

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,**

Plaintiffs,

v.

**FEDERAL ENERGY REGULATORY
COMMISSION,**

Defendant.

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

**DEFENDANT'S RESPONSE TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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, submits the following response to Plaintiffs' motion for summary judgment. ECF 18.

INTRODUCTION

Plaintiffs brought this action under the Freedom of Information Act, 5 U.S.C. § 552, and alleged the Federal Regulatory Energy Commission (FERC) improperly withheld the names and addresses of individuals who own property in the path of a proposed natural gas pipeline. FERC argues that the withholding of the names and addresses of the property owners was proper under the privacy protection provided by Exemption 6 because the release of the information will not show how FERC operates as an agency.

Here, the legal issues are limited to whether FERC properly withheld the information under FOIA. Contrary to Plaintiffs' arguments, the legal issues before this Court do not include: (1) the Due Process Clause of the Fifth Amendment; (2) any statutory or constitutional responsibilities of FERC to send notice to the landowners; (3) any statutory and constitutional rights of the landowners to seek judicial review of FERC's decision; and (4) eminent domain issues related to the pipeline. These arguments and challenges are outside the scope of a FOIA lawsuit and will not be addressed by FERC.

RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS

Defendant responds to Plaintiffs' Statement of Undisputed Material Facts as follows:

1. Undisputed.
2. Disputed. Defendant does not agree with the characterization of Certificate holders having “extraordinary powers.” Defendant agrees that Certificate holders may exercise eminent domain to acquire property rights to construct and operate the project in exchange for just compensation.
3. Disputed. Defendant is required by regulation to issue notices of application and publish them in the Federal Register. *See, e.g.*, 18 C.F.R. § 157.9. Pipeline companies are required to “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.” 18 C.F.R. § 157.6(d). Such notice shall include “[a] brief summary of what rights the landowner has at the Commission and in proceedings under the eminent domain rules of the relevant state.” 18 C.F.R. § 157.6(d)(3)(v).
4. Disputed. Defendant issues the notices of application on its own and publishes them in the Federal Register. *See, e.g.*, 18 C.F.R. § 157.9. Pipeline companies are not “delegated” any authority but are required under 18 C.F.R. § 157.6(d) to “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.”
5. Disputed. Pursuant to 18 C.F.R. § 157.6(d), 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.”

6. Undisputed.

7. Disputed. Defendant issues the notices of application on its own and publishes them in the Federal Register. *See, e.g.*, 18 C.F.R. § 157.9. The applicant is not “delegated” any authority but is required under 18 C.F.R. § 157.6(d) to “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.”

8. Undisputed.

9. Undisputed.

10. Undisputed.

11. Undisputed. However, although the deadline for intervention in the PCP proceedings was 5:00 pm on October 26, 2017, Defendant considered requests for late intervention in this proceeding.

12. Undisputed.

13. Undisputed.

14. Undisputed.

15. Undisputed.

16. Undisputed.

17. Undisputed.

18. Undisputed.

19. Undisputed.

ARGUMENT

I. **FERC properly withheld the names and addresses of the individual landowners under Exemption 6.**

A. Exemption 6 protects personal privacy.

Under FOIA, 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.* 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).

B. The two-step test for Exemption 6.

Balancing these interests requires two steps. *Id.* at 1091. First, the court must evaluate the personal privacy interest to ensure that the privacy interest is non-trivial or more than *de minimis*. *Id.* If the agency establishes a non-trivial privacy interest, the burden shifts to the requestor to establish that the public interest outweighs the privacy interest. *Rojas v. Federal Aviation Admin.* 941 F.3d 392, 405 (9th Cir. 2019).

Second, the requestor must show that the “public interest in the information outweighs the privacy interest.” *Rojas*, 941 F.3d at 405. In the FOIA balancing analysis, the only relevant public interest is the extent to which disclosure “would shed light on an agency’s performance of its statutory duties or otherwise let citizens know what their government is up to.” *Id.* (quoting *Bibles v. Or. Nat Desert Ass’n*, 519 U.S. 355, 355-56 (1997)).

C. 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 Plaintiffs do not dispute that the names and addresses of the landowner “is potentially a ‘similar file.’” ECF 17, p. 30. Accordingly, the burden shifts to Plaintiffs to establish that the public interest outweighs the privacy interest. Importantly, under 18 C.F.R. § 157.6(d), it was the obligation of Pacific Connector Gas Pipeline to notify the affected landowners. FERC did 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 addition, 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.

Because Plaintiffs have failed to meet their burden in establishing that the public interest outweighs the privacy interest of the landowners, FERC properly decided to withhold the names and addresses of the individual

landowners under Exemption 6 and summary judgment should be granted in its favor.

II. FERC adequately segregated and released the names and addresses of commercial entities who were property owners.

Under FOIA, any “reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b)(the sentence immediately following the exemption).

Here, FERC properly segregated and produced the names and addresses of commercial property owners. ECF 15-2, p. 2. Therefore, summary judgment should be granted in favor of FERC on this issue.

III. FERC’s declarations properly authenticated its documents.

Plaintiffs allege that the declarations from FERC employees: (1) are boilerplate declarations; (2) provide no justification for withholding the information; and (3) are conclusory statements that contain over-generalized assertions that the documents were withheld under Exemption 6.

To the contrary, a declaration supporting a motion for summary judgment “must be made on personal knowledge, set out facts that would be admissible in evidence, and that the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4).

Here, the declarations from FERC employees state facts and properly authenticate documents supporting FERC’s motion for summary judgment.

CONCLUSION

Plaintiffs' motion for summary judgment (ECF 18) should be denied and Defendant's motion for summary judgment (ECF 13) should be granted.

Dated: December 23, 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