marks omitted). The agency then is obligated to perform a "reasonable" search in response to the request framed by the requestor. *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986); *Zemansky v. United States EPA*, 767 F.2d 569, 571-73 (9th Cir. 1985). An agency, however, is "not obligated to look beyond the four corners of the request for leads to the location of responsive documents." *Kowalczyk v. DOJ*, 73 F.3d 386, 389 (D.C. Cir. 1996); *see also Williams v. Ashcroft*, 30 Fed. Appx. 5, 6 (D.C. Cir. 2002) (agency need not look for records not sought in initial FOIA request).

B. The searches in this case were legally sufficient

Here, there is no material doubt that the searches performed were adequate. As explained in the Tao Declaration, Mr. Tao is familiar with the organization of FERC and, with his staff, he was able to determine which offices were likely to have responsive documents, *see* Tao Decl. ¶ 8, and he is "presumed able to familiarize himself with what [records Defendant] does and does not maintain." *American-Arab Anti-Discrimination Comm. v. DHS*, 516 F. Supp. 2d 83, 87-88 (D.D.C. 2007). As Plaintiffs' request was only for emails "sent or received by either [former FERC Chairman] Jon Wellinghoff, or Norman Bay of FERC's Office of Enforcement," *see* Ex. A (FOIA request), FERC reasonably determined that the Office of Enforcement (where Mr. Bay was employed at the time) and the Office of the Executive Director (which possessed the records of the former Chairman) were the proper places to search for emails that included the listed search terms in either the "subject field" or the "body," as plaintiffs specifically had directed. *See* Tao Decl. ¶¶ 9, 14. The search ultimately yielded a total of 63 responsive documents. *Id.* ¶ 23.

In sum, FERC's search was reasonable and legally sufficient. Defendant searched the places it reasonably determined were most likely to yield responsive records.

II. FERC Properly Applied FOIA Exemptions To Withhold Limited Records

As explained below and as detailed in the Tao Declaration and the *Vaughn* index, Defendant properly relied on Exemptions 4, 5, 6 and 7(E) to withhold certain information in response to Plaintiffs' request. It bears emphasis that FERC made discretionary releases of several records that might properly have been withheld. *See* Tao Decl. ¶ 25; *see also id.* ¶ 36 (noting Attorney General's Memorandum encouraging agencies to make discretionary releases even if such releases are not technically required); Memo from Attorney General to Heads of Executive Departments and Agencies, Mar. 19, 2009, *available at* http://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf.

A. Exemption 4

FERC properly applied FOIA Exemption 4 to withhold in full one document and portions of seven others that "detailed Constellation's financial position with regard to disgorgement, and were an integral part of confidential settlement discussions. Disclosure of [such] confidential commercial or financial information would interfere with the government's ability to reach such a settlement in the future." Tao Decl. ¶ 26. 5 U.S.C. § 552(b)(4) protects against the disclosure of "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential," and such information may be withheld if its disclosure would 1) "impair the Government's ability to obtain necessary information in the future; or 2) ... cause substantial harm to the competitive position of the person from whom the information was obtained." *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 762, 770 (D.C. Cir. 1974) (footnote omitted). Because, as Mr. Tao notes (at ¶ 26), if companies were concerned that through a FOIA request their proprietary commercial or financial information could be released to competitors or others if it is provided to FERC, the government's ability to obtain such necessary information might be

limited, such information is properly withheld under Exemption 4. Moreover, Constellation (or its successor) plainly has a commercial interest in "detailed information concerning [its] financial position with regard to disgorgement." Tao Decl. ¶ 26; *see Baker & Hostetler LLP v. U.S. Dept. of Commerce*, 473 F.3d 312, 319 (D.C. Cir. 2006) (Exemption 4 is construed "broadly and applies (among other situations) when the provider of the information has a commercial interest in the information submitted to the agency"). Thus, FERC acted properly in withholding under Exemption 4 limited commercial and financial information provided by Constellation, as explained in the Tao Declaration and further elaborated upon in the *Vaughn* index.

B. *Exemption 5*

Exemption 5 protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This exemption shields documents of the type that would be privileged in the civil discovery context, including materials protected by the attorney-client privilege, the attorney work-product privilege, and the executive deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); *see Judicial Watch, Inc. v. DOJ*, 365 F.3d 1108, 1113 (D.C. Cir. 2004); *Rockwell Intern. Corp. v. DOJ*, 235 F.3d 598, 601 (D.C. Cir. 2001).

Documents covered by the deliberative process privilege and exempt under Exemption 5 include those "'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.'" *Sears, Roebuck*, 421 U.S. at 150 (quoting *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966)); *see McKinley v. FDIC,* 744 F. Supp. 2d 128, 137-38 (D.D.C. 2010). As the Supreme Court has explained:

> The deliberative process privilege rests on the obvious realization that officials will not communicate candidly among themselves if each remark is a potential item of discovery and front page news, and its object is to enhance the quality of agency decisions by protecting open and frank discussion among those who make them within the Government.

Dep't of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 8-9 (2001) (internal quotation marks and citations omitted).

The deliberative process privilege is designed to prevent injury to the quality of agency decisions by (1) encouraging open, frank discussions on matters of policy between subordinates and superiors; (2) protecting against premature disclosure of proposed policies before they are adopted; and (3) protecting against public confusion that might result from the disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency's decision. *See Sears, Roebuck*, 421 U.S. at 151-53; *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980); *Citizens for Responsibility and Ethics in Washington v. Dep't of Homeland Sec.*, 648 F. Supp. 2d 152, 156 (D.D.C. 2009); *FPL Group Inc. v. IRS*, 698 F. Supp. 2d 66, 81 (D.D.C. 2010). Examples of documents covered by the deliberative process privilege include: recommendations, draft documents, proposals, suggestions, advisory opinions, and other documents, such as email messages, that reflect the personal opinions of the author rather than the policy of the agency or the give and take of the policy making process. *See Bloomberg, L.P. v. SEC*, 357 F. Supp. 2d 156, 168 (D.D.C. 2004).

To invoke the deliberative process privilege, an agency must show that the exempt document is both pre-decisional and deliberative. *Access Reports v. DOJ*, 926 F.2d 1192, 1194 (D.C. Cir. 1991); *Coastal States Gas*, 617 F.2d at 868; *Tax Analysts v. IRS*, 117 F.3d 607, 616 (D.C. Cir. 1997). For a document to be pre-decisional, it must be antecedent to the adoption of an agency policy. *See Jordan v. DOJ*, 591 F.2d 753, 774 (D.C. Cir. 1978) (en banc); *see also In re*

Sealed Case, 121 F.3d 729, 737 (D.C. Cir. 1997) ("The deliberative process privilege does not shield documents that simply state or explain a decision the government has already made[.]"). To show that a document is pre-decisional, however, the agency need not identify a specific final agency decision; it is sufficient to establish "'what deliberative process is involved, and the role played by the documents at issue in the course of that process.'" *Heggestad v. DOJ*, 182 F. Supp. 2d 1, 7 (D.D.C. 2000) (quoting *Coastal States Gas*, 617 F.2d at 868); *see Gold Anti-Trust Action Committee v. Board of Governors*, 762 F. Supp. 2d 123, 135-36 (D.D.C. 2011) ("[E]ven if an internal discussion does not lead to adoption of a specific government policy, its protection under Exemption 5 is not foreclosed as long as the document was generated as part of a definable decision-making process.") (citing *Petroleum Info. Corp. v. Dep't of the Interior*, 976 F.2d 1429, 1434 (D.C. Cir. 1992)).

A document is "deliberative" if it "'reflects the give-and-take of the consultative process.'" *McKinley*, 744 F. Supp. 2d at 138 (quoting *Coastal States Gas*, 617 F.2d at 866). Thus, "'pre-decisional materials are not exempt merely because they are pre-decisional; they also must be part of the agency give-and-take of the deliberative process by which the decision itself is made.'" *Jowett, Inc. v. Dep't of Navy*, 729 F. Supp. 871, 875 (D.D.C. 1989) (quoting *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)). The privilege protects factual material if it is "inextricably intertwined" with deliberative material, *FPL Group*, 698 F. Supp. 2d at 81, or if disclosure "would 'expose an agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" *Quarles v. Dep't of Navy*, 893 F.2d 390, 392 (D.C. Cir. 1990)) (quoting *Dudman Commc'ns Corp. v. Dep't of Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987)). "The 'key question' in identifying 'deliberative' material is whether disclosure of the information would

'discourage candid discussion within the agency.'" *Access Reports*, 926 F.2d at 1195 (quoting *Dudman*, 815 F.2d at 1567-68).

Here, FERC properly invoked Exemption 5 to withhold numerous predecisional, deliberative records concerning the investigation and settlement with Constellation. "The Commission's decision-making occurs through public orders voted out by Commissioners, who are appointed by the President. Senior and lower level staff members offer predecisional advice to the Commissioners, but any decisions are those of the Commissioners." Tao Decl. ¶ 27; *accord id.* at 6 n.1 ("the Commission has in fact repeatedly informed the public about the *actual*, final actions it undertook with regard to the subjects of Plaintiffs' request") (citing FERC publications and news articles). Thus, numerous emails that included "internal, deliberative, pre-decisional communications, drafts, and staff analysis" were withheld in full or in part because "release of the withheld material would chill future staff discussion or cause public confusion by disclosing analysis and communications that ultimately did not form part of the final agency analysis and decisions voted out by the Commissioners and released to the public." *Id.* The Declaration rightly notes that, "in deliberating whether and how to take actions contemplated by the Agency, it often considers a variety of options, some of which will be selected and ultimately effected, while others may be set aside for a wide variety of reasons." *Id.* Certain factual material that was "inextricably intertwined with the deliberative matter" likewise was withheld. *Id.*

One kind of material that was withheld under Exemption 5 was "policy discussions between staff members." *Id.* ¶ 28. As final decisions of the Commission are rendered by the Commission itself, staff opinions were withheld where they were preliminary, *i.e.*, "subject to supervisory review or approval, and Commissioner vote, and did not represent the official views of the Agency." *Id.* The materials withheld included "staff members' personal and internal

opinions on potential Commission decisions." *Id.* Such items necessarily are predecisional and also reflect the "'give-and-take of the consultative process,'" *McKinley*, 744 F. Supp. 2d at 138. Deliberative memos from junior staff members to senior staff members likewise were properly withheld for similar reasons. *See id.* ¶ 29 (describing staff's "preliminary views on various iterations of draft orders . . . and various iterations of drafts of a stipulation and consent agreement that had not been voted out by FERC Commissioners, and that accordingly did not represent the final or official views of the Agency").

Proposed edits to drafts of Commission Orders and of the stipulation and consent agreement likewise were rightly withheld under Exemption 5. Such drafts "differ from the final versions, are authored by staff members who lack the authority to render final decisions, and do not represent the official views of the Agency." *Id.* ¶¶ 30, 31. Moreover, "the drafts include internal communication and deliberation among staff, the release of which may cause public confusion as to the Agency's official position." *Id.* Further, releasing such pre-decisional information could "'discourage candid discussion within the agency.'" *Access Reports*, 926 F.2d at 1195 (citation omitted).

Exemption 5 was also applied to several documents that are covered by the attorney work product and attorney-client privileges. The former encompasses not only "documents prepared in anticipation of foreseeable litigation, even if no specific claim is contemplated," *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992), but also to law enforcement investigation records when, as here, the investigation is "based upon a specific wrongdoing and represent[s] an attempt to garner evidence and build a case against the suspected wrongdoer." *SafeCard Servs. v. SEC*, 926 F.2d 1197, 1202 (D.C. Cir. 1991). The latter protects "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional

advice." *Mead Data Cent., Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Here, certain material was withheld that involving discussions "between staff members and their attorneys in the course of seeking legal advice, discussions among attorneys in the formulation of legal advice, and legal recommendations." Tao Decl. ¶ 32. As detailed in the *Vaughn* index, the withheld documents involved legal advice provided following the settlement around the close of the Constellation investigation about appropriate "talking points." *See Vaughn* entries 33 & B1. Such material was properly withheld under each of these privileges.

C. Exemption 6

Exemption 6 permits the withholding of "personnel and medical files and similar files" when the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). The term "similar files" is broadly construed and includes "Government records on an individual which can be identified as applying to that individual." *Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 602 (1982); *Lepelletier v. FDIC*, 164 F.3d 37, 47 (D.C. Cir. 1999) ("The Supreme Court has interpreted the phrase 'similar files' to include all information that applies to a particular individual."); *Govt. Accountability Project v. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010). In assessing the applicability of Exemption 6, courts weigh the "privacy interest in non-disclosure against the public interest in the release of the records in order to determine whether, on balance, the disclosure would work a clearly unwarranted invasion of personal privacy." *Lepelletier*, 164 F.3d at 46; *Chang v. Dep't of Navy*, 314 F. Supp. 2d 35, 43 (D.D.C. 2004). "[T]he only relevant public interest in the FOIA balancing analysis [is] the extent to which disclosure of the information sought would 'she[d] light on an agency's performance of its statutory duties' or otherwise let citizens know 'what their government is up to.'" *Lepelletier*, 164 F.3d at 47 (quoting *Dep't of Def. v. Fed. Labor Relations*

Auth., 510 U.S. 487, 497 (1994)) (alterations in original); *Beck v. DOJ*, 997 F.2d 1489, 1492 (D.C. Cir. 1993) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)). "Information that 'reveals little or nothing about an agency's own conduct' does not further the statutory purpose." *Beck*, 997 F.2d at 1492.

Importantly, "[t]he privacy interest at stake belongs to the individual, not the agency." *Amuso v. DOJ*, 600 F. Supp. 2d 78, 93 (D.D.C. 2009); *accord Reporters Comm.*, 489 U.S. at 763-65. And "the concept of personal privacy . . . is not some limited or 'cramped notion' of that idea," *NARA v. Favish*, 541 U.S. 157, 165-70 (2004) (construing analogous Exemption 7(C)), but rather is grounded in "both the common law and the literal understandings of privacy [that] encompass the individual's control of information concerning his or her person." *Reporters Comm.*, 489 U.S. at 763. "Even seemingly innocuous information can be enough to trigger the protections of Exemption 6." *Horowitz v. Peace Corps*, 428 F.3d 271, 279 (D.C. Cir. 2005). An individual's privacy interest "is not limited to [personal information] of an embarrassing or intimate nature." *People for the Am. Way Found. v. Nat'l Park Serv.*, 503 F. Supp. 2d 284, 304 (D.D.C. 2007); *accord Appleton v. FDA*, 451 F. Supp. 2d 129, 145 (D.D.C. 2006). Indeed, in enacting FOIA, "Congressional concern for the protection of the kind of confidential data usually included in a personnel file is abundantly clear." *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976).

Moreover, "where there is a substantial probability that disclosure will cause an interference with personal privacy, it matters not that there may be two or three links in the causal chain." *Nat'l Ass'n of Retired Fed. Employees v. Horner*, 879 F.2d 873, 878 (D.C. Cir. 1989). Under Exemption 6, any personal privacy interest greater than *de minimis* is considered to be

"substantial." *Consumers' Checkbook Ctr. for the Study of Servs. v. HHS*, 554 F.3d 1046, 1050 (D.C. Cir. 2009).

Here, FERC invoked Exemption 6 only to withhold identifying and contact information of private individuals and of lower-level staff members (as well as the personal cell phone number of the former FERC Chairman). Tao Decl. ¶ 33. These persons maintain a strong privacy interest in this information, the release of which "would constitute [a] clearly unwarranted invasion[] of privacy" and could lead to "unwanted contact by the media and others." *Id.* "Lower level staff should be able to do their jobs without excessive public scrutiny of their role in a particular matter." *Id*.

The burden is on Plaintiffs to establish that disclosure would sufficiently serve the public interest so as to overcome the individuals' privacy interests. *See, e.g., Carter v. Dep't of Commerce*, 830 F.2d 388, 391 n.13 (D.C. Cir. 1987); *accord Associated Press v. DOD*, 549 F.3d 62, 66 (2d Cir. 2008); *Salas v. Office of the Inspector Gen.*, 577 F. Supp. 2d 105, 112 (D.D.C. 2008) ("It is the requester's obligation to articulate a public interest sufficient to outweigh an individual's privacy interest, and the public interest must be significant." (citing *Favish*, 541 U.S at 172)). Here there is no countervailing public interest that would be served by the disclosure of this personal information. *Id.*; *see Am. Fed'n of Gov't Employees, Local 812 v. Broadcasting Bd. of Governors*, 711 F. Supp. 2d 139, 156 (D.D.C. 2010) (upholding redaction of names and other information relating to another individual pursuant to Exemption 6); *Govt. Accountability Project v. U.S. Dep't of State*, 699 F. Supp. 2d 97, 105-06 (D.D.C. 2010) (concluding that agency properly redacted personal email addresses of applicants for board positions because "releasing their email addresses serves no public interest because these email addresses would not reveal 'what the government is up to'"). Indeed, courts have held that "[w]hile there may be some

public interest in obtaining the identifying information of the Federal employees at issue, disclosure would not shed any light on the workings of [an agency]." *Canaday v. U.S. Citizenship & Immigration Servs.*, 545 F. Supp. 2d 113, 118 (D.D.C. 2008). The identity of which junior staff worked on various matters, their personal email addresses, the personal cell phone of the former Chairman, and the identities of various third parties will not show what the government is up to, and thus are properly withheld under Exemption 6.

In sum, because there is no countervailing public interest that can overcome the privacy interest of these individuals, FERC properly redacted their identifying and contact information pursuant to Exemption 6. *See Beck v. DOJ,* 997 F.3d 1489, 1494 (D.C. Cir. 1993) (when there is no public interest at all, the court "'need not linger over the balance; something outweighs nothing every time'") (quoting *Nat'l Ass'n of Retired. Fed. Employees v. Horner*, 879 F.2d 873, 879 (D.C. Cir. 1989)).

D. Exemption 7(E)

Exemption 7(E) permits withholding of "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law." 5 U.S.C. § 552(b)(7)(E); *Blackwell v. F.B.I.*, 646 F.3d 37, 42 (D.C. Cir. 2011) (noting the "relatively low bar for the agency to justify withholding" information under Exemption 7(E)). The exemption allows for withholding information "not just for circumvention of the law, but for a risk of circumvention; not just for an actual or certain risk of circumvention, but for an expected risk; not just for an undeniably or universally expected risk, but for a reasonably expected risk; and not just

for certitude of a reasonably expected risk, but for the chance of a reasonably expected risk." *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009). "[A]n agency may seek to block the disclosure of internal agency materials relating to guidelines, techniques, sources, and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation." *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002). No balancing of public and private interests is required to uphold a withholding under Exemption 7(E). *See Lesar v. U.S. DOJ*, 636 F.2d 472, 486 n.80 (D.C. Cir. 1980).

Given the subject of Plaintiffs' FOIA request—a settlement following an investigation by a law enforcement body evaluating wrongdoing by a large corporation—it is unsurprising that FERC invoked Exemption 7(E) in this case to withhold certain information that might limit the efficacy of its "current and future investigations." Tao Decl. ¶ 34. FERC has law enforcement powers under both the Federal Power Act and the Natural Gas Act. *See id.* at 13 n.2. Indeed, Plaintiffs have acknowledged that FERC has "substantial regulatory, policy and enforcement powers." Compl. ¶ 11. In exercising these powers, FERC utilized certain techniques "that are confidential and must remain so in order to preserve their effectiveness." Tao Decl. ¶ 34.

FERC's law enforcement role repeatedly has been recognized by this Court. *E.g.*, *STS Energy Partners LP v. FERC*, -- F. Supp. 3d --, 2015 WL 1000037, at *5 (D.D.C. 2015) (rejecting argument that FERC is not law enforcement agency). The "'crucial factor'" in determining whether Exemption 7 applies is "whether the claimed investigation is 'an inquiry as to an identifiable . . . violation of law.'" *Id.* (quoting *Birch v. U.S. Postal Serv.*, 803 F.2d 1206, 1210 (D.C. Cir. 1986)). Here, as in *STS*, there can be no doubt that FERC's investigation of unlawful market manipulation by Constellation that resulted in a $135 million civil penalty and a $110 million disgorgement was effected by FERC in its law enforcement role and pursuant to law

enforcement techniques that FERC appropriately seeks to safeguard in order to preserve their continuing effectiveness. Thus, this Court should uphold the application of Exemption 7(E) to protect the materials for which the exemption is asserted in the *Vaughn* index. *See also Williston Basin Interstate Pipeline Co. v. FERC*, 1989 WL 44655, at *1-2 (D.D.C. 1989) (upholding application of Exemption 7(E) to FERC to protect against "disclos[ure of] techniques used by field auditors to determine if plaintiff was in compliance with federal statutes and regulations").

In sum, FERC acted properly in withholding under Exemption 7(E) information about law enforcement techniques and procedures that must be kept private to protect the public interest so that such techniques and procedures' effectiveness will be preserved. Tao Decl. ¶ 34. "It is self-evident that information revealing [such] procedures could render those procedures vulnerable and weaken their effectiveness." *Morley v. CIA*, 508 F.3d 1108, 1129 (D.C. Cir. 2007) (refusing to be "overly formalistic" and finding that withholding of documents that would "provide insight" into an agency's investigatory or procedural techniques is proper under Exemption 7(E)); *Techserve Alliance v. Napolitano*, 803 F. Supp. 2d 16, 29 (D.D.C. 2011) (finding that agency properly withheld documents that would reveal the selection criteria, fraud indicators, and investigative process that agencies use in fraud investigations during the H-1B visa process). Accordingly, each of the withholdings under Exemption 7(E) was proper.

III. FERC Properly Produced All Segregable Records

Under the 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 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. Executive Office of the President*, 97 F.3d 575, 578-79 (D.C. Cir. 1996); *Canning v. DOJ*, 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). Here, where non-exempt information could be segregated from exempt information, Defendant segregated and disclosed the non-exempt information from the records. Tao Decl. ¶ 36. FERC also made discretionary releases where possible. *Id.* ¶ 25. Indeed, the Declaration and the *Vaughn* index demonstrate throughout, with reasonable specificity, that all documents reviewed were processed to achieve maximum disclosure consistent with the provisions of FOIA. Material withheld either was "properly covered by a FOIA exemption, immaterial and non-responsive, or inextr[icably] intertwined with deliberative matter such that disclosure would reveal the predecisional deliberations." *Id.* ¶ 36. Therefore, the Court should find that FERC has properly complied with the duty to segregate exempt from non-exempt information.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court grant summary judgment in favor of Defendant as to all claims in this case.[2]

Respectfully submitted,

RONALD C. MACHEN JR.

[2] Plaintiffs further demand costs and fees if they "substantially prevail[]." *See* Compl. ¶¶ 51-55 (citing 5 U.S.C. § 552(a)(4)(E)). As shown above, FERC has satisfied its legal obligations to provide all non-exempt, reasonably segregable responsive records, and therefore Plaintiffs are not entitled to fees and costs. In the event, however, that the Court does not grant FERC summary judgment, FERC requests leave to take up the issue of costs and fees, if appropriate, following the Court's decision on this motion.

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