



February 10, 2023

Director, Office of Hearings and Appeals, HG-I
Department of Energy
1000 Independence Avenue, SW
Washington, D.C. 20585
OHA.Filings@hq.doe.gov

RE: Freedom of Information Act Appeal – FOIA Docket No. GFO-2023-00170-F¹

Dear Director,

Earthjustice respectfully appeals the decision of the Department of Energy (DOE)/Golden Field Office (GFO) to withhold records in response to Earthjustice’s Freedom of Information Act (FOIA) request number GFO-2023-00170-F. Earthjustice’s FOIA request seeks “all submitted concept papers, related documents, written communications, and other information received in response to the Bipartisan Infrastructure Law: Additional Clean Hydrogen Programs (Section 40314): Regional Clean Hydrogen Hubs Funding Opportunity Announcement, #DE-FOA-0002779, issued by the Department of Energy’s Hydrogen Program on September 22, 2022, with concept papers due on November 7, 2022.” The request is attached as Exhibit A. The GFO issued its determination letter on November 14, 2022, which is included here as Exhibit B. In its determination letter, the GFO stated that it identified records responsive to Earthjustice’s request, “however, all records are being withheld under FOIA Exemptions 5 – Deliberative Process Privilege.” Exhibit B at pdf p. 1. DOE’s failure to provide the requested documents is unlawful and in violation of FOIA. Earthjustice files this timely appeal of the determination letter in FOIA Docket No. GFO-2023-00170-F pursuant to 5 U.S.C. § 552(a)(6)(A)(i)(III)(aa).

INTRODUCTION

In the 2021 Bipartisan Infrastructure Law, Congress ordered DOE to establish a program to support regional clean hydrogen hubs and appropriated \$8 billion for that program.² On September 22, 2022, DOE published a Funding Opportunity Announcement (FOA) to solicit regional clean hydrogen hubs. The FOA established a two-phase application process, requiring applicants to submit a “concept paper” before submitting a full application. The FOA required applicants to submit concept papers by November 7, 2022, to be eligible to submit full applications, which are due April 7, 2023.³ The FOA required concept papers to provide certain information, including the proposed hub’s clean hydrogen production and end-use technologies,

¹ Earthjustice has styled this appeal as an appeal in Docket No. GFO-2023-00170-F because this is the docket number provided in the determination letter. Given that the GFO issued this determination letter in 2022, it is possible that there was a typo in the determination letter and the GFO docketed this request in No. GFO-2022-00170-F. In that case, Earthjustice respectfully appeals the GFO’s determination in Docket No. GFO-2022-00170-F.

² 42 U.S.C. § 16161a.

³ Department of Energy, *DE-FOA-0002779: Bipartisan Infrastructure Law: Additional Clean Hydrogen Programs (Section 40314): Regional Clean Hydrogen Hubs Funding Opportunity Announcement*, <https://oced-exchange.energy.gov/Default.aspx#FoaId4dbbd966-7524-4830-b883-450933661811>.

total cost of the project, and how the proposed hub would facilitate a national clean hydrogen network in the United States.

Earthjustice submitted a FOIA request to the DOE for “all submitted concept papers, related documents, written communications, and other information received in response to the Bipartisan Infrastructure Law Funding Opportunity Announcement.” Exhibit A. The GFO denied Earthjustice’s FOIA request on November 14, 2022, explaining that it was withholding responsive records under “FOIA Exemptions 5 – Deliberative Process Privilege.” Exhibit B at pdf p. 1. The determination letter also stated that “the redacted information consists of pre-decisional deliberative information” and that “[t]he release of such internal deliberative scoring and pre-deliberative discussion would have a chilling effect on DOE’s ability to address similar matters in the future.” *Id.* at pdf p. 2.

On the day that Earthjustice received the GFO’s determination letter, Earthjustice contacted DOE via email to confirm that it was clear that its FOIA “request sought materials submitted to DOE from outside parties that are not federal government entities” and not “any records drafted by federal agency staff” such as “DOE’s internal scoring or other deliberative discussions.” Earthjustice sent a follow-up email on November 30, 2022, again seeking to confirm that “Earthjustice’s FOIA request was clear in its intent to seek only records that were drafted outside of DOE and submitted to the Department by non-federal entities.” DOE responded via email, stating that Earthjustice’s “request was clear and understood.” This email exchange is attached as Exhibit C.

LEGAL BACKGROUND

FOIA is intended to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.”⁴ The Supreme Court has interpreted the disclosure provisions of FOIA broadly, noting that the Act is animated by a “philosophy of full agency disclosure.”⁵ FOIA requires federal agencies to disclose records and information to citizens upon request unless the information falls within one of nine narrowly construed exemptions.⁶

In this case, DOE has invoked Exemption 5, which applies to “inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.”⁷ To withhold a document pursuant to Exemption 5, an agency must show that the document: (1) is an inter- or intra-agency memorandum or letter and

⁴ *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

⁵ *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989).

⁶ See 5 U.S.C. § 552(b); *Milner v. Dep’t of Navy*, 131 S.Ct. 1259, 1262 (2011) (noting that the exemptions are “‘explicitly made exclusive’ and must be ‘narrowly construed.’”) (quoting *FBI v. Abramson*, 456 U.S. 615, 630 (1982) (internal citations omitted); *Dep’t of the Air Force v. Rose*, 425 U.S. 352, 361 (1976) (noting that “disclosure, not secrecy, is the dominant objective of the Act”).

⁷ 5 U.S.C. § 552(b)(5).

(2) is pre-decisional and deliberative.⁸ In addition, DOE must release any “reasonably segregable” non-exempt information to the public.⁹

ARGUMENT

A. The Concept Papers Are Not Inter- or Intra-Agency Memorandums or Letters.

Exemption 5 applies to certain “inter-agency or intra-agency memorandums or letters.”¹⁰ To qualify as an inter- or intra-agency communication, a document must have been created by an agency, its employee, or its consultant.¹¹ For purposes of FOIA, “‘agency’ means [an] authority of the Government of the United States.”¹² If an agency fails to prove this element is met, it cannot withhold a document under Exemption 5.¹³

Documents submitted to agencies by parties outside the federal government, including application materials, are not inter- or intra-agency communications.¹⁴ In *Department of Interior v. Klamath Water Users Protective Association*, the Supreme Court explained that Exemption 5 does not apply when an outside group communicates its views to an agency that are “necessarily adverse to the interests of competitors.”¹⁵ The Supreme Court unanimously held that documents submitted by the Klamath Tribe to the Department of the Interior regarding the Tribe’s water rights in the Klamath River Basin were not inter- or intra-agency communications because the Tribe was a non-government third party acting in its own interest.¹⁶ The court rejected an argument that the Tribe was a consultant of the Department because the function of the Tribe’s communications was to support its claims, when “there [was] not enough water [in the Klamath River Basin] to satisfy everyone.”¹⁷ Like the Tribe in *Klamath*, the non-agency third parties that submit concept papers to DOE are promoting their own interest in accessing scarce resources. The DOE has a limited appropriation for the regional clean hydrogen hubs program, and the interests of each applicant are necessarily adverse to those of the competing applicants.

Federal agencies are not eligible to apply for DOE’s regional clean hydrogen hub program,¹⁸ and in *Klamath* the Supreme Court refused to expand Exemption 5 to protect communications from outside entities designed to advance those entities’ interests. Thus, the

⁸ *Grand Cent. P’ship., Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (to qualify for Exemption 5 “document[s] must be both ‘predecisional’ and ‘deliberative’”).

⁹ 5 U.S.C. § 552(b) (“Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletions of the portions which are exempt under this subsection.”).

¹⁰ 5 U.S.C. § 552(b)(5).

¹¹ *Dep’t of Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 9 (2001).

¹² 5 U.S.C. § 551.

¹³ *Klamath*, 532 U.S. at 9 (the first element is “independent[ly] vital[ly]”).

¹⁴ *See id.* at 8 (To qualify for Exemption 5 a document’s “source must be a Government agency”); *see also Missouri Coal. for the Env’t v. United States Army Corps of Engineers*, 369 F. Supp. 3d 151, 158-59 (D.D.C. 2019) (Army Corps of Engineers “misapplied Exemption 5 to non-agency documents”).

¹⁵ *Klamath*, 532 U.S. at 3.

¹⁶ *See id.* at 3.

¹⁷ *See id.* at 13-14.

¹⁸ The FOIA listed five types of eligible domestic entities: institutions of higher education, for-profit entities, non-profit entities, state and local governmental entities, and Tribal nations. FOIA at 58-59. None of these entities qualify as an “agency” for purposes of FOIA. *See* 5 U.S.C. § 551.

concept papers are not inter- or intra-agency communications, and DOE cannot rely on Exemption 5 to withhold the concept papers. The agency is categorically barred from using Exemption 5 to shield communications that are not “inter-agency or intra-agency.”¹⁹

B. The Concept Papers Are Not Deliberative Agency Records.

To satisfy the second element of Exemption 5, an agency must prove that a withheld document is both pre-decisional and deliberative.²⁰ Deliberative documents must “reflect[] the give-and-take of the consultative process,” either by assessing the merits of a particular viewpoint, or by articulating the process used by the agency to formulate a decision.²¹ The concept papers do not reflect the give-and-take of DOE’s consultative process because they reflect the viewpoints of their authors, who are not agency staff, consultants, or officials. Similarly, the concept papers cannot articulate DOE’s decision-making process because their authors are outside the agency. Earthjustice did not seek documents that would reveal the opinions of individuals within DOE or the agency’s process for formulating a decision on the concept papers, such as internal discussions or scoring.²² Thus, the concept papers are not protected by the deliberative process privilege.

It would be improper for DOE to attempt to expand Exemption 5 to cover the concept papers because doing so would not serve the purpose of the deliberative process privilege. As the Supreme Court has observed, the 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.*”²³ Releasing the concept papers would not chill discussions among agency officials and staff because the concept papers do not contain any such communications.

C. DOE Failed to Release Information That Can Be Segregated From The Documents Withheld Under Exemption 5.

Under FOIA, “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt” under one of the nine narrowly construed statutory exemptions.²⁴ Here, DOE failed to segregate and disclose non-

¹⁹ See *Klamath*, 532 U.S. at 9 (“the first condition of Exemption 5 is no less important than the second; the communication must be ‘inter-agency or intra-agency.’”). For that reason, in *Klamath*, the Court was able to affirm the judgment of the court of appeals without considering whether the documents would be discoverable in litigation. *Id.* at 12, note 3.

²⁰ *Klamath*, 532 U.S. at 8; see also *United States Fish & Wildlife Serv. v. Sierra Club, Inc.*, 141 S. Ct. 777, 783 (2021) (“the deliberative process privilege . . . protects from disclosure documents generated during an agency’s deliberations.”).

²¹ *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866-67 (D.C. Cir. 1980) (holding that deliberative process privilege “covers recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency”).

²² See Exhibit A (the FOIA request); Exhibit C (email exchange confirming the GFO’s understanding that the request seeks “only records that were drafted outside of DOE and submitted to the Department by non-federal entities” and not “DOE’s internal scoring or other deliberative discussions”).

²³ *Klamath*, 532 U.S. at 8-9 (emphasis added) (internal quotes and citation omitted).

²⁴ 5 U.S.C. § 552(b); *Milner*, 131 S.Ct. at 1262.

exempt portions of the records withheld, and appears to have made no effort whatsoever to do so.²⁵

DOE has not provided the requisite detailed justification as to why the information is not reasonably segregable here. “[U]nless the segregability provision of the FOIA is to be nothing more than a precatory precept, agencies must be required to provide the reasons behind their conclusions in order that they may be challenged by FOIA plaintiffs and reviewed by the courts.”²⁶ While the agency is not required to provide so much detail that the exempt material would be effectively disclosed, “[i]n order to demonstrate that all reasonably segregable material has been released, the agency must provide a ‘detailed justification’ for its non-segregability.”²⁷ DOE’s failure to provide any reason that otherwise segregable, non-deliberative portions of the documents should be released is not a detailed justification. Specifically, DOE has provided no description of the non-exempt information in each document and how the non-exempt material is dispersed throughout the document. DOE’s failure to make the required showings concerning segregability—and to release any segregable, non-exempt portions of the withheld records—is unlawful, even if DOE is able to establish that certain portions of the withheld records are exempt.

CONCLUSION

For all the foregoing reasons, DOE’s failure to provide the requested records is unlawful and in violation of FOIA.

Please contact Sara Gersen at the email or telephone number below if you have any questions concerning this appeal. We look forward to a response to this appeal as soon as possible and in no event later than the twenty days mandated by FOIA.²⁸

Sincerely,

/s/ Sara Gersen
Sara Gersen
Senior Attorney
Earthjustice
707 Wilshire Blvd, Suite 4300
Los Angeles, CA 90017
(213) 766-1073
sgersen@earthjustice.org

²⁵ See Exhibit B.

²⁶ *Mead Data Cent., Inc. v. U.S. Dep’t of Air Force*, 566 F.2d 242, 261 (D.C. Cir. 1977); see also *Ctr. for Biological Diversity v. Off. of Mgmt. & Budget*, 625 F. Supp. 2d 885, 890 (N.D. Cal. 2009) (finding that OMB’s explanations for claiming deliberative process privilege were “insufficiently detailed, conclusory” and did not provide the court with “enough information to determine whether segregability [was] an option”).

²⁷ *Johnson v. Exec. Off. for U.S. Att’ys*, 310 F.3d 771, 776 (D.C. Cir. 2002) (quoting *Mead Data*, 566 F.2d at 261).

²⁸ 5 U.S.C. § 552(a)(6)(A)(ii).

Exhibit A

REQUESTED RECORDS SECTION – DOE Regional Clean Hydrogen Hubs Concept Paper Submissions

Please provide all submitted concept papers, related documents, written communications, and other information received in response to the Bipartisan Infrastructure Law: Additional Clean Hydrogen Programs (Section 40314): Regional Clean Hydrogen Hubs Funding Opportunity Announcement, #DE-FOA-0002779, issued by the Department of Energy's Hydrogen Program on September 22, 2022, with concept papers due on November 7, 2022. The Funding Opportunity Announcement can be found at this link: <https://oced-exchange.energy.gov/Default.aspx#FoalId4dbbd966-7524-4830-b883-450933661811>

SUBMITTED AS INDIVIDUAL FOR PERSONAL/NON-COMMERCIAL USE

FEE WAIVER SECTION

1. Subject of the request

- a. Earthjustice seeks information regarding the Department of Energy's ("DOE") Hydrogen Program and the \$8 billion Regional Clean Hydrogen Hubs program through the concept paper submissions, which directly influence DOE's strategic mission, hydrogen-related activities such as future funding opportunities through the H2Hubs, and use of taxpayer money to finance emerging energy technologies. Therefore, the requested DOE records concern "operations or activities of the government."

2. The informative value of the information to be disclosed

- a. The records that Earthjustice has requested bear upon DOE's regulatory activities involving the research and development of hydrogen production, delivery, infrastructure, storage, fuel cells, and multiple end uses across the transportation, industrial, and power sectors. Thus, disclosure of the records has informative value to the public in that it is likely to contribute to the public's understanding of government operations and activities surrounding hydrogen technology.

3. Contribution to an understanding by the general public

- a. The requested records will contribute to the general public's understanding of the ongoing activities of DOE's Hydrogen Program and the \$8 billion Regional Clean Hydrogen Hubs program.
- b. Earthjustice is able to ensure that the requested information will be disseminated to the general public. Earthjustice is a non-profit public interest law organization dedicated to protecting the magnificent places, natural resources, and wildlife of this earth, and to defending the right of all people to a healthy environment. Earthjustice has made safeguarding the nation's air and promoting this nation's clean-energy transition some of its top priorities. Earthjustice has the "ability and intention" to convey the information regarding ongoing activities of DOE's Hydrogen Program and the \$8 billion Regional Clean Hydrogen Hubs program. Earthjustice can publicize information received from this request in its monthly electronic newsletter, which serves hundreds of thousands of subscribers, and it can utilize its online action alert system to urge

members of the public to contact policymakers and ask them to take action based on information received from this request; typically, tens of thousands of individuals respond to such alerts. Earthjustice's communications staff can disseminate newsworthy information obtained from this request to the media.

4. The significance of the contribution to public understanding

- a. The information Earthjustice seeks will contribute significantly to the public's understanding of DOE's Hydrogen Program and \$8 billion Regional Clean Hydrogen Hubs program through the concept paper submissions, which directly influence DOE's strategic mission, hydrogen-related activities such as future funding opportunities through the H2Hubs, and use of taxpayer money to finance emerging energy technologies. Earthjustice will make any newsworthy information or documents received in response to this request publicly available and will use them as the bases for public advocacy and investigation.

5. The existence and magnitude of a commercial interest

- a. Earthjustice is a non-profit organization with no commercial, trade, or profit interests in the requested information. Earthjustice seeks to use the information requested solely for its investigation of DOE's hydrogen-related activities, in particular the massive amount of funding included in the \$8 billion Regional Clean Hydrogen Hubs program, and to inform the public and support advocacy efforts around protecting human health and the environment. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

6. The primary interest in disclosure

- a. As noted with respect to the previous factor, Earthjustice's sole interest in disclosure of the requested records is to investigate DOE's hydrogen-related activities, in particular the massive amount of funding included in the \$8 billion Regional Clean Hydrogen Hubs program, and to inform the public and support advocacy efforts around protecting human health and the environment. Thus, there is no relevant commercial interest here, and the request is entirely in the public interest.

Exhibit B



Department of Energy

Golden Field Office
15013 Denver West Parkway
Golden, Colorado 80401

November 14, 2022

Via Email

Mr. Nick Thorpe
Earthjustice
1001 G. Street NW, Suite 1000
Washington, DC 20001

Subject: Determination Letter - Freedom of Information Act (FOIA) Requests, Department of Energy (DOE)/Golden Field Office (GFO) Docket No. GFO-2023-00170-F.

Dear Mr. Thorpe:

This letter is in response to your request under FOIA, pursuant to 5 U.S.C. §552, requesting the following: “all submitted concept papers, related documents, written communications, and other information received in response to the Bipartisan Infrastructure Law: Additional Clean Hydrogen Programs (Section 40314): Regional Clean Hydrogen Hubs Funding Opportunity Announcement, #DE-FOA-0002779, issued by the Department of Energy’s Hydrogen Program on September 22, 2022, with concept papers due on November 7, 2022.”

DOE – GFO Determination

In accordance with DOE’s regulations implementing the FOIA, 10 C.F.R. 1004.S(b), I am the DOE official responsible for making the initial determination with regard to the disclosure of the information you requested.

The GFO conducted a search for documents responsive to your request. The search was conducted by utilizing the search criteria specified in your request. At the conclusion of the search, documents were determined to be responsive to your request. However, all records are being withheld under FOIA Exemptions 5 – Deliberative Process Privilege.

Exemption 5 -Deliberative Process Privilege (5 U.S.C. § 552(b)(5))

Relevant agency records are protected from public disclosure pursuant to FOIA Exemption 5, where they contain deliberative information. This protection includes not only documents circulated within an agency, but also those from another agency that advises the decision-making authority. See, e.g., *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188 (1975); *Bureau of Nat'l Affairs, Inc. v. U.S. Dep't of Justice*, 742 F.2d 1484, 1497 (D.C. Cir. 1984).

Here, the redacted information consists of pre-decisional deliberative information (Discussions and documents related to the preparation of awards under DOE Funding Opportunity Announcements). This pre-decisional information was prepared to assist in the selection of awardees under these FOAs. **NOTE: The expected time-period for DOE selection notification is Fall 2023 at which time, you may re-submit your request. Recommend waiting until September 2023 to ensure the process is complete. Feel free to contact the undersigned for confirmation.**

The deliberative process exemption exists to "prevent injury to the quality of agency decisions." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975). Factors which were considered in my decision to withhold portions of the spreadsheet included the following: (1) the requested agency records are intra-agency documents conveying pre-decisional advice for the exclusive purpose of drafting of a final document; and (2) the fact that the requested documents were generated as part of a continuing process of agency decision-making.

The release of such internal deliberative scoring and pre-deliberative discussion would have a chilling effect on DOE's ability to address similar matters in the future. See, e.g., *City of West Chicago v. NRC*, 547 F. Supp. 740, 750 (N.D. 111.1982) (detailing the concern that the quality of agency decision-making would be compromised by the inhibiting effect on agency personnel from exposure to public criticism of their recommendations); and *Brinton v. Department of State*, 636 F.2d 600, 604 (D.C. Cir. 1980) (noting the impossibility of frank, written agency discussions if all such writings were subject to public scrutiny).

In short, the deliberative process privilege ensures that the DOE decision makers can express opinions in relation to the drafting of funding opportunities without fear that later disclosure may bring criticism or second guessing.

This satisfies the standard set forth at 5 U.S.C. § 552(a)(8)(A) that agencies shall withhold information under FOIA "only if (I) the agency reasonably foresees that disclosure would harm an interest protect by an exemption...; or (II) disclosure is prohibited by law..." 5 U.S.C. § 552(a)(8)(A) also provides that whenever full disclosure of a record is not possible, agencies shall "consider whether partial disclosure of information is possible...and (II) take reasonable steps necessary to segregate and release nonexempt information." Therefore, we have determined that, in certain instances, a partial disclosure is proper. As provided in the Attorney General's guidance, the disclosure obligation under the FOIA is not absolute. I have determined that the withholding of the scoring information and other pre-deliberative discussions is justified as it is reasonably foreseeable that the disclosure of this information would have a chilling effect on future DOE decisions. The release of the redacted documents would compromise the deliberative process by which DOE makes its decisions.

Fees

The search, review, and duplication fees for this FOIA request have been waived because these fees were below the minimum recoupment threshold.

Your Right to Appeal

If you disagree with DOE's determination, you may appeal in writing within 90 calendar days of the receipt of this letter to the Director, Office of Hearings and Appeals, HG-I, Department of Energy, 1000 Independence Avenue, SW, Washington, D.C. 20585. Both the letter and the envelope (as applicable) must be clearly marked "Freedom of Information Act Appeal." This appeal may be delivered to the Office of Hearings and Appeals by U.S. Mail (at the address provided above), by commercial delivery service (at the address provided above), by electronic mail to OHA.Filings@hq.doe.gov, or by FAX to (202) 287-1415.

Your appeal must contain a concise statement of grounds upon which it is brought, and a description of the relief sought. It should also include a discussion of all relevant authorities, including but not limited to, DOE (and predecessor agencies) rulings, regulations, interpretations and decisions on appeals, and any judicial determinations being relied upon to support the appeal. A copy of this Determination Letter from DOE containing the release determination which is being appealed must be submitted with the appeal. Your appeal should also provide a telephone number, email address, or other means for communication with you during normal business hours.

Once you exhaust your administrative remedies, judicial review of this FOIA request is thereafter available within the district in which you reside, have a principal place of business, where the records are located, or in the District of Columbia.

Dispute resolution services are available at no charge from the Golden FOIA Liaison Officer. The Golden FOIA Liaison Officer is Nicholas Rising. He may be contacted at 720-584-9180 or by email at: Nicholas.Rising@ee.doe.gov. Using the dispute resolution services of the Golden FOIA Liaison Officer does not affect your right to pursue litigation.

The 2007 FOIA amendments created the Office of Government Information Services (OGIS) to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS at:

National Archives and Records
Administration Office of Government
Information Services 8601 Adelphi
Road-OGIS
College Park, MD
20740 E-mail:
ogis@nara.gov

Contact Information

If you have any questions, please contact the undersigned at 240.562.1468 or by e-mail at daniel.dial@ee.doe.gov.

Sincerely

Daniel J Dial

Daniel J. Dial
Governmental Information Specialist
FOIA/Privacy Officer
DOE, Golden Field Office

Exhibit C

From: [Dial, Daniel](#)
To: [Sara Gersen](#); [Nick Thorpe](#)
Cc: [Moss, Brianne \(CONTR\)](#)
Subject: RE: FOIA Request #GFO-2023-00170-F Acknowledgement
Date: Wednesday, November 30, 2022 12:34:05 PM
Attachments: [image001.png](#)
[image002.png](#)

This message originated outside of Earthjustice. Please use caution before opening attachments or links.



Good morning Sara,

My apologies for not responding sooner. Yes, your request was clear and understood. In fact, we've received numerous requests duplicate to yours seeking the same information. All of which received the same response. As stated in our Final Determination letter, the requested information is clearly pre-decisional as negotiations are on-going. The information collected by the submitters is being used to assist in the selection of awardee's. Releasing this information even in part prior to the award could cause substantial harm to the applicants. As previously mentioned, I would recommend re-submitting your request following the selection notification, Fall 2023.

I hope this helps. I'll look forward to working with you and Nick again in the near future.

Thank!

V/r

Dan

From: Sara Gersen <sgersen@earthjustice.org>
Sent: Wednesday, November 30, 2022 9:35 AM
To: Dial, Daniel <daniel.dial@ee.doe.gov>; Nick Thorpe <nthorpe@earthjustice.org>
Cc: Moss, Brianne (CONTR) <brianne.moss@ee.doe.gov>
Subject: [EXTERNAL] RE: FOIA Request #GFO-2023-00170-F Acknowledgement

Hi Daniel,

I'm writing to follow up on my email, in case it got lost in the shuffle of the hectic holiday season. Would you be able to confirm whether Earthjustice's FOIA request was clear in its intent to seek only records that were drafted outside of DOE and submitted to the Department by non-federal entities? I'd be happy to discuss this matter by phone if that's easier than email.

Best,

Sara

From: Sara Gersen

Sent: Monday, November 14, 2022 1:09 PM
To: Dial, Daniel <daniel.dial@ee.doe.gov>; Nick Thorpe <nthorpe@earthjustice.org>
Cc: Moss, Brianne (CONTR) <brianne.moss@ee.doe.gov>
Subject: RE: FOIA Request #GFO-2023-00170-F Acknowledgement

Hi Daniel,

Thanks for the prompt response to Earthjustice's request. I'm surprised at the finding that the requested records are protected by the deliberative process privilege, so I wanted to follow up to make sure our request was clear. The request sought materials submitted to DOE from outside parties that are not federal government entities, and we did not intend to seek any records drafted by federal agency staff. Was that intent clear? If the determination letter was based on an understanding that we were seeking DOE's internal scoring or other deliberative discussions, we'd be happy to clarify the request through whatever mechanism you advise.

Best,
Sara

From: Dial, Daniel <daniel.dial@ee.doe.gov>
Sent: Monday, November 14, 2022 12:59 PM
To: Nick Thorpe <nthorpe@earthjustice.org>
Cc: Moss, Brianne (CONTR) <brianne.moss@ee.doe.gov>; Sara Gersen <sgersen@earthjustice.org>
Subject: RE: FOIA Request #GFO-2023-00170-F Acknowledgement

This message originated outside of Earthjustice. Please use caution before opening attachments or links.

Good afternoon Nick,

Please see the attached Final Determination Letter regarding your FOIA request. It was discovered that the FOA is still undergoing negotiations. As such, the associated documents cannot be released at this time. As explained in the attached, the negotiations are expected to be complete and awarded in the Fall 2023 timeframe. Recommend you re-submit your request around September 2023 to ensure the process is complete. You may also contact me directly for confirmation prior to re-submitting. The requested documents should be releasable at least in part at that time. In the meantime, let me know if you have any questions/concerns or if I can be of any other assistance.

Nice to hear from you again!

Thanks!
V/r
Dan

Daniel J. Dial

Government Information Specialist
Freedom of Information Act & Privacy Officer
Records Management Field Official
U.S. Department of Energy, Golden Field Office
15013 Denver West Parkway
Golden, CO 80401

From: Nick Thorpe <nthorpe@earthjustice.org>
Sent: Thursday, November 10, 2022 2:09 PM
To: Dial, Daniel <daniel.dial@ee.doe.gov>
Cc: Moss, Brianne (CONTR) <brianne.moss@ee.doe.gov>; Sara Gersen <sgersen@earthjustice.org>
Subject: [EXTERNAL] RE: FOIA Request #GFO-2023-00170-F Acknowledgement

Hi Daniel—

Thanks so much for your email, and I can confirm that I've received both your acknowledgement letter along with a notification from HQ DOE that my FOIA request was transferred to the Golden Field Office. In future communications about this request, could you also include Sara Gersen (cc'd)?

Thanks, and hope that you have a great weekend,

Nick

Nick Thorpe (he, him, his)
Climate & Energy Senior Program Associate
Earthjustice
1001 G Street NW, Suite 1000
Washington, DC 20001
T: 202.797.4303 or 202.667.4500 Ext. 4303
F: 202.667.2356
earthjustice.org



[@Nick_Thorpedo](https://twitter.com/Nick_Thorpedo)



EARTHJUSTICE

From: Dial, Daniel <daniel.dial@ee.doe.gov>
Sent: Thursday, November 10, 2022 1:37 PM
To: Nick Thorpe <nthorpe@earthjustice.org>
Cc: Moss, Brianne (CONTR) <brianne.moss@ee.doe.gov>
Subject: FOIA Request #GFO-2023-00170-F Acknowledgement

Good morning Nick,

You should have received a notification from HQ DOE that your FOIA request was transferred to the Golden Field Office (GFO). Reference HQ-2023-00164-F. This is to acknowledge receipt of your request was has been re-assigned docket number GFO-2023-00170-F. I have tasked the appropriate office with conducting a search for documents responsive to your request and will keep you informed of our progress. In the meantime, let me know if you have any questions/concerns or if I can be of any additional assistance.

Thanks and have a great weekend!

V/r

Dan

Daniel J. Dial

Government Information Specialist
Freedom of Information Act & Privacy Officer
Records Management Field Official
U.S. Department of Energy, Golden Field Office
15013 Denver West Parkway
Golden, CO 80401

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