



June 14, 2017

VIA ELECTRONIC MAIL

U.S. Department of Energy
1000 Independence Ave., SW
Washington, DC 20585
FOIA-Central@hq.doe.gov

Re: Freedom of Information Act Request: Department of Energy Grid Study

Dear FOIA Officer:

This is a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”), from the Center for Biological Diversity (“Center”), a non-profit organization that works to secure a future for all species hovering on the brink of extinction through science, law, and creative media, and to fulfill the continuing educational goals of its membership and the general public in the process.

REQUESTED RECORDS

The Center requests from the U.S. Department of Energy (“DOE”), including but not limited to headquarters staff and national laboratory staff, the following records created and/or obtained by the agency from April 14, 2017 to the date of DOE’s search:

1. All records that contain, or refer to, communications between DOE and non-federal agency individuals or companies, including but not limited to, energy companies, mentioning and/or otherwise referencing the “Study Examining Electricity Markets and Reliability” (“Grid Study”) and/or the matters being addressed in the Grid Study, such as:
 - (a) “[T]he extent to which federal policy interventions and the changing nature of the electricity fuel mix are challenging the original policy assumptions that shaped the creation of [wholesale electricity markets];”
 - (b) “[w]hether wholesale energy and capacity markets are adequately compensating attributes such as on-site fuel supply and other factors that strengthen grid resilience and, if not, the extent to which this could affect grid reliability and resilience in the future;” and/or
 - (c) “[t]he extent to which continued regulatory burdens, as well as mandates

and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants.” See Attachment A. Secretary of Energy’s April 14, 2017 Memo RE Study Examining Electricity Markets and Reliability.

For this request, the term “all records” refers to, but is not limited to, any and all documents, correspondence (including, but not limited to, inter and/or intra-agency correspondence as well as correspondence with entities or individuals outside the federal government), emails, letters, notes, telephone records, telephone notes, minutes, memoranda, comments, files, presentations, consultations, biological opinions, assessments, evaluations, schedules, telephone logs, papers published and/or unpublished, reports, studies, photographs and other images, data (including raw data, GPS or GIS data, UTM, LiDAR, etc.), maps, and/or all other responsive records, in draft or final form.

This request is not meant to exclude any other records that, although not specially requested, are reasonably related to the subject matter of this request. If you or your office have destroyed or determine to withhold any records that could be reasonably construed to be responsive to this request, I ask that you indicate this fact and the reasons therefore in your response.

Under the FOIA Improvement Act of 2016, agencies are prohibited from denying requests for information under FOIA unless the agency reasonably believes release of the information will harm an interest that is protected by the exemption. FOIA Improvement Act of 2016 (Public Law No. 114-185), codified at 5 U.S.C. § 552(a)(8)(A).

If you decide to invoke a FOIA exemption, please include sufficient information for us to assess the basis for the exemption, including any interest(s) that would be harmed by release. Please include a detailed ledger which includes:

1. Basic factual material about each withheld record, including the originator, date, length, general subject matter, and location of each item; and
2. Complete explanations and justifications for the withholding, including the specific exemption(s) under which the record (or portion thereof) was withheld and a full explanation of how each exemption applies to the withheld material. Such statements will be helpful in deciding whether to appeal an adverse determination. Your written justification may help to avoid litigation.

In addition, if you determine that portions of the records requested are exempt from disclosure, we request that you segregate the exempt portions and mail the non-exempt portions of such records to my attention at the address below within the statutory time limit. 5 U.S.C. § 552(b).

The Center is willing to receive records on a rolling basis.

FORMAT OF REQUESTED RECORDS

Under FOIA, you are obligated to provide records in a readily-accessible electronic format and in the format requested. *See, e.g.*, 5 U.S.C. § 552(a)(3)(B) (“In making any record available to a

person under this paragraph, an agency shall provide the record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format.”). “Readily-accessible” means text-searchable and OCR-formatted. *See* 5 U.S.C. § 552(a)(3)(B). Please provide all records in a readily-accessible, electronic .pdf format. Additionally, please provide the records either in (1) load-ready format with a CSV file index or excel spreadsheet, or if that is not possible; (2) in .pdf format, without any “portfolios” or “embedded files.” Portfolios and embedded files within files are not readily-accessible. Please do not provide the records in a single, or “batched,” .pdf file. We appreciate the inclusion of an index.

RECORD DELIVERY

We appreciate your help in expeditiously obtaining a determination on the requested records. As mandated in FOIA, we anticipate a reply within 20 working days. 5 U.S.C. § 552(a)(6)(A)(i). Failure to comply within the statutory timeframe may result in the Center taking additional steps to ensure timely receipt of the requested materials. Please provide a complete reply as expeditiously as possible. You may email or mail copies of the requested records to:

Margaret E. Townsend
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97211
mtownsend@biologicaldiversity.org

If you find that this request is unclear, or if the responsive records are voluminous, please call me at (971) 717-6409 to discuss the scope of this request.

REQUEST FOR FEE WAIVER

FOIA was designed to provide citizens a broad right to access government records. FOIA’s basic purpose is to “open agency action to the light of public scrutiny,” with a focus on the public’s “right to be informed about what their government is up to.” *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 773-74 (1989) (internal quotation and citations omitted). In order to provide public access to this information, FOIA’s fee waiver provision requires that “[d]ocuments shall be furnished without any charge or at a [reduced] charge,” if the request satisfies the standard. 5 U.S.C. § 552(a)(4)(A)(iii). FOIA’s fee waiver requirement is “liberally construed.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1310 (D.C. Cir. 2003); *Forest Guardians v. U.S. Dept. of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

The 1986 fee waiver amendments were designed specifically to provide non-profit organizations such as the Center access to government records without the payment of fees. Indeed, FOIA’s fee waiver provision was intended “to prevent government agencies from using high fees to discourage certain types of requesters and requests,” which are “consistently associated with requests from journalists, scholars, and *non-profit public interest groups*.” *Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added). As one Senator stated, “[a]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information” 132 Cong. Rec. S. 14298 (statement of Senator Leahy).

I. The Center Qualifies for a Fee Waiver.

Under FOIA, a party is entitled to a fee waiver when “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the [Federal] government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii). DOE FOIA regulations at 10 C.F.R. § 1004.9(a) establish the same standard.

Thus, the DOE must consider four factors to determine whether a request is in the public interest: (1) whether the subject of the requested records concerns “the operations or activities of the Federal government,” (2) whether the disclosure is “likely to contribute” to an understanding of government operations or activities, (3) whether the disclosure “will contribute to public understanding” of a reasonably-broad audience of persons interested in the subject, and (4) whether the disclosure is likely to contribute “significantly” to public understanding of government operations or activities. 10 C.F.R. § 1004.9 (a)(i)(A) – (D). As shown below, the Center meets each of these factors.

A. The Subject of This Request Concerns “The Operations and Activities of the Government.”

The subject matter of this request concerns the operations and activities of the DOE. The Center requests from DOE, including but not limited to headquarters staff and national laboratory staff, the following records created and/or obtained by the agency from April 14, 2017 to the date of DOE’s search: (1) all records that contain, or refer to, communications between DOE and non-federal agency individuals or companies, including but not limited to, energy companies, mentioning and/or otherwise referencing the Grid Study and/or the matters being addressed in the Grid Study, such as: (a) “[T]he extent to which federal policy interventions and the changing nature of the electricity fuel mix are challenging the original policy assumptions that shaped the creation of [wholesale electricity markets];” (b) “[w]hether wholesale energy and capacity markets are adequately compensating attributes such as on-site fuel supply and other factors that strengthen grid resilience and, if not, the extent to which this could affect grid reliability and resilience in the future;” and/or (c) [t]he extent to which continued regulatory burdens, as well as mandates and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants.” See Attachment A.

This FOIA will provide the Center and the public with crucial insight into communications between DOE and outside parties concerning the DOE Grid Study. It is clear that oversight of the Grid Study is a specific and identifiable activity of the government, in this case the executive branch agency, the DOE. *Judicial Watch*, 326 F.3d at 1313 (“[R]easonable specificity is all that FOIA requires with regard to this factor”) (internal quotations omitted). Thus, the Center meets this factor.

B. Disclosure is “Likely to Contribute” to an Understanding of Government Operations or Activities.

The requested records are meaningfully informative about government operations or activities and will contribute to an increased understanding of those operations and activities by the public.

Disclosure of the requested records will allow the Center to convey information to the public about the Grid Study, and what communications and input DOE has sought from outside parties that shape the Grid Study. Once the information is made available, the Center will analyze it and present it to its 1.3 million members and online activists and the general public in a manner that will meaningfully enhance the public’s understanding of the topic.

Thus, the requested records are likely to contribute to an understanding of DOE operations and activities.

C. Disclosure of the Requested Records Will Contribute to a Reasonably Broad Audience of Interested Persons’ Understanding of the Grid Study

The requested records will contribute to public understanding of how the development of the Grid Study is consistent with the DOE’s mission to “ensure America’s security and prosperity by addressing its energy, environmental and nuclear challenges through transformative science and technology solutions.”¹ As explained above, the records will contribute to public understanding of the Grid Study, and whether input from outside parties, including but not limited to, energy companies have and/or will shape the Grid Study.

Oversight of energy studies, and specifically development of the Grid Study are areas of interest to a reasonably-broad segment of the public. The Center will use the information it obtains from the disclosed records to educate the public at large about the important work that the DOE does, and the connection between energy efficiency and environmental health. *See W. Watersheds Proj. v. Brown*, 318 F.Supp.2d 1036, 1040 (D. Idaho 2004) (“... find[ing] that WWP adequately specified the public interest to be served, that is, educating the public about the ecological conditions of the land managed by the BLM and also how ... management strategies employed by the BLM may adversely affect the environment.”).

Through the Center’s synthesis and dissemination (by means discussed in Section II, below), disclosure of information contained in and gleaned from the requested records will contribute to a broad audience of persons who are interested in the subject matter. *Ettlinger v. FBI*, 596 F.Supp. at 876 (benefit to a population group of some size distinct from the requester alone is sufficient); *Carney v. Dep’t of Justice*, 19 F.3d 807, 815 (2d Cir. 1994), *cert. denied*, 513 U.S. 823 (1994) (applying “public” to require a sufficient “breadth of benefit” beyond the requester’s own interests); *Cnty. Legal Servs. v. Dep’t of Hous. & Urban Dev.*, 405 F.Supp.2d 553, 557 (E.D. Pa. 2005) (in granting fee waiver to community legal group, court noted that while the requester’s “work by its nature is unlikely to reach a very general audience,” “there is a segment of the public that is interested in its work”).

¹ See *Energy.gov: Mission*, <https://energy.gov/mission>, (last visited June 12, 2017).

Indeed, the public does not currently have an ability to easily evaluate the requested records, which concern the DOE Grid Study and communications surrounding its development that are not currently in the public domain. *See Cmty. Legal Servs. v. HUD*, 405 F.Supp.2d 553, 560 (D. Pa. 2005) (because requested records “clarify important facts” about agency policy, “the CLS request would likely shed light on information that is new to the interested public.”). As the Ninth Circuit observed in *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1286 (9th Cir. 1987), “[FOIA] legislative history suggests that information [has more potential to contribute to public understanding] to the degree that the information is new and supports public oversight of agency operations... .”²

Disclosure of these records is not only “likely to contribute,” but is certain to contribute, to public understanding of the Grid Study’s development. The public is always well served when it knows how the government conducts its activities, particularly matters touching on legal questions. Hence, there can be no dispute that disclosure of the requested records to the public will educate the public about what third parties DOE is consulting with to develop its Grid Study, and how these communications shape the Grid Study’s advancement.

D. Disclosure is Likely to Contribute Significantly to Public Understanding of Government Operations or Activities.

The Center is not requesting these records merely for their intrinsic informational value. Disclosure of the requested records will significantly enhance the public’s understanding of the communications relating to DOE’s Grid Study. Indeed, public understanding will be *significantly* increased as a result of disclosure because the requested records will help reveal more about the Grid Study’s progress and the communications that have helped shape the study. The records are also certain to shed light on DOE’s compliance with its mission.³ Such public oversight of agency action is vital to our democratic system and clearly envisioned by the drafters of the FOIA. Thus, the Center meets this factor as well.

II. The Center has a Demonstrated Ability to Disseminate the Requested Information Broadly.

The Center is a non-profit organization that informs, educates, and counsels the public regarding environmental issues, policies, and laws relating to environmental issues. The Center has been substantially involved in the activities of numerous government agencies for over 25 years, and has consistently displayed its ability to disseminate information granted to it through FOIA.

In consistently granting the Center’s fee waivers, agencies have recognized: (1) that the information requested by the Center contributes significantly to the public’s understanding of the government’s operations or activities; (2) that the information enhances the public’s

² In this connection, it is immaterial whether any portion of the Center’s request may currently be in the public domain because the Center requests considerably more than any piece of information that may currently be available to other individuals. *See Judicial Watch*, 326 F.3d at 1315.

³ *See supra* note at 1.

understanding to a greater degree than currently exists; (3) that the Center possesses the expertise to explain the requested information to the public; (4) that the Center possesses the ability to disseminate the requested information to the general public; (5) and that the news media recognizes the Center as an established expert in the field of imperiled species, biodiversity, and impacts on protected species. The Center's track record of active participation in oversight of governmental activities and decision-making, and its consistent contribution to the public's understanding of those activities as compared to the level of public understanding prior to disclosure are well established.

The Center intends to use the records requested here similarly. The Center's work appears in more than 2,500 news stories online and in print, radio and TV per month, including regular reporting in such important outlets as *The New York Times*, *Washington Post*, and *Los Angeles Times*. In 2016, more than 2 million people visited the Center's extensive website, viewing a total of more than 5.2 million pages. The Center sends out more than 277 email newsletters and action alerts per year to more than 1.3 million members and supporters. Three times a year, the Center sends printed newsletters to more than 58,016 members. More than 233,000 people have "liked" the Center on Facebook, and there are regular postings regarding the connection between energy efficiency and environmental health. The Center also regularly tweets to more than 52,200 followers on Twitter. The Center intends to use any or all of these far-reaching media outlets to share with the public information obtained as a result of this request.

Public oversight and enhanced understanding of the DOE's duties is absolutely necessary. In determining whether disclosure of requested information will contribute significantly to public understanding, a guiding test is whether the requester will disseminate the information to a reasonably-broad audience of persons interested in the subject. *Carney v U.S. Dept. of Justice*, 19 F.3d 807 (2nd Cir. 1994). The Center need not show how it intends to distribute the information, because "[n]othing in FOIA, the [agency] regulation, or our case law require[s] such pointless specificity." *Judicial Watch*, 326 F.3d at 1314. It is sufficient for the Center to show how it distributes information to the public generally. *Id.*

III. Obtaining the Requested Records is of No Commercial Interest to the Center.

Access to government records, disclosure forms, and similar materials through FOIA requests is essential to the Center's role of educating the general public. Founded in 1994, the Center is a 501(c)(3) nonprofit conservation organization (EIN: 27-3943866) with more than 1.3 million members and online activists dedicated to the protection of endangered and threatened species and wild places. The Center has no commercial interest and will realize no commercial benefit from the release of the requested records.

IV. Conclusion

For all of the foregoing reasons, the Center qualifies for a full fee-waiver. We hope that the DOE will immediately grant this fee waiver request and begin to search and disclose the requested records without any unnecessary delays.

If you have any questions, please contact me at (971) 717-6409 or foia@biologicaldiversity.org. All records and any related correspondence should be sent to my attention at the address below.

Sincerely,

A handwritten signature in black ink, appearing to read "Margaret E. Townsend", with a long horizontal flourish extending to the right.

Margaret E. Townsend
Open Government Staff Attorney
CENTER FOR BIOLOGICAL DIVERSITY
P.O. Box 11374
Portland, OR 97211-0374
foia@biologicaldiversity.org

Attachments

Attachment A (Secretary of Energy's April 14, 2017 Memo RE Study Examining Electricity Markets and Reliability)

Attachment A



The Secretary of Energy

Washington, DC 20585

April 14, 2017

MEMORANDUM TO THE CHIEF OF STAFF

FROM:

RICK PERRY
SECRETARY OF ENERGY

RICK PERRY

SUBJECT: STUDY EXAMINING ELECTRICITY MARKETS AND RELIABILITY

At the most recent G7 Energy Ministerial, my colleagues discussed the need for an energy transition utilizing greater efficiency and fuel diversity. There was also notable concern about how certain policies are affecting, and potentially putting at risk, energy security and reliability. It impressed upon me that the United States should take heed of the policy choices our allies have made, and take stock of their consequences.

A reliable and resilient electric system is essential to protecting public health and fostering economic growth and job creation. The U.S. electric system is the most sophisticated and technologically advanced in the world. Consumers utilize heating, air conditioning, computers, and appliances with few disruptions. Nonetheless, there are significant changes occurring within the electric system that could profoundly affect the economy and even national security, and as such, these changes require further study and investigation.

Baseload power is necessary to a well-functioning electric grid. We are blessed as a nation to have an abundance of domestic energy resources, such as coal, natural gas, nuclear, and hydroelectric, all of which provide affordable baseload power and contribute to a stable, reliable, and resilient grid. Over the last few years, however, grid experts have expressed concerns about the erosion of critical baseload resources.

Specifically, many have questioned the manner in which baseload power is dispatched and compensated. Still others have highlighted the diminishing diversity of our nation's electric generation mix, and what that could mean for baseload power and grid resilience. This has resulted in part from regulatory burdens introduced by previous administrations that were designed to decrease coal-fired power generation. Such policies have destroyed jobs and economic growth, and they threaten to undercut the performance of the grid well into the future. Finally, analysts have thoroughly documented the market-distorting effects of federal subsidies that boost one form of energy at the expense of others. Those subsidies create acute and chronic problems for maintaining adequate baseload generation and have impacted reliable generators of all types.

Each of these and other related issues must be rigorously studied and analyzed, and the Department of Energy is uniquely qualified for the task. The results of this analysis will help the federal government formulate sound policies to protect the nation's electric grid. In establishing these policies, the Trump Administration will be guided by the principles of reliability, resiliency, affordability, and fuel assurance—principles that underpin a thriving economy.

I am directing you today to initiate a study to explore critical issues central to protecting the long-term reliability of the electric grid, using the full resources and relationships available to the Department. By Wednesday, April 19, 2017, present to me an implementation plan to complete this study 60-days from that date, that will explore the following issues:

- The evolution of wholesale electricity markets, including the extent to which federal policy interventions and the changing nature of the electricity fuel mix are challenging the original policy assumptions that shaped the creation of those markets;
- Whether wholesale energy and capacity markets are adequately compensating attributes such as on-site fuel supply and other factors that strengthen grid resilience and, if not, the extent to which this could affect grid reliability and resilience in the future; and
- The extent to which continued regulatory burdens, as well as mandates and tax and subsidy policies, are responsible for forcing the premature retirement of baseload power plants.

I have committed to the President that this report will not only analyze problems but also provide concrete policy recommendations and solutions. I also committed to the President that I will do everything within my legal authority to ensure that we provide American families and businesses an electric power system that is technologically advanced, resilient, reliable, and second to none.