

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
MEDFORD DIVISION**

DEB EVANS, RON SCHAAF, et al.,

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

Plaintiffs,

v.

**REPORT AND
RECOMMENDATION**

**FEDERAL ENERGY REGULATORY
COMMISSION,**

Defendant.

CLARKE, Magistrate Judge.

Plaintiffs bring this cause of action against the Federal Energy Regulatory Commission (“FERC”), requesting relief under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 et seq. Plaintiffs seek to obtain mailing lists showing the names and addresses of private landowners that may be impacted by a proposed natural gas pipeline project. This case comes before the Court on cross motions for summary judgment. For the reasons below, this Court recommends that Plaintiffs’ Motion for Summary Judgment (#18) be GRANTED and FERC’s Motion for Summary Judgment (#13) be DENIED.

BACKGROUND

FERC has the authority to regulate the interstate transportation of natural gas. 15 U.S.C. § 717. Pacific Gas Connector Pipeline, LP (“PCP”) applied to FERC for a Certificate of Public Convenience and Necessity in October 2017. Certificate holders may exercise eminent domain to acquire property rights for an approved project in exchange for just compensation. As part of the Jordan Cove Energy Project (the “Pipeline Project”), PCP plans to construct and operate an interstate natural gas transmission pipeline that would cross through Southern Oregon. Plaintiffs are ten individual Oregon landowners who allege that the pipeline will run through their land if the Pipeline Project is approved.

FERC’s Notice of Application for PCP was published in the Federal Register on October 26, 2017, signifying its acceptance of PCP’s application filing. Pursuant to 18 C.F.R. § 157.6(d), an applicant is 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.” The applicant’s notification must also include a copy of FERC’s issued notice of application. 18 C.F.R. § 157.9.

Pursuant to 18 C.F.R. § 157.21(f)(4), PCP was required to submit to FERC a stakeholder mailing list (also commonly referred to throughout this litigation as the “landowner list”). This list is used by FERC for distribution of certain notices. PCP filed the landowner lists to FERC as “privileged,” and the lists are not publicly available. On January 15, 2019, Plaintiffs submitted a FOIA request to FERC for any and all records related to private landowners identified by PCP in relation to the Pipeline Project, including but not limited to, the stakeholder mailing list.

In response to the FOIA request, FERC produced records containing the names and addresses of commercial entities on the stakeholder lists. FERC also produced records

containing the names and addresses of private landowners, but with the names and addresses redacted based on FOIA Exemption 6. Plaintiffs appealed the response to FERC's Office of the General Counsel and the appeal was denied on April 1, 2019. The subject of this lawsuit is limited to whether FERC properly withheld the names and addresses of private landowners under FOIA Exemption 6.

LEGAL STANDARD

“FOIA cases typically and appropriately are decided on motions for summary judgment.” *Defs. of Wildlife v. U.S. Border Patrol*, 623 F. Supp. 2d 83, 87 (D. D.C. 2009); *see Bigwood v. U.S. Agency for Int'l Dev.*, 484 F. Supp. 2d 68, 73 (D. D.C. 2007). In FOIA cases, the agency bears the ultimate burden of proof to demonstrate the adequacy of its search and that it properly withheld any records. *See Defs. of Wildlife*, 623 F. Supp. 2d at 88, 91. The Court may grant summary judgment based solely on information provided in an agency's affidavits or declarations when 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 contrary 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). Such affidavits or declarations are “accorded a presumption of good faith, which cannot be rebutted by ‘purely speculative claims about the existence and discoverability of other documents.’” *SafeCard Servs., Inc. v. SEC*, 926 F.2d 1197, 1200 (D.C. Cir. 1991) (quoting *Ground Saucer Watch, Inc. v. CIA*, 692 F.2d 770, 771 (D.C. Cir. 1981)).

DISCUSSION

The issue for summary judgment is whether FERC properly invoked FOIA Exemption 6 to withhold that names and addresses of private landowners identified as those that may be

affected by the Pipeline Project. Plaintiffs also maintain that, should the Court find the names and addresses exempt from disclosure, FERC failed to segregate nonexempt material for production.

I. Exemption 6

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

A. The private landowners have more than a *de minimis* privacy interest in avoiding disclosure of their names and addresses.

Whether the public disclosure of private individuals' names and addresses on a government list is more than a *de minimis* threat to privacy "depends upon the characteristic(s) revealed by virtue of being on the particular list and the consequences likely to ensue." *Nat'l Ass'n of Retired Fed. Emps. v. Horner*, 879 F.2d 873, 874 (D.C. Cir. 1989). The threat to privacy must be real rather than speculative. *See Dep't of the Air Force v. Rose*, 425 U.S. 352, 380 n.19

(1976) (explaining that Exemption 6 is “directed at threats to privacy interest more palpable than mere possibilities”). However, the threat to privacy need not be a certainty. *See Civil Beat Law Center*, 929 F.3d at 1091. The agency need not document that mistreatment or harassment has happened in the past or will certainly happen in the future. *Id.* The agency must merely establish that disclosure of the information could potentially result in harassment of the individuals. *Id.* at 1092.

FERC argues that the names and home addresses of private 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). In *Odland v. FERC*, a case very similar to this one that also involved the names and addresses of landowners in the path of a pipeline, the court found that individuals had at least a modest privacy interest in their names and home addresses being released. 34 F. Supp. 3, 22 (D. D.C. 2014).

Plaintiffs argue that there is no real privacy interest in this case because none of the landowners chose to be on the lists so disclosing their names and addresses would not reveal any significant personal matters, beliefs or characteristics about the individuals on the list. While this may be true, the existence of a privacy interest does not turn on an individual’s choice to be included on a government list. Although Plaintiffs have stated at oral argument that they do not intend to use the lists to contact any of the private landowners, the Pipeline Project has been a

hot topic in the community with many citizens engaging in public protest. Under FOIA, “once there is disclosure, the information belongs to the general public,” not just the requester. *See Niskanen Center v. FERC*, 19-125(JEB), 2020 WL 224515 (D. D.C. Jan. 15, 2020) (quoting *Nat’l Archives & Records Admin. v. Favis*, 541 U.S. 157, 174 (2004)). Disclosure of the names and addresses of the private landowners whose property lay in the path of the proposed pipeline has the potential to result in harassment or unwanted contact from the public. Therefore, this Court finds that the landowners have more than a *de minimis* privacy interest in avoiding disclosure of their names and addresses.

B. The public interest in disclosure outweighs the privacy interest in this case.

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.” *Rojas*, 941 F.3d at 405 (quoting *Bibles v. Or. Nat Desert Ass’n*, 519 U.S. 355, 355-56 (1997)). The requestor has the burden of establishing the public interest. *Civil Beat Law Center*, 929 F.3d at 1091.

Here, Plaintiff seeks to shed light on whether notice of the Pipeline Project was sent to all potentially affected landowners. Although this was not clearly articulated in the briefing, Plaintiffs made clear at oral argument that their concern is whether the lists themselves are accurate. They claim that if the names and addresses on the landowner lists are disclosed, they will proceed with comparing those lists to property records of the planned pipeline route to determine whether every landowner that could potentially be impacted by the planned route is actually on the lists. Plaintiffs do not trust that FERC has taken steps to ensure that PCP included all potentially affected landowners on the lists, nor do Plaintiffs have a way of discovering whether the lists are accurate without disclosure. FERC argues that because PCP

prepared the lists, disclosure will reveal nothing about FERC's conduct or how FERC operates.

The Court disagrees.

By comparing the lists prepared by PCP with the property records of the planned pipeline route, Plaintiffs will be able to shed light on whether FERC's procedure of allowing a private entity to create the landowner lists actually works to ensure that notice of the Pipeline Project was sent to all the right people. FERC is sending important notices about the Pipeline Project to only those on a list created by PCP, a private entity with direct financial interest in the Pipeline Project. FERC is Constitutionally required to ensure that notice is sent to all those that may be deprived of their property rights should the Pipeline Project be completed. Did FERC take any measures to double check the lists? Did FERC oversee PCP's list making process? Were the lists ever updated when the proposed route of the pipeline changed? FERC has not provided answers to these questions. The Court finds there is a substantial public interest in discovering whether the process used by the government to determine which citizens are sent notice of their due process rights is effective. Therefore, the Court finds that this substantial public interest outweighs the privacy interest in this case.

II. Segregated Materials

Due to the Court finding that the public interest outweighs the privacy interest in this case, and therefore, that the requested records should be disclosed, the Court need not reach the issue of segregated materials.

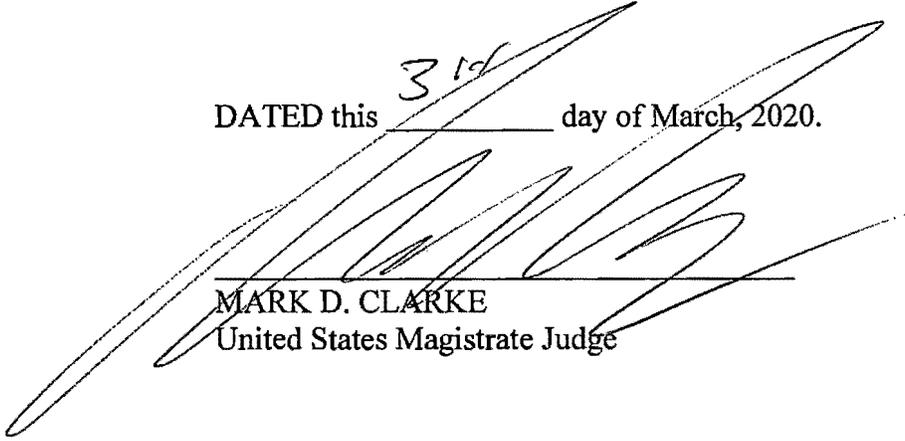
RECOMMENDATION

For the reasons stated above, the Plaintiffs' Motion for Summary Judgment (#18) should be GRANTED and Defendant's Motion for Summary Judgment (#13) should be DENIED.

Defendants should be ordered to comply with Plaintiffs' FOIA request and release unredacted landowner lists.

This Report and Recommendation will be referred to a district judge. Objections, if any, are due no later than fourteen (14) days after the date this recommendation is filed. If objections are filed, any response is due within fourteen (14) days after the date the objections are filed. *See* Fed. R. Civ. P. 72, 6. Parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 31st day of March, 2020.


MARK D. CLARKE
United States Magistrate Judge