

BILLY J. WILLIAMS, OSB #901366

United States Attorney

District of Oregon

KEVIN DANIELSON, OSB #065860

Assistant United States Attorney

kevin.c.danielson@usdoj.gov

1000 SW Third Avenue, Suite 600

Portland, OR 97204-2902

Telephone: (503) 727-1000

Attorneys for Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

**DEB EVANS; RON SCHAAF; BILL
GOW; SHARON GOW; STACEY
MCLAUGHLIN; CRAIG
MCLAUGHLIN; TWYLA BROWN;
RICHARD BROWN; CLARENCE
ADAMS; STEPHANY ADAMS;
NISKANEN CENTER,**

Case No. 1:19-cv-00766-CL

**DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

Plaintiffs,

v.

**FEDERAL ENERGY
REGULATORY COMMISSION,**

Defendant.

CERTIFICATE OF COMPLIANCE WITH LR 7-1

Counsel for Defendant has conferred with Plaintiffs' counsel, Tonia L. Moro, and she objects to this motion. The parties have made a good-faith effort to resolve this dispute but have been unable to do so.

MOTION

Defendant Federal Energy Regulatory Commission as represented by Billy J. Williams, United States Attorney for the District of Oregon, through Assistant U.S. Attorney Kevin Danielson, moves for summary judgment under Fed. R. Civ. P. 56.

UNDISPUTED FACTS

1. Plaintiffs are 10 individuals, residents of Oregon, and the Niskanen Center, Inc., located in Washington, D.C. The individuals have property in Oregon that will allegedly be affected by a proposed natural gas pipeline. Complaint, ECF 1, ¶ 1.
2. The Federal Energy Regulatory Commission (FERC) has the authority to regulate the interstate transportation of natural gas. 15 U.S.C. § 717.
3. Pursuant to 18 C.F.R. § 157.21(f)(4), within 30 days issuance of a notice commencing a prospective applicant's pre-filing process, the prospective applicant must submit to the Commission a stakeholder mailing list (which includes, but is not limited to, all affected landowners). This list is used by FERC for distribution of certain subsequent notices, such as the Notice of

Intent to prepare an environmental document. Once the pre-filing process is complete, 18 C.F.R. § 157.6(d) requires that an applicant, shall “make a good faith effort to notify all affected landowners and towns, communities, and local, state and federal governments and agencies involved in the project.” The applicant’s notification must include a copy of FERC’s issued notice of application, which is also published in the Federal Register. *See, e.g.,* 18 C.F.R. § 157.9; Declaration of Terry Turpin, ¶¶ 2-3.

4. The Jordan Cove Energy Project includes plans to construct and operate a liquefied natural gas production, storage, and export facility in Coos County, Oregon. Pacific Connector Gas Pipeline plans to construct and operate an interstate natural gas transmission pipeline related to the project. Declaration of Lakesha Abney, Exhibit 1, p. 1.

5. On January 15, 2019, Plaintiffs submitted the following request under the Freedom of Information Act (FOIA) to FERC:

Please produce any and all records and information in FERC’s possession or control in relation to private landowners identified by the Pacific Connector Gas Pipeline, LP in Docket No. CP17-494, including, but not limited to, the following landowner lists:

- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20180409 5216 on April 9, 2018;
- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20180206 5089 on February 6, 2018;
- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20180103 5102 on January 3, 2018;
- Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20171121 5153 on

November 21, 2017; and • Landowner List Information of Pacific Connector Gas Pipeline, LP, et al., under CP17-494, et al., Submittal 20171023 5363 on October 23, 2017.

First Supplemental Declaration of Lakesha Abney, Exhibit 5.

6. In a letter dated February 22, 2019, FERC responded to Plaintiffs' FOIA request. FERC produced records containing the names and addresses of commercial entities on the landowner lists. FERC also produced records containing the names and addresses of private individuals on the landowners list but the names and addresses were redacted based on Exemption 6. *Id.*, Exhibit 6.

7. Plaintiffs appealed the response to FERC's Office of the General Counsel and the appeal was denied on April 1, 2019. *Id.*, Exhibit 7.

8. A copy of the Notice of Intent to Prepare an Environmental Impact Statement for the project was sent to all affected landowners. Declaration of Lakesha Abney, Exhibit 1, p. 9; Exhibit 2, p. 2.

9. A copy of the Notice of Availability of the Draft Environmental Impact Statement for the Proposed Jordan Cove Energy Project was sent to potentially affected landowners. *Id.*, Exhibit 3, p. 2.

10. During June of 2019, FERC held four public comment sessions on the Jordan Cove Energy Project draft environmental impact statement. *Id.*, Exhibit 4.

11. Releasing the names and addresses of individual landowners could result in the individuals being subjected to unsolicited and unwanted contact by others who could intrude on their privacy. Dec. of Turpin, ¶ 4.

SUMMARY JUDGMENT

A party is entitled to summary judgment “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). Most FOIA cases are decided on summary judgment. *Animal Legal Defense Fund v. U.S. Food & Drug Admin.*, 836 F.3d 987, 989 (9th Cir. 2016) (en banc). The usual summary judgment standard applies to FOIA cases. *Cameranesi v. United States Dep’t of Defense*, 856 F.3d 626, 636 (9th Cir. 2017). The court views the evidence in the light most favorable to the non-moving party, decides whether there are any genuine issues of material fact, and applies the relevant, substantive law. *Id.* In a FOIA case, if there are genuine issues of material fact, the district court should proceed to an adversary hearing or bench trial. *Id.*

THE FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA) requires federal agencies to make government records available to the public. 5 U.S.C. § 552. Congress enacted FOIA to allow public access to government documents in order to keep citizens informed about the operation of the government and to hold the

government accountable to the people. *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). Disclosure of documents, and not secrecy, is the objective of the act. *Id.*

When FOIA was enacted, Congress recognized that disclosure of some information might legitimately be kept from the public. *Lahr v. NTSB*, 569 F.3d 964, 973 (9th Cir. 2009). FOIA contains nine specific categories of material that are exempt from disclosure by the government. 5 U.S.C. §552(b)(1)-(9). These exemptions are narrowly construed and FOIA mandates disclosure of agency documents unless the records are exempt. *Milner v. Dep't of the Navy*, 562 U.S. 562, 565 (2011). Because of FOIA's strong presumption of disclosure, the burden is on the agency to justify the withholding of any requested documents. *Lahr*, 569 F.3d at 973.

ARGUMENT AND AUTHORITY

- I. **FERC properly withheld the names and addresses of the individual landowners under Exemption 6 because release of the information would constitute a clearly unwarranted invasion of the personal privacy of the landowners and would not show anything about the workings of FERC.**

Exemption 6 protects personal privacy.

Exemption 6 protects information related to a person's personal privacy. 5 U.S.C. § 552(b)(6). The exemption allows an agency to withhold the following information: "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of

personal privacy.” *Id.* The phrase “similar files” is broadly interpreted and government records containing information that applies to specific individuals satisfies the threshold test. *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 525 U.S. 1021, 1024 (9th Cir. 2008).

In determining whether disclosure would result in a “clearly unwarranted invasion of personal privacy,” a court must balance the public interest in disclosure against the privacy interest of the individual. *Civil Beat Law Center for the Public Interest, Inc. v. Centers for Disease Control & Prevention*, 929 F.3d 1079, 1090-91 (9th Cir. 2019). Balancing these two interests requires two steps. *Id.* at 1091.

The two-step test for Exemption 6.

In the first step, the court must evaluate the personal privacy interest to ensure that the privacy interest is non-trivial or more than *de minimis*. *Id.* “Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment – including disclosures of an individual’s identity – constitute nontrivial intrusions into privacy under Exemption 6.” *Civil Beat Law Center*, 929 F.3d at 1091 (quoting in part *Cameranesi*, 856 F.3d at 638).

The invasion of a personal privacy interest may be clearly unwarranted “even when the invasion of privacy is far from a certainty.” *Id.* The agency

need not document that mistreatment or harassment happened in the past or will certainly happen in the future. *Id.* at 1091-92. The agency must merely establish that disclosure of the information could potentially result in harassment of the individuals. *Id.* at 1092. Here, FERC's Director of the Office of Energy Projects, Terry Turpin, has stated that releasing the names and addresses of individual landowners could result in their privacy being invaded by unsolicited and unwanted contact by others. Dec. of Turpin, ¶ 4.

In the second step, the requestor must show that the public interest is significant and the information requested is likely to advance that interest. *Civil Beat Law Center*, 929 F.3d at 1091. The only relevant public interest in disclosure is the extent to which disclosure would contribute to the public understanding of the activities or operations of the government. *Id.*

Names, home addresses, and contact information are protected.

The names, home addresses, and contact information for individuals have been consistently protected under Exemption 6. See, e.g. *Bibles v. Oregon Natural Desert Ass'n*, 519 U.S. 355 (1997) (holding that the names and addresses on a mailing list for a newsletter from the Bureau of Land Management were protected by Exemption 6); *U.S. Dep't of Defense v. Fed. Labor Relations Authority*, 510 U.S. 487, 502 (1994) (holding the home addresses of federal employees were protected under Exemption 6); *Civil Beat Law Center*, 929 F.3d at 1092 (holding that the names and contact

information for employees of the Center for Disease Control were protected under Exemption 6); *Cameranesi v. U.S. Dep't of Defense*, 856 F.3d 626, 638 (9th Cir. 2017) (holding that the names of foreign students and instructors at a Department of Defense training center were protected under Exemption 6).

Names and addresses for landowners are protected.

In *Odland v. Federal Energy Regulatory Comm.*, 34 F. Supp. 3 (D.D.C. 2014), plaintiffs made a FOIA request for the names and addresses from landowner lists related to a compressor station for a proposed natural gas pipeline. The information was withheld under Exemption 6. *Id.* at 20.

The *Odland* court found that FERC properly withheld the information under Exemption 6. *Id.* at 22. The court found the individuals had, at least, a modest privacy interest in the information. *Id.* In addition, the court found that plaintiffs had failed to show there was any public interest in disclosure because releasing the names and addresses of the landowners would not reveal anything about how FERC worked. *Id.* Moreover, the court found that there was ample public documentation showing that FERC and the pipeline company provided notice of the project through newspapers, open house meetings, and mailing. *Id.* Accordingly, the court found that “FERC properly invoked Exemption 6 when it withheld the names and addresses from the landowner lists.” *Id.*

In *Columbia Riverkeeper v. FERC*, 650 F. Supp. 2d 1121, 1122 (D. Or. 2009), plaintiff made a FOIA request for the mailing lists showing the names and addresses of landowners notified of a public meetings about a proposed natural gas pipeline. FERC withheld the information under Exemption 6. The court found the individuals had a minimal or reduced privacy interest in their names and addresses. *Id.* at 1129. The court also found that FERC did not meet its “burden of proving that the information by plaintiffs would not shed light on FERC’s performance of its statutory duties governing notice.” *Id.* at 1130. Therefore, it ruled that Exemption 6 did not apply and ordered FERC to produce the documents.

The *Odland* court distinguished *Columbia Riverkeeper* where disclosure of the names and addresses on the mailing lists “was in the public interest because it would reveal whether FERC had complied with the public notice mandate.” *Odland*, 34 F. Supp. 3d at 22. However, in *Odland*, plaintiffs were not trying to shed light on whether FERC sent notice. Rather, plaintiffs wanted to find out if notice was received. *Id.* Whether notice was received by the landowners was irrelevant to FERC’s conduct and not a matter of public interest. *Id.* Because plaintiffs had not shown that releasing the names and addresses of the landowners would show anything about the workings of FERC, there was no public interest in disclosure. *Id.* In conducting the balancing test, the privacy interest prevailed because there

was no public interest in disclosure. *Id.* Accordingly, the *Odland* court ruled that Exemption 6 applied to the names and addresses of the landowners. *Id.*

The balancing test weighs in favor of the privacy interest because there is no interest in public disclosure.

Here, the first step for Exemption 6 is met because, in similar cases, courts have recognized that landowners have a privacy interest in their names and addresses that is non-trivial or more than de minimis. In *Odland*, the court found that the landowners had, at least, a modest privacy interest in their names and addresses. 34 F. Supp. 3d at 22.

In the second step for Exemption 6, Plaintiffs have not shown how releasing the names and addresses of the landowners would reveal anything about the workings of FERC. FERC has presented evidence showing the landowners were notified of the project through different mailings and that four public meetings about the project were held.

Importantly, it is the obligation of the applicant for the project to provide FERC the names and addresses of the stakeholders, such as individual landowners. FERC does not create the list of the names and addresses of the individual landowners. Therefore, releasing the names and addresses of the individual landowners would not show how FERC works.

In balancing the privacy interest against public disclosure, Plaintiffs have not shown that releasing the information would significantly contribute

to the public's understanding of the operation or activities of FERC.

Therefore, there is no public interest in disclosure. Even "a modest privacy interest outweighs nothing every time." *Odland*, 34 F. Supp. 3d at 22.

Accordingly, FERC properly withheld the names and addresses of the individual landowners under Exemption 6.

II. The adequacy of the search and segregability are not at issue.

In the complaint, Plaintiffs have only challenged the withholding of the records under Exemption 6. They have not challenged the adequacy of the search or whether any non-exempt information was segregable and disclosed after redaction of the exempt information.

CONCLUSION

Defendant Federal Energy Regulatory Commission's motion for summary judgment should be granted.

Dated: September 25, 2019.

Respectfully submitted,

BILLY J. WILLIAMS
United States Attorney
District of Oregon

/s/ Kevin C. Danielson
KEVIN C. DANIELSON
Assistant United States Attorney
Attorneys for Defendant