

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION**

<b>KEVIN CLARKE, et al.,</b>	§	
<b>Plaintiffs,</b>	§	
<b>v.</b>	§	
	§	<b>A-24-CV-614-DAE</b>
<b>COMMODITY FUTURES TRADING COMMISSION,</b>	§	
<b>Defendant.</b>	§	

**ORDER**

Before the court are Defendant’s Motion for a Protective Order from Abusive Discovery Requests (Dkt. 101), Plaintiffs’ Motion to Compel Production of Complete Administrative Record (Dkt. 102), Defendant’s Motion for Relief from Requirement that Parties Engage in Alternative Dispute Resolution (Dkt. 105), and all related briefing.<sup>1</sup> On January 7, 2025, the court held a hearing on the motions. The court has considered the parties’ briefing, the applicable law, and the arguments made at the hearing. For reasons stated at the hearing, the court rules as follows.

**I. ADMINISTRATIVE RECORD**

Defendant seeks a protective order forbidding, limiting, or staying Plaintiffs’ discovery requests. Dkt. 101, at 1. Plaintiffs seek to compel Defendant to produce the complete administrative record, including materials “leading to the agency decisions challenged in this case.” Dkt. 102, at 1. The parties disagree about the scope of an administrative record. Both parties agree that an administrative record includes materials relevant to the decision that were before the decisionmaker at the time the decision was made, but disagree on the practical implications. A complete administrative record is one that “consists of all documents and materials directly or

---

<sup>1</sup> The motions and related briefing were referred to the undersigned for disposition by United States Senior District Judge, David A Ezra, pursuant to 28 U.S.C. § 636(b), Federal Rule of Civil Procedure 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas. *See* Text Orders dated Dec. 2, 2024, Dec. 3, 2024, and Dec. 9, 2024.

indirectly considered by agency decision-makers and includes evidence contrary to the agency's position.” *Exxon Corp. v. Dep’t of Energy*, 91 F.R.D. 26, 33 (N.D. Tex. 1981) (Higginbotham, J.). Judge Higginbotham’s opinion further supports the inclusion of internal documents by citing *Tenneco Oil Co. v. Dep’t of Energy*, 475 F. Supp. 299, 317 (D. Del. 1979), to state “It strains the Court's imagination to assume the administrative decision-makers reached their conclusion without reference to a variety of internal memoranda, guidelines, directives, and manuals.” *Exxon Corp.*, 91 F.R.D. at 34, n.11.

Following *Exxon Corp. v. Dep’t of Energy*, this court finds internal documents, which otherwise meet the parties’ agreed definition of an administrative record, to be part of the administrative record. This court joins many others in this Circuit in following *Exxon Corp. E.g., Exxon Mobil Corp. v. Mnuchin*, No. 3:17-CV-1930, 2018 WL 4103724, at \*2, \*3 (N.D. Tex. Aug. 29, 2018); *Sierra Club v. Angelle*, No. 19-CV-13966, 2021 WL 9526861, at \*2, \*3 (E.D. La. Mar. 4, 2021); *Sana Healthcare Carrollton, LLC v. Dep’t of Health & Human Servs.*, No. 4:23-CV-738, 2024 WL 2723873, at \*6 (E.D. Tex. May 28, 2024).

Therefore, the court **ORDERS** Defendant to produce all documents or materials relevant to the decision and before the decisionmaker at the time the decision was made, which may include internal materials and materials received from external sources. The court further **ORDERS** Defendant to include an affidavit signed by the Director of the Division of Market Oversight, Vincent McGonagle, who was identified by the parties and the court as the decisionmaker responsible for the letters at issue, stating the supplemented administrative record is a true and complete record of the relevant materials before him at the time of his decision. Defendant must supplement the administrative record by **Friday, February 7, 2025**.

Defendant's Motion for a Protective Order from Abusive Discovery Requests (Dkt. 101) and Plaintiffs' Motion to Compel Production of Complete Administrative Record (Dkt. 102) are each **GRANTED IN PART** and **DENIED IN PART**.

**II. EXCUSAL FROM ADR**

Defendant further requests to be exempted from Alternative Dispute Resolution as required by Local Rule CV-88 and the parties' Scheduling Order (Dkt. 94). For reasons discussed at the hearing, the undersigned **GRANTS** Defendant's Motion for Relief from Requirement that Parties Engage in Alternative Dispute Resolution (Dkt. 105). The parties are exempted from the requirement of Local Rule CV-88 that they engage in alternative dispute resolution, and they are excused from the requirement in the Scheduling Order that they report on alternative dispute resolution efforts by December 15, 2024.

SIGNED January 8, 2025.

  
\_\_\_\_\_  
MARK LANE  
UNITED STATES MAGISTRATE JUDGE