

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CENTER FOR BIOLOGICAL DIVERSITY,
1411 K Street N.W. Suite 1300
Washington DC 20005

Plaintiff,

v.

U.S. DEPARTMENT OF ENERGY,
1000 Independence Ave., SW
Washington, DC 20585

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Civil Action No.: _____

INTRODUCTION

1. This case challenges the Department of Energy’s (“DOE”) failure to timely search for, and provide, records related to the Interconnections Seam Study (“Seam Study”) – an evaluation of options for improving the connections within the U.S. electricity grid, which will allow renewable energy resources to be used more efficiently within the greater electricity system. Although DOE’s National Renewable Energy Laboratory (“NREL”) has been working on the Seam Study for years, and has reportedly sent a final version to DOE officials, the final Study was reportedly “pulled back by DOE headquarters” in late October, 2019.

2. Seeking to understand the status of the Seam Study and the progress towards its completion, on October 29, 2019 the Center submitted a request under the Freedom of Information Act, 5 U.S.C. § 552, *as amended* (“FOIA”) seeking records on the Study, including records concerning the benefits of strengthening the connections between the three major U.S. grid sections. *See Attachment 1.*

3. Although more than 20-working days have passed, to date Defendant has neither produced any responsive records nor provided a firm timetable for their production. Accordingly, the Center brings this suit pursuant to FOIA seeking declaratory and injunctive relief to require the search for, and production of, all responsive records.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this matter pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

5. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e).

6. Injunctive relief is appropriate under 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 2202. Declaratory relief is appropriate under 28 U.S.C. § 2201.

PARTIES

7. Plaintiff Center for Biological Diversity (“the Center”) is a national, non-profit conservation organization with offices throughout the United States. The Center has more than one million members and online activists who care about protecting the natural environment from the ravages of climate change and other environmental degradation. Among the Center’s priorities are initiatives that advance the critical energy transition from dirty fossil fuels to clean and renewable energy. The Center and its members are harmed by Defendant’s violations of FOIA, which are preventing the Center from gaining a full understanding of Defendant’s activities, priorities, and decision-making.

8. Defendant U.S. Department of Energy is a cabinet-level federal agency with custody and/or control of the records subject to the Center’s FOIA request, and is subject to FOIA pursuant to 5 U.S.C. § 552(f).

STATUTORY BACKGROUND

9. FOIA's basic purpose is for government transparency. It establishes the public's right to access all federal agency records with certain narrow exceptions. 5 U.S.C. § 552(b)(1)-(9).

10. FOIA imposes strict deadlines on federal agencies when they receive requests for records pursuant to FOIA. Specifically, within 20 working days of receiving a FOIA request, an agency must determine if it will release requested records and notify the requester of its determination and the reasons therefor, and the right to appeal an adverse agency determination. *Id.* § 552(a)(6)(A)(i).

11. FOIA requires each agency to make reasonable efforts to search for records in a manner reasonably calculated to locate all records responsive to the FOIA request. *Id.* § 552(a)(3)(C)-(D). The cut-off date for the agency's search is the date that the agency conducts the search and not any earlier date.

12. FOIA requires federal agencies to expeditiously disclose requested records, *see id.* §§ 552(a)(3)(A), (a)(6)(C)(i), and places the burden on the agency to prove that it may withhold responsive records from a requester. *Id.* § 552(a)(4)(B).

13. FOIA provides that the U.S. district courts have jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

14. FOIA provides this Court jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Id.* § 552(a)(4)(B).

FACTUAL BACKGROUND

1. The Nation’s Grid And The Interconnections Seam Study

15. The U.S. power system, or grid, has three major components: the Western Interconnection, the Eastern Interconnection, and the Electric Reliability Council of Texas (“ERCOT”) (collectively, the “Interconnections”). The Eastern Interconnection connects Central Canada eastward to the Atlantic coast (excluding Québec), south to Florida and west to the foot of the Rocky Mountains (excluding most of Texas). The Western Interconnection connects Western Canada south to Baja California in Mexico, and reaching eastward over the Rockies to the Great Plains. Finally, ERCOT connects most of Texas.

16. Within each Interconnection, all of the electric utilities are electrically tied together during normal system conditions. But very little electricity is transferred between the Interconnections, and the three separate Interconnections operate almost independently of each other.

17. The Interconnections Seam Study is intended to evaluate the benefits of strengthening the connections (or seams) between these three Interconnections, and the degree to which these efforts could facilitate a more reliable, resilient, sustainable, and affordable U.S. electricity system.

18. Because energy generally must be used as soon as its generated (unless energy storage capacity is available), one of the challenges of increasing renewable energy development has been insuring that intermittent wind and solar generation can be immediately dispatched. While storage technologies continue to mature, one of the vital benefits of improving the connections across the U.S. grid will be expanding the availability of these intermittent resources to reach locations where the energy can be immediately used.

19. The Department of Energy’s National Renewable Energy Laboratory (“NREL”) is the lead agency preparing the Seam Study, in coordination with other partners. Completion of the Study is important to allow policy-makers to make the significant investment decisions necessary to moving forward with improving these grid connections.

2. DOE’s Apparent Effort to Suppress Release of The Final Seam Study

20. On information and belief, in 2018 NREL completed work on the Seam Study, which details the enormous potential of relying on improved grid connections to expand access to renewable power, and submitted it to DOE for final approval. However, rather than finalize the Study and therefore allow progress on this important work, DOE sent the Study back to NREL for further work.

21. Although NREL is continuing to work on the Seam Study, agency officials do not anticipate that the Study’s contents or conclusions are going to substantially change. Rather, as one of the Study’s principal authors recently told the press, “[m]y expectation is that (the additional analysis) probably will not change the basic thrust of our conclusions: High capacity interregional transmission lines, particularly connecting the eastern and western grid compounds, have significant benefits.” Peter Behr, *Details Emerge About DOE 'Super-grid' Renewable Study*, E&E News, Oct. 29, 2019. Instead, some analysts have suggested that the Study is being suppressed because allowing greater access to renewable energy could impact demand for dirty fossil fuel energy in areas where renewable energy sources would gain additional access. *See id.*

22. According to press accounts, at present the final Seam Study may not be publicly released until 2022. *Id.*

3. The Center's FOIA Request

23. Seeking to obtain the information contained in the Seam Study, on October 29, 2019, the Center sent DOE and NREL a FOIA request, asking for the following:

all records generated in connection to the NREL "Interconnections Seam Study," ("Seam Study") or any related study that considers a continent-spanning transmission network, and the role of such a network expanding access to renewable energy resources, including but not limited to, records that:

1. Quantify the value of strengthening the connections (or seams) between the three major components of the U.S. power system;
2. Address approaches to encourage efficient development and utilization of U.S. energy resources through such connections;
3. Evaluate the degree to which interconnection can facilitate a more reliable, resilient, sustainable, and affordable U.S. electricity system;
4. Consider a suite of power system futures, including the following particular classes of power system models: long-term capacity expansion, year-long production cost, and AC power flow; and/or
5. Discuss the study's insight on the economic, environmental, reliability, and resiliency benefits of the study scenarios.

24. DOE responded to the FOIA request the next day by asking whether the Center would accept responsive emails and then request email attachments of interest. The Center immediately agreed to that approach, on the condition that it not be required to submit additional FOIA requests for attachments. DOE also granted the Center's request for a fee waiver along with a final response from DOE headquarters stating that all responsive records were located at DOE's Golden Field Office (GFO) in Colorado, where NREL is located.

25. To date, the Center has neither received responsive records nor any communication indicating when records will be received.

FIRST CLAIM FOR RELIEF

(Failure to Promptly Disclose Records Responsive to the Center's FOIA Request)

26. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

27. DOE is violating FOIA by failing to promptly disclose records responsive to the Center's FOIA request.

28. None of FOIA's statutory exemptions apply to the records that the Center seeks.

29. The Center has a statutory right to the records it seeks.

30. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to EPA in the foreseeable future.

31. The Center's organizational activities are adversely affected by DOE's failure to produce the requested records.

SECOND CLAIM FOR RELIEF

(Failure to Conduct Adequate Searches for Records Responsive to the Center's FOIA Request)

32. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

33. The Center has a statutory right to have DOE process its FOIA request in a manner that complies with FOIA. 5 U.S.C. § 552(a)(3).

34. DOE is violating the Center's rights in this regard by unlawfully failing to complete a search reasonably calculated to locate all records responsive to the Center's FOIA request.

35. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to DOE in the foreseeable future.

36. The Center's organizational activities will be adversely affected if DOE continues to violate FOIA's requirement to undertake a search reasonably calculated to locate records that are responsive to the Center's FOIA request.

THIRD CLAIM FOR RELIEF

(Failure to Provide Reasonably Segregable Portions of Any Lawfully Exempt Records)

37. Plaintiff re-alleges and incorporates by reference the allegations made in all preceding paragraphs.

38. The Center has a statutory right to any reasonably segregable portion of a record that contains information that is subject to any of FOIA's exemptions. 5 U.S.C. § 552(b).

39. DOE is violating the Center's rights in this regard by unlawfully withholding reasonably segregable portions of any lawfully exempt records that are responsive to the Center's FOIA request.

40. Based on the nature of the Center's organizational activities, it will undoubtedly continue to employ FOIA's provisions in record requests to DOE in the foreseeable future.

41. The Center's organizational activities will be adversely affected if DOE is allowed to continue violating FOIA's disclosure provisions.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court:

1. Order Defendant to conduct searches reasonably calculated to locate all records responsive to the Center's FOIA request, utilizing a cut-off date for such searches that is the date the searches are conducted, and providing the Center, by a date certain, with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

2. Declare that Defendant's failures to timely undertake a search for and disclose to Plaintiff all records responsive to Plaintiff's FOIA Request, as alleged above, are unlawful under FOIA, U.S.C. § 552(a)(6)(A)(i).

3. Award Plaintiff its costs and reasonable attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E) or 28 U.S.C. § 2412.

4. Grant such other and further relief as the Court may deem just and proper.

DATED: January __, 2020

Respectfully submitted,

/s/ Howard M. Crystal
Howard M. Crystal
(D.C. Bar No. 446189)

/s/ Anchun Jean Su
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(D.C. Bar No. CA285167)

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