

One commenter contends, for example, that the media has used such information to expose safety hazards in pipelines.²³

12. The Commission remains convinced that the responsible course is for it to protect CEII. The arguments that such protection is unnecessary are speculative and unconvincing. For instance, one commenter points to an estimate that seventy percent of infrastructure attacks come from insiders as evidence that CEII is unlikely to aid an attack,²⁴ while another states that “the possibility that terrorists will study government records and take advantage of perceived weaknesses is speculative.”²⁵ The Commission is not prepared to stake the public’s safety on this reasoning. According to the National Infrastructure Protection Center, the energy sector is considered one of the most attractive terrorist targets.²⁶ According to media reports, the FBI identified “multiple casings of sites” where users routed through switches in Saudi Arabia, Indonesia, and Pakistan examined “emergency phone systems, electrical generation and transmission, water storage and distribution, nuclear power plants and gas facilities.”²⁷ Where vulnerable areas exist, the Commission believes its responsibility is to reduce risks rather than to wait for proof that an attack is imminent or even likely.

13. The Commission also is unconvinced that the general public’s need for information warrants the risk of disclosure of CEII. The “need to know” has never been absolute: the FOIA itself recognizes this principle by having nine exemptions, and the NOPR proposed to do nothing more than rely upon FOIA exemptions in withholding CEII.²⁸ The Commission received no convincing arguments in response to the NOPR that there are practical benefits from public availability of CEII that would outweigh

possible dangers from attacks on energy infrastructure. Furthermore, this rulemaking is intended to provide an avenue for disclosure in instances where there might be some benefit. The Commission has attempted to strike the best balance possible between the benefits of information and the protection of people and property.

B. Legal Authority to Protect CEII

14. In the NOI that initiated this rulemaking, the Commission invited comments on statutes that might affect the Commission’s ability to protect CEII. The FOIA was identified as the statute that could mandate disclosure of some sensitive information. After receiving comments from many commenters, the Commission set out its view, in the NOPR, that one or more of several FOIA exemptions would most likely apply to CEII,²⁹ namely: (1) Exemption 2, which exempts “records related solely to the internal personnel rules and practices of an agency”;³⁰ (2) Exemption 4, which protects from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential”;³¹ and (3) Exemption 7, which protects from disclosure certain law enforcement information, including information the disclosure of which might jeopardize a person’s life or safety.³²

15. Most commenters agree with the Commission’s belief that one or more of these three exemptions would apply to CEII,³³ and the Commission adopts the analysis in the NOPR to support its decision here.³⁴ Some, however, either express concerns about the Commission’s analysis of one or more exemptions or outright disagree with that analysis.³⁵ A few commenters assert that the Commission was somehow

overriding the FOIA³⁶ by creating an “extra-legal category of protected information,”³⁷ or by making CEII non-requestable under the FOIA.³⁸

16. The comments asserting that the Commission is somehow attempting to abrogate or circumvent the FOIA reflect a fundamental misunderstanding of this rulemaking. The Commission expressly acknowledged in the NOPR its continuing obligation to comply with the FOIA.³⁹ This rule does not exempt any information from disclosure under that statute unless it falls within an existing exemption, abrogate in any way the right of any person to submit a request under the FOIA, or make any document or category of documents non-requestable or otherwise not subject to the FOIA. It is not the function of this rule to make any document unavailable that would otherwise be available absent this rulemaking. Instead, the purpose of this rulemaking is to establish a mechanism for making available certain categories of documents that would otherwise be unavailable.

17. The discussion of the FOIA exemptions in the NOPR reflects the Commission’s view that a re-evaluation of information access policies, including analysis of the FOIA provisions, is dictated by the changed understanding of safety issues resulting from the 9/11 tragedy.⁴⁰ That re-evaluation would be needed regardless of any regulation governing access to CEII. It becomes relevant here as a part of the reasoning behind this rulemaking, but it should not be mistaken for a determination as to whether any specific piece of information is accessible under the FOIA. A FOIA requester has a right to receive an individualized determination based on the document(s) requested. The Commission has not made, and cannot properly make, generic determinations as to whether FOIA exemptions apply. Accordingly, specific arguments with respect to Exemptions 2, 4, and 7 addressed in the NOPR,⁴¹ and raised again here,⁴² are best

²³ Reporters Committee at p. 3–4. The Commission does not, however, have jurisdiction over pipeline safety issues, which belongs to the Department of Transportation. See 49 U.S.C. Chapter 601.

²⁴ American Library Association at p. 2.

²⁵ Reporters Committee at p. 3.

²⁶ See National Infrastructure Protection Center Advisory 02–007 (September 10, 2002) (identifying most attractive targets as transportation and energy sectors and “[f]acilities or gatherings that would be recognized worldwide as symbols of American power or security.”) The National Infrastructure Protection Center’s mission is to serve as the United States government’s focal point for threat assessment, warning, investigation and response for threats or attacks against critical infrastructures, including energy and water systems.

²⁷ See *The Washington Post*, *Cyber-Attacks by Al Qaeda Feared*, June 27, 2002, p. A01.

²⁸ 67 FR 57994 at p. 57996, FERC Stats. & Regs. ¶ 32,564 at p. 34,541.

²⁹ *Id.* at pp. 57997–800, ¶ 32,564 at pp. 34,542–46.

³⁰ 5 U.S.C. 552(b)(2).

³¹ 5 U.S.C. 552(b)(4).

³² 5 U.S.C. 552(b)(7)(F).

³³ *E.g.*, American Electric Power System at p. 1; Duke Energy Corporation (Duke) at p. 7; Edison Electric Institute (EEI) at pp. 6–7; Southern California Edison Company (SCE) at p. 10; Southern Company Services, Inc. (Southern) at p. 2; Washington Legal Foundation and Public Interest Clinic, George Mason University School of Law (Washington Legal Foundation) at pp. 5–6.

³⁴ For the public’s convenience, the Commission’s FOIA analysis is reiterated in Appendix B.

³⁵ *E.g.*, Hydropower Reform Coalition (HRC) at p. 3; Massachusetts Energy Facilities Siting Board at p. 3; National Association of Regulatory Utility Commissioners (NARUC) at pp. 3, 7–10, 12–15; OMB Watch at pp. 4–6; Reporters Committee at pp. 2, 4, 7; joint comments of the Public Utilities Commission of Ohio, the Michigan Public Service Commission and the Oklahoma Corporation Commission (States) at pp. 3, 7–10, 12–17; Whitfield Russell Associates at p. 8.

³⁶ OMB Watch at pp. 4–5; Reporters Committee at pp. 2, 7.

³⁷ American Library Association at p. 2.

³⁸ OMB Watch at p. 4.

³⁹ 67 FR 57994 at p. 57996, FERC Stats. & Regs. ¶ 32,564 at p. 34,541.

⁴⁰ *Id.* at pp. 57996–800, ¶ 32,564 at pp. 34,541–46.

⁴¹ *Id.*

⁴² *E.g.*, NARUC at p. 12; States at p. 13; OMB Watch at p. 5; Whitfield Russell Associates at p. 8 (harm resulting from terrorist attacks would not constitute competitive harm under Exemption 4); Reporters Committee at p. 7; OMB Watch at p. 6 (information that was previously public is not protected under the FOIA).