

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

CENTER FOR BIOLOGICAL DIVERSITY,
1411 K Street NW, Suite 1300
Washington, D.C. 20005

Plaintiff,

v.

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

Defendant.

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Civil Action No.: _____

INTRODUCTION

1. This action challenges the U.S. Department of Energy’s (“DOE” or “Defendant”) failure to timely search for and produce records responsive to the Center for Biological Diversity’s (“the Center” or “Plaintiff”) Freedom of Information Act request, submitted more than one year ago, regarding the North American Energy Resilience Model (“NAERM”). DOE claims that NAERM—which aims to model and assess North America’s power system, or grid, vulnerabilities—will help to ensure reliable and resilient energy delivery in the face of growing threats. The Center’s Freedom of Information Act, 5 U.S.C. § 552 *et seq.*, as amended (“FOIA”) request seeks records regarding DOE’s collaboration with industry in preparation of NAERM, and the impacts it might have on the vital clean energy transition.

2. More than 12 months after the Center submitted its FOIA request, DOE has neither produced any responsive records nor provided a firm timetable for production. Accordingly, the Center brings this action under FOIA, seeking declaratory and injunctive relief to require the prompt production of all responsive records.

JURISDICTION AND VENUE

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

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

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

PARTIES

6. Plaintiff Center for Biological Diversity is a national, non-profit conservation organization with offices throughout the United States, including in Washington, D.C. The Center has more than 1.7 million members and online activists who care about protecting the natural environment from the climate emergency and other environmental degradation. Among the Center's priorities are initiatives that advance the critical energy transition from 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 with respect to the country's grid and its long-term energy supply and infrastructure resilience.

7. 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

8. FOIA's basic purpose is 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).

9. 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). An agency may extend its determination deadline by up to 10 working days only in “unusual circumstances,” and with written notice to the requester. *Id.* § 552(a)(6)(B)(i).

10. If the agency fails to comply with FOIA’s time limits, a requester will be deemed to have constructively exhausted their administrative remedies, and can seek immediate judicial review. *Id.* § 552(a)(6)(C)(i).

11. FOIA requires each agency to undertake a search for requested 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, upon request by the requester, 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) (“promptly”), (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.” *Id.* § 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

A. The North American Energy Resilience Model

15. Citing growing threats to North America’s electric power systems, or grids, and the infrastructure and electrical supply that support them, DOE is collaborating with its National Laboratories, and private companies, to develop the North American Energy Resilience Model (“NAERM”)—an effort to model grid vulnerabilities across North America.¹

16. As DOE summarized in a July of 2019 NAERM report (“2019 NAERM Report”), the aim of NAERM is to build “a comprehensive resilience modeling system” for energy infrastructure that will help identify energy system vulnerabilities, and “ensure reliable and resilient energy delivery.” DOE particularly noted growing hazards for the grid, including weather and natural disasters that cause widespread power outages, and national security concerns such as cyber or physical attacks on U.S. infrastructure.

17. The 2019 NAERM Report indicates that NAERM will model and assess “dependencies on natural gas,” and the coupling of gas and electric infrastructures. Of particular concern to the Center is the extent to which NAERM may be biased to support reliance on gas, including fracked gas, as a resilience tool, at the expense of renewable energy sources, including wind and solar. DOE relied on similar rationales to support its highly controversial Grid Study in 2017.

18. DOE has stated that preparation of NAERM will include “extensive industry engagement.” DOE has thus presumably exchanged numerous records with third parties concerning NAERM and its goals.

¹ The effort is being carried out under Presidential Policy Directive-21, which states that “[i]t is the policy of the United States to strengthen the security and resilience of its critical infrastructure against both physical and cyber threats.” Presidential Policy Directive-21—Critical Infrastructure Security and Resilience (Feb. 12, 2013).

19. To date, there is little public information about NAERM (a taxpayer-funded initiative), including the extent of DOE's relationships with private industry in developing the model, the impact NAERM may have on North America's energy portfolio and reliance on particular types of energy, *e.g.*, fossil fuels versus renewable energy, and which entities participated in the 2019 NAERM Report.

B. The Center's FOIA Request

20. Seeking to obtain the information surrounding DOE's activities and operations related to NAERM, on August 23, 2019, the Center sent DOE a FOIA request, asking for the following records, created or obtained between January 1, 2018, through the date-of-search:

- All records of communications between DOE and non-federal agency individuals, including but not limited to employees of energy companies, mentioning and/or referencing the "July 2019 North American Energy Resilience Model" ("2019 NAERM Report"), and/or the matters being addressed in the 2019 NAERM Report;
- All records that mention or discuss the anticipated costs of the NAERM project;
- All records that mention or discuss whether implementation of the NAERM may lead to increased reliance on fossil fuels, such as onsite coal or natural gas reserves; and
- All records that mention or discuss the relationship between NAERM and wind and solar energy resources, including whether implementation of NAERM may impact wind and solar energy development at either the utility scale or through distributed energy resources.

21. Approximately 8 months later, in response to the Center's inquiry on the status of the request, DOE indicated in April of 2020 that the Agency "hope[d] to have a partial response . . . by the end of May."

22. In response to a further inquiry in June of 2020, DOE's FOIA Officer indicated they were "asking legal to expedite their review so we can get this to you by June 12 and will let legal know of this deadline." However, on June 12, 2020, the FOIA Officer informed the Center that the first partial response was "still undergoing some layers of review," and on June 16, 2020, provided a

further response, stating that, “[t]he documents are still undergoing review and unfortunately the review will take longer than initially expected.”

23. After DOE failed to respond to the Center’s request for a status update in August of 2020, on September 29, 2020, the Center informed DOE of the “very time sensitive” nature of informing the public about these presently evolving issues, and that the Center intended to pursue legal action if DOE did not comply with FOIA. The Center requested that DOE “immediately provide an estimated date” of completion. DOE has not responded.

24. As of the date of filing this Complaint, 419 days after the initial request, the Center has neither received responsive records nor any recent communication indicating when records will be received.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

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

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

26. DOE is violating FOIA by failing to promptly disclose records responsive to the Center’s FOIA request. *Id.* § 552(a)(3)(A).

27. DOE has not provided the Center with any records responsive to its August 23, 2019 FOIA request.

28. On information and belief, Defendant currently has possession, custody, or control of the requested records.

29. DOE has not claimed that FOIA’s statutory exemptions apply to the records that the Center seeks, and has identified no legal basis for its failure to promptly disclose responsive records.

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

31. 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.

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

33. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, DOE will continue to violate the Center's right to receive public records under FOIA.

SECOND CLAIM FOR RELIEF

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

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

35. The Center has a statutory right to have DOE process its FOIA request in a manner that complies with FOIA. *Id.* § 552(a)(3).

36. 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.

37. To date, DOE has not provided the Center with any information on its search process.

38. 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.

39. 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.

40. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, DOE will continue to violate the Center's right to receive public records under FOIA.

THIRD CLAIM FOR RELIEF

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

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

42. 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. *Id.* § 552(b).

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

44. 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.

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

46. Unless enjoined and made subject to a declaration of the Center's legal rights by this Court, DOE will continue to violate the Center's right to receive public records under FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

A. 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 promptly providing the Center with all responsive records and reasonably segregable portions of lawfully exempt records sought in this action.

B. Declare that Defendant's failures to respond to Plaintiff's FOIA request, to timely undertake a search for, and to promptly disclose to Plaintiff all records responsive to Plaintiff's FOIA request, as alleged above, are unlawful under 28 U.S.C. §§ 552(a)(3)(A), (a)(6)(A)(i).

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

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

DATED: October 15, 2020

Respectfully submitted,

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

/s/ Alison Borochoff-Porte
Alison Borochoff-Porte, *D.D.C. admission pending*
(D.C. Bar No. 219393)

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