

resolved in the context of particular FOIA requests, where submitters have the opportunity to enumerate potential competitive harm associated with release, and where the Commission can evaluate the harm of releasing that particular information. For purposes of this rulemaking, however, the Commission continues to believe that the types of information it has identified as CEII are exempt from disclosure under the FOIA.

18. As a separate matter, some commenters raise issues concerning the Commission's experience with Exemption 7 and question whether it applies outside the context of criminal investigations.⁴³ In particular, OMB Watch wonders how the Commission could have removed from public access tens of thousands of documents on the basis that they were compiled for law enforcement purposes and asks whether the Commission ever relied upon Exemption 7 prior to the 9/11 attack.⁴⁴ With respect to OMB Watch's first argument, the Commission did not remove thousands of documents from public access in October 2001 based on Exemption 7. The Commission removed them because they fit within certain categories of documents that were identified as likely to contain information that could be harmful in the hands of terrorists. The Commission did not do a document-by-document review of these documents to determine whether they contained information exempt from disclosure under the FOIA. In response to OMB Watch's second point, the Commission has relied from time to time on Exemption 7 prior to 9/11.⁴⁵ More to the point, it has long been recognized that Exemption 7 applies to civil as well as criminal law enforcement.⁴⁶ OMB Watch is likewise mistaken that the Commission will claim that all information it collects constitutes law enforcement information.⁴⁷ The Commission has no such intention because it recognizes that Exemption 7 does not protect all law

enforcement information, but only certain limited types, such as information the disclosure of which might interfere with enforcement proceedings or endanger the safety of an individual.⁴⁸

19. Some commenters raise administrative issues. They assert, for example, that this rulemaking will improperly remove functions from qualified "access professionals," and that the Commission has not adequately explained what qualifications the CEII Coordinator must possess.⁴⁹ These concerns are misplaced. As stated above, FOIA requests will continue to be processed according to the Commission's established FOIA procedures and the Commission's FOIA staff. The Commission's goal in appointing the CEII Coordinator will be the same as its goal in assigning staff to handle FOIA requests, or for that matter all of its staff: to ensure that employees are qualified and properly trained to handle their appointed responsibilities. Moreover, as explained below in the discussion on the use of a CEII Coordinator, the Coordinator will be free and indeed encouraged to consult with the staff who provides advice and recommendations on FOIA responses.

20. Some commenters ask whether the Commission will automatically transfer a FOIA request to the CEII Coordinator if it turns out that the requested information is CEII.⁵⁰ The answer is, generally no. If a requester files a FOIA request and does not follow the procedures for seeking access to CEII, the request will be handled as a FOIA request and, if the requested information is exempt from disclosure, it will be withheld. The requester will, however, be notified that the information, although exempt from disclosure under the FOIA, may be accessible under the CEII procedures. If the requester seeks access under both the FOIA and CEII procedures, Commission staff will coordinate the response.

21. The Commission received comments questioning whether a utility must claim CEII status for information in order for it to qualify for protection under Exemption 4.⁵¹ The information either is or is not CEII. Thus, a claim that information is CEII is not necessary for the information to qualify as such. For the same reason, a claim that information is CEII will not necessarily qualify it as CEII. Accordingly, a

submitter's ability to claim protection under Exemption 4 in particular is not, and cannot be, conditioned on a claim of CEII status. Information may qualify for Exemption 4 protection and not be CEII, just as information may qualify for CEII protection and not fit within Exemption 4, as long as it fits within another FOIA exemption.

22. As stated above, the Commission recognizes that it is bound by the FOIA. Where the FOIA affords certain rights to submitters of information, the Commission remains obligated to recognize those rights, just as it remains obligated to recognize the rights of FOIA requesters. Nevertheless, if a utility fails to claim CEII status for information that would qualify as CEII, the risk that the information will be disclosed is increased because Commission staff may not become fully aware of the dangers of disclosing it. Commission staff will endeavor to identify CEII in processing requests, including information for which submitters have not claimed CEII status, but proper determinations about what information should be released under the FOIA will be easier to make where submitters identify information they believe to constitute CEII.

23. Finally, some requesters express concern whether the Commission will provide adequate information about decisions not to disclose CEII, including information that would allow requesters to challenge claims of competitive harm.⁵² Determinations of competitive harm would occur as part of the FOIA process and would be subject to existing FOIA procedures. The Commission informs a FOIA requester of the reason(s) for withholding information and the requester may appeal that determination to the Commission's General Counsel and ultimately to a United States District Court.⁵³ This rulemaking makes no changes to that procedure. Where information that is exempt from disclosure under the FOIA is found to be CEII, as noted, the Commission will so notify the requester.

C. Definition of CEII

24. The NOPR proposed to define CEII in § 388.113(c)(1) of the Commission's regulations⁵⁴ as:

Information about proposed or existing critical infrastructure that: (i) Relates to the production, generation, transportation, transmission, or distribution of energy; (ii) Could be useful to a person in planning an attack on critical infrastructure; (iii) Is exempt from mandatory disclosure under the

⁴³ E.g., OMB Watch at p. 7; Reporters Committee at p. 6.

⁴⁴ OMB Watch at p. 7.

⁴⁵ A review of the Commission's Annual FOIA reports for FY 1998 through 2001 indicates that the Commission relied on Exemption 7 in Fiscal Years 2001 and 1998, specifically citing exemption 7(A) eight times, 7(B) two times, 7(C) three times, 7(D) two times, and 7(E) five times during those two fiscal years. The Commission also relied on Exemption 7(F) more recently in modifying its practice of making the entirety of FERC Form No. 715 available to the public. See Order on Treatment of Information Collected in Form No. 715, 100 FERC ¶ 61,141 (2002).

⁴⁶ E.g., *Detroit Free Press, Inc. v. DOJ*, 73 F.3d 93, 96 (6th Cir. 1996); *Williams v. IRS*, 479 F.2d 317, 318 (3rd Cir. 1973).

⁴⁷ See OMB Watch at p. 7.

⁴⁸ 5 U.S.C. 552(b)(7).

⁴⁹ OMB Watch at p. 7; Reporters Committee at pp. 4-5.

⁵⁰ NARUC at p. 24; States at p. 24.

⁵¹ NARUC at p. 13; States at p. 14.

⁵² NARUC at pp. 23-24; States at pp. 24-25.

⁵³ 18 CFR 388.108(c)(1), 388.110 (2002).

⁵⁴ 18 CFR 388.113(c)(1) (2002).