



Federal Communications Commission
Washington, D.C. 20554

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DA 15-1379

By Electronic Mail to: evans@fhhlaw.com

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Re: Request for Confidentiality; Application of Joseph A. Sofio for AWS-3 Licenses in the 1695-1710 MHz, 1755-1780 MHz and 2155-2180 MHz Bands, ULS File No. 0006670108

Dear Mr. Evans:

Joseph A. Sofio (“Mr. Sofio” or “Applicant”) requests confidential treatment under Section 0.459 of the Commission’s rules,¹ for certain information disclosed to the Commission in his above-referenced application (“Request”).² Mr. Sofio was the winning bidder for 28 licenses offered in Auction 97 with a total of \$13,483,500 in net provisionally winning bids.³ This letter provides notice of our denial in part of the Request, specifically the request to keep non-public the names of nine of 11 individuals, a limited liability company, and two trusts that Mr. Sofio reported in his application as parties to agreements or other understandings with the Applicant. In accordance with Section 0.459(g),⁴ Mr. Sofio has until December 16, 2015—ten business days from the date of this letter—to file an application for review by the Commission of this denial in part. We are not herein ruling on any other information covered by the Request (*e.g.*, the amounts, interest rates, and maturity dates of the loans) and will defer action with respect to such information pursuant to Section 0.459(d)(3).⁵

In the above-referenced application, as filed on February 13, 2015, Mr. Sofio identified himself as an individual Applicant and certified that he is eligible for a very small business bidding credit and had no affiliates and no agreements relevant to this claim.⁶ On April 2, 2015, in response to informal staff

¹ 47 C.F.R. § 0.459.

² ULS File No. 0006670108, Exhibit E: Request for Confidential Treatment (filed April 2, 2015) (“Confidentiality Request”); Exhibit E: Supplemental Request for Confidential Treatment (filed April 21, 2015) (“Supplemental Confidentiality Request”) (collectively, the “Request”).

³ See Auction of Advanced Wireless Services (AWS-3) Licenses Closes, Winning Bidders Announced for Auction 97, *Public Notice*, 30 FCC Rcd 630 (WTB 2015) (“*Winning Bidders Public Notice*”).

⁴ 47 C.F.R. § 0.459(g). Oral notice, by telephone, was also provided on December 2, 2015.

⁵ 47 C.F.R. § 0.459(d)(3).

⁶ ULS File No. 0006670108 (filed Feb. 13, 2015).

inquiries, Mr. Sofio provided, as attachments to the FCC Form 601, Exhibit D, thirteen promissory notes,⁷ dated April 2, 2015, between Mr. Sofio and 11 individuals, one limited liability company, and two trusts.⁸ Mr. Sofio sought confidential treatment for the names of nine of the individuals, one limited liability company, and two trusts to redact their identities (as well as the above referenced information) from public disclosure.⁹ The agreements were redacted as attachments to the FCC Form 601, and Mr. Sofio did not provide summaries of the agreements in Exhibit D to the FCC Form 601 or include the names of the parties to the agreements on FCC Form 601, Schedule B, as required.¹⁰

On April 21, 2015, in response to further staff inquiries, Mr. Sofio again amended the FCC Form 601 to provide, as attachments to Exhibit D, agreements that were referenced in or superseded by the April 2nd agreements.¹¹ Specifically, Mr. Sofio provided one promissory note to a limited liability company, dated October 2, 2014, and twelve promissory notes, dated February 25, 2015, to ten individuals¹² and two trusts, with the promissory note to one of those individuals superseding the October 2nd promissory note to the limited liability company. Mr. Sofio, in the Supplemental Confidentiality Request, again seeks to redact the following from those agreements: the amount of the principal borrowed; names of the lenders; addresses of the lenders; rates of interest; and due dates for payments related to the loans.¹³ Mr. Sofio also redacts FCC Form 601, Exhibit D itself to remove any references to conversations or understandings reached with other parties during the auction.¹⁴ The Supplemental Confidentiality Request argues that the redacted terms in the agreements and in the narrative discussion of FCC Form 601, Exhibit D “constitute ‘commercial or financial information obtained from any person’, which is an exception to the public disclosure rules identified in Section 0.457(d).”¹⁵ Mr. Sofio also

⁷ FCC File No. 0006670108 (filed Apr. 2, 2015). Although we herein refer to the agreements as promissory notes, they extend beyond the mere promise of a payment of funds at a defined percentage of interest for a fixed term. However for ease of reference, we herein interchangeably use the terms agreements and promissory notes.

⁸ FCC File No. 0006670108 (filed April 2, 2015), Exhibit D.

⁹ Confidentiality Request at 2. Mr. Sofio did not seek confidential treatment for the names of two parties with whom he entered into agreements. Specifically, Mr. Sofio did not seek confidential treatment for the identities of his mother, Mary Sypkens, and his sister, Lisa Sofio, “as lenders because the Commission’s rules presume some kinship affinity based on that level of family relatedness, but for the other lenders there is no reason for their identities to be released.” Confidentiality Request at 2. We note that the rules are more broadly applicable than as stated by Mr. Sofio, but it is correct the kinship affiliation rule extends to a mother and her children.

¹⁰ 47 C.F.R. § 1.2110(j); *Winning Bidders Public Notice*, Attachment D at 12-13.

¹¹ FCC File No. 0006670108 (filed April 21, 2015), Exhibit D.

¹² As noted above, two of the ten individuals are Mary Sypkens and Lisa Sofio, and no confidentiality is sought for agreements between Mr. Sofio and each of them.

¹³ Supplemental Confidentiality Request at 1.

¹⁴ FCC File No. 0006670108 (filed April 21, 2015), Exhibit D (discussion under “Financing Plan”). The Applicant provides no basis or explanation for redacting such information.

¹⁵ Supplemental Confidentiality Request at 1.

raises the privacy interests of the parties to the agreements with Mr. Sofio as a separate ground for non-disclosure.¹⁶ Exhibit D, as amended, still omits the summary of each agreement, which is required by the Commission's rules, including, the names of parties to those agreements.¹⁷ Moreover, the names of parties to agreements with Mr. Sofio remain absent from FCC Form 601, Schedule B.¹⁸

Section 0.457(d) addresses the Commission's authority to withhold materials from public inspection if they contain trade secrets and commercial or financial information obtained from any person and privileged or confidential.¹⁹ Section 0.457(d) of the Commission's rules²⁰ is based on exemption 4 of the Freedom of Information Act (FOIA), which provides that an agency need not disclose information that is "trade secrets and commercial or financial information obtained from a person and privileged or confidential."²¹ If the information was required to be disclosed, as here, it will be considered confidential only "if disclosure ... is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."²² A request for confidentiality may be

¹⁶ Supplemental Confidentiality Request at 1-2. Mr. Sofio suggests that mandatory disclosure would betray Mr. Sofio's commitment of confidentiality to the lenders. We note that there is no such provision referenced in any of the agreements.

¹⁷ 47 C.F.R. § 1.2110(j); 47 C.F.R. § 1.2112(b)(1)(iii); *see also Winning Bidders Public Notice*, Attachment D at 4 (explaining that an applicant must list agreement name, agreement type, and parties to the agreement in the FCC Form 601, Schedule B and must summarize its agreements in Exhibit D and provide copies of each agreement as part of Exhibit D); FCC Form 601, Schedule B, Instructions at 2 (requiring an applicant to provide the name of the agreement, the parties to the agreement, and to identify the type of agreement).

¹⁸ We note that auction applicants must familiarize themselves thoroughly with the Commission's general competitive bidding rules, including Commission decisions in proceedings regarding competitive bidding procedures, application requirements, and obligations of Commission licensees. Auction of Advanced Wireless Services (AWS-3) Licenses Scheduled for November 13, 2014; Notice and Filing Requirements, Reserve Prices, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 97, *Public Notice*, 29 FCC Rcd 8386, 8391 ¶ 9 (2014) ("*Auction 97 Procedures Public Notice*"). The *Auction 97 Procedures Public Notice* also put applicants on notice that "[a]ll bidders must also be thoroughly familiar with the procedures, terms and conditions contained in this Public Notice and any future public notices that may be issued in this proceeding." *Id.*

¹⁹ 47 C.F.R. § 0.457(d). 47 C.F.R. § 0.457(d) explains that "[u]nless the materials to be submitted are listed in paragraph (d)(1) of this section and the protection thereby afforded is adequate, any person who submits materials which he or she wishes withheld from public inspection under 5 U.S.C. 552(b)(4) must submit a request for non-disclosure pursuant to § 0.459." 47 C.F.R. § 0.457(d). The information for which Mr. Sofio seeks confidential treatment is not listed in Section 0.457(d)(1). Therefore, 47 C.F.R. § 0.459(b) requires a statement of the reasons for withholding the materials from inspection and of the facts upon which those records are based. 47 C.F.R. § 0.459(b).

²⁰ 47 C.F.R. § 0.459(d).

²¹ 5 U.S.C. § 552(b)(4).

²² *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C.Cir.1974). Only an agency may raise an "impairment" argument. We therefore reject Mr. Sofio's arguments concerning the affect such a disclosure may have on the Commission's process. We further note that *Probe Research, Inc.*, 50 RR2d 351 (1981), cited by Mr. Sofio, involves the *voluntary* submission of a pricing guide, not information *required* to be disclosed under agency rules. We find *Probe* to be irrelevant to the instant matter.

granted only if it is demonstrated by a preponderance of the evidence that non-disclosure is consistent with the provisions of the FOIA.²³ Moreover, an agency must point to specific evidence substantiating an assertion that release of a record would cause substantial competitive harm to the person from whom the information was obtained.²⁴ The agency must provide evidence that if the requested information is disclosed, competitive harm would be “imminent.”²⁵ The specific evidence must show that the competitive harm will result from the affirmative use of the information by competitors of the person from whom the information was obtained, not merely injuries to that person's competitive position in the marketplace or “embarrassing publicity attendant upon public revelations.”²⁶

We do not dispute that the agreements contain financial information obtained from a person. However, we find that (i) Mr. Sofio fails to demonstrate by a preponderance of the evidence that non-disclosure of the names of parties to the agreements at issue, which involve an auction applicant seeking designated entity credits, is consistent with the provisions of FOIA and (ii) Mr. Sofio fails to raise a persuasive argument that disclosure of the names of parties to agreements with an applicant will cause substantial harm to the competitive position of the person from whom the information was obtained.

Mr. Sofio's requests for confidential treatment rest on claims of competitive injury that are supported by little if any specific evidentiary support with respect to the identity of parties with which he has agreements, and are contrary to the Commission's consistent experience in connection with applicants seeking designated entity benefits that disclose the names of parties that have entered into agreements with the applicants.²⁷ His argument is based not on competitive considerations but on the speculation that parties that have entered into financing agreements with Mr. Sofio “might well be subject to solicitations from others,” but even then only “once they learn the amounts which have been extended.”²⁸ The Court of Appeals for the District of Columbia Circuit has emphasized that the important point for competitive harm in the FOIA context is that it be limited to harm flowing from the affirmative use of proprietary information by competitors.²⁹ Mr. Sofio has failed to demonstrate how the disclosure of the names of parties that have entered into agreements with an auction applicant would cause substantial harm to the competitive positions of Mr. Sofio or those parties with which he has entered into agreements related to his pending application, or more generally, how the names of parties that have entered into agreements

²³ 47 C.F.R. § 0.459(d)(2).

²⁴ See *Public Citizen Health Research Group v. F.D.A.*, 704 F.2d 1280, 1291 (D.C.Cir.1983) (“*Public Citizen*”) (“Conclusory and generalized allegations of substantial competitive harm, of course, are unacceptable and cannot support an agency's decision to withhold requested documents.”).

²⁵ *Iglesias v. C.I.A.*, 525 F.Supp. 547, 559 (D.D.C.1981).

²⁶ *Public Citizen*, 704 F.2d at 1291 n. 30.

²⁷ Much of Mr. Sofio's showing relates to concerns about disclosure of the terms of his loans, rather than the identity of his lenders. As noted above, we have deferred consideration of those confidentiality issues in accordance with the Commission's rules.

²⁸ Request for Confidential Treatment at 2.

²⁹ *Public Citizen*, 704 F.2d at 1291 n. 30.

with an auction applicant seeking designated entity benefits are even proprietary information that a competitor could affirmatively use to harm Mr. Sofio. Moreover, the precedent that Mr. Sofio relies on does not support his allegation that competitive harm would be caused by the disclosure of the names of parties that have entered into agreements with him. Rather, Mr. Sofio tries to relate to instances where, in very different proceedings, the Commission has afforded sensitive financial information confidential treatment, such as the prices for licenses being acquired in a transfer of control application.³⁰ In contrast, Mr. Sofio is the winning bidder in a public auction, Auction 97. The prices for each license won are public information. We therefore find the referenced precedent irrelevant.

Furthermore, Mr. Sofio is required to demonstrate eligibility for designated entity credits, including the disclosure of agreements from lenders to fund Mr. Sofio's winning bids, which requires the disclosures of the names of the parties to agreements with the Applicant. The Commission has explained that

A fundamental necessity in the conduct of spectrum auctions is that the eligibility of applicants for any bidding credits and their suitability as licensees must be fully scrutinized. Indeed, fairness to the other participants in the auction requires that this financial information be accessible to the public. Competing bidders and the public in general have a compelling interest in having access to the information that is the subject of the confidentiality request because it bears directly on . . . [an applicant's] eligibility for bidding credits.³¹

We categorically reject Mr. Sofio's suggestion that the identities of parties who have agreements with designated entity applicants are "irrelevant to this process."³² The Commission's disclosure rules would apply regardless of whether the lender was a "major financial institution" or an individual.³³ Mr. Sofio's position in favor of anonymity is inconsistent with the Commission's rules for designated entities and the policy of transparency and openness that permeates the designated entity rules.

³⁰ Supplemental Confidentiality Request at 1. The Commission has distinguished the provisions set forth in 47 C.F.R. § 1.2110 (designated entities) from 47 C.F.R. § 1.2111 (transfer of control). Whereas the former requires a designate entity applicant to file agreements to demonstrate that it qualifies for certain bidding credits, the latter requires the filing of purchase agreements to assess the Commission's competitive bidding processes, not the parties' qualifications. See AMTS Consortium, LLC, *Memorandum Opinion and Order*, 25 FCC Rcd 526 (2010) ("*AMTS Consortium*").

³¹ Northeast Communications of Wisconsin, Inc., *Memorandum Opinion and Order*, 15 FCC Rcd 3289, 3290 ¶ 3 (2000) ("*Northeast Communications*"); *AMTS Consortium*, 25 FCC Rcd at 530 (noting that in *Northeast Communications*, the Commission denied confidential treatment because the submitter had, by requesting a bidding credit, placed in issue the very information which it sought to shield from public scrutiny) (internal quotations omitted).

³² Supplemental Confidentiality Request at 1.

³³ Supplemental Confidentiality Request at 1; Supplemental Confidentiality Request at 2 ("Unlike large companies who can rely on major financial institutions for debt financing, smaller entrepreneurs necessarily have to turn to friends and family for financing. By compelling disclosure of the names of the lenders and amounts of the loans, the Commission will have effectively closed off the most ready source of financing for such applicants, indirectly removing from the applicant pool the very sort of innovative and independent entrepreneurs whom Congress instructed the Commission to encourage.").

Public interest in disclosure and transparent, open agency evaluation of an applicant's eligibility for designated entity benefits outweighs any *de minimis* privacy concerns raised by Mr. Sofio, which in any event we find unpersuasive. First, as noted above, the disclosure of the names of parties to the agreements is required by the Commission's rules.³⁴ Second, the privacy interest is minimal given this being a business investment. Indeed, Mr. Sofio makes no effort to demonstrate the applicability of FOIA exemption 6, which addresses a "clearly unwarranted invasion of personal privacy."³⁵ The disclosure will reveal that the lenders loaned Mr. Sofio an unknown amount of money at an undisclosed rate for an unspecified term for investment in wireless licenses.³⁶ It reveals little of their funding capabilities, which is the prime concern cited by Mr. Sofio.³⁷ In any event, the *de minimis* privacy concerns raised are insignificant when balanced against the public interest in disclosure of agreements between an applicant for designated entity credits and other parties and in ensuring that the Commission maintains the integrity of the auction and licensing process by being open and transparent.

We find Mr. Sofio's reliance on *Percy Squire*³⁸ to be misplaced.³⁹ Percy Squire sought information on file with the Commission, and D.B. Zwirn Special Opportunities Fund, LLC ("Zwirn") sought to protect the information as confidential.⁴⁰ The information was tens of thousands of pages, and

³⁴ 47 C.F.R. § 1.2110(j); 47 C.F.R. § 1.2112(b)(1)(iii); *see also Winning Bidders Public Notice*, Attachment D at 4 (explaining that an applicant must list agreement name, agreement type, and parties to the agreement in the FCC Form 601, Schedule B and must summarize its agreements in Exhibit D and provide copies of each agreement as part of Exhibit D); FCC Form 601, Schedule B, Instructions at 2 (requiring an applicant to identify the name of the agreement, the parties to the agreement, and the type of agreement); 47 C.F.R. § 1.2110(n) (imposing a continuing requirement on a designated entity to file agreement(s) as part of an annual report); FCC Form 611-T, Instructions at 2 (providing instructions for the continuing obligation for a designated entity to file agreements); Implementation of the Commercial Spectrum Enhancement Act and Modernization of the Commission's Competitive Bidding Rules and Procedures, *Second Report and Order and Second Further Notice of Proposed Rule Making*, 21 FCC Rcd 4753, 4768 ¶ 42 (2006) ("*2006 Competitive Bidding Second R&O*") ("we will review the agreements to which designated entity applicants and licensees are parties"). The Commission explained that "we will undertake a thorough review of the long-form application (FCC Form 601) filed by every winning bidder claiming designated entity benefits and will carefully review all relevant contracts, agreements, letters of intent, and other such documents affecting that applicant. . . . Thus, we will require that all designated entity applicants that are winning bidders at an auction file all relevant contracts, agreements, letters of intent, and other such documents affecting that applicant as part of the long-form application (FCC Form 601)." *Id.* at 4769 ¶ 44.

³⁵ 5 U.S.C. § 552(b)(6).

³⁶ As noted above, the disclosure will also reveal that the agreements extend beyond mere promises of payments and terms related thereto.

³⁷ *See* Supplemental Confidentiality Request at 2 ("Disclosure of their identities and the specifics of each loan would place their personal financial affairs at risk by alerting outside parties with whom they may be dealing to the size and extent of their funding capabilities and funding commitments.").

³⁸ Percy Squire, *Memorandum Opinion and Order*, 26 FCC Rcd 14930 (2011) ("*Percy Squire*").

³⁹ *See* Supplemental Confidentiality Request at 1.

⁴⁰ Zwirn sought to protect all of the information from disclosure due to ongoing litigation and fear that the other party may abuse the information. The Commission rejected Zwirn's contention as being an inappropriate basis for granting confidential treatment. *Percy Squire*, 26 FCC Rcd at 14933 ¶¶ 7-8.

the Enforcement Bureau and the Commission issued orders protecting very specific information as confidential but this protection did not shield Zwirn's identity as a lender to the licensee. In any event, as explained above, the public interest in the disclosure of the identity of parties to agreements with an applicant seeking designated entity credits is even more compelling. We therefore will not permit Mr. Sofio to withhold from the public the names of parties to which he has entered into agreements related to his pending application.

We also note that Mr. Sofio generally speculates that disclosure of the information may result in abuse of the Commission's procedures⁴¹ by unnamed third parties. Mr. Sofio's expressed concern that unnamed third parties may attempt to use certain information to the disadvantage of Mr. Sofio or the lenders is not a sufficient reason for granting confidentiality. Mr. Sofio's request appears to be premised on the assumption that the Commission's procedures are insufficient to deter abuse of the Commission's process and that the Commission may fail to impose appropriate sanctions for such abuse. We disagree. The Commission has repeatedly indicated that it is prepared to impose sanctions for abuse of administrative process.⁴² Finally, to the extent Mr. Sofio is concerned that third parties, acting in good faith, may file pleadings against it based on the disclosure at issue, our confidentiality rules may not be used as a shield against claims that may arise through the discovery of non-confidential information.

Accordingly, Joseph A. Sofio's requests for the confidential treatment of the names of the parties to agreements with the Applicant and of the names of parties that the Applicant had conversations with or reached oral understandings with prior to and during Auction 97 ARE DENIED. We defer action on any other information covered by the Request and will continue to keep that information non-public in accordance with Section 0.459(d)(3).⁴³

Mr. Sofio must amend the above-referenced application to make it acceptable for filing by (1) adding the names of parties that have entered into agreements with the Applicant on Form 601, Schedule B, Question 15 (and completing any other information required in FCC 601, Schedule B, Question 15); (2) summarizing those agreements, including providing the names of the parties thereto, in FCC Form

⁴¹ The term "abuse of process" has been defined as "the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule." Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuse of the Renewal Process, *First Report and Order*, 4 FCC Rcd 4780, 4793 n.3 (1989); see *Silver Star Communications-Albany, Inc., Memorandum Opinion and Order*, 3 FCC Rcd 6342, 6352 ¶ 41 (1988); Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Process, *Notice of Proposed Rulemaking*, 2 FCC Rcd 5563, 5563 ¶ 2 (1987); see also *Policy Regarding Character Qualifications In Broadcast Licensing, Report, Order and Policy Statement*, 102 FCC 2d 1179 (1986), *recon. granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed mem. sub nom National Assoc. for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987) (strike pleadings, harassment of opposing parties, and violation of ex parte rules constitute abuse of process).

⁴² See Commission Taking Tough Measures against Frivolous Pleadings, *Public Notice*, FCC No. 96-42, 11 FCC Rcd 3030 (1996) ("the Federal Communications Commission reminds parties to our proceedings and their attorneys that our rules prohibit the filing of frivolous pleadings or pleadings filed for the purpose of delay in proceedings before the Commission or its staff.").

⁴³ 47 C.F.R. § 0.459(d)(3).

601, Exhibit D; (3) providing, as public attachments to FCC Form 601, Exhibit D, copies of those agreements without the names of the parties thereto redacted; and (4) providing, in FCC Form 601, Exhibit D, the names of parties that the Applicant, and any representatives of the Applicant, had conversations with or reached oral understandings with prior to, during, or after Auction 97, or during the pendency of his long-form application (FCC Form 601).

Pursuant to Section 0.459(g) of the Commission's rules,⁴⁴ Mr. Sofio may file an application for review by the Commission no later than December 16, 2015—ten business days from the date of this letter.⁴⁵ If the application for review is denied, Mr. Sofio will be afforded 10 business days in which to seek a judicial stay of the ruling.⁴⁶ If these periods expire without action by Mr. Sofio, the materials will be placed in a public file with the names of the parties to agreements with the Applicant and the names of parties that the Applicant had conversations with or reached oral understandings with prior to and during Auction 97 no longer redacted.⁴⁷ The materials will be accorded confidential treatment, as provided in Sections 0.459(g) and 0.461,⁴⁸ until the Commission acts on any timely applications for review of our denial in part of Mr. Sofio's request for confidentiality, and until a court acts on any timely motion for stay of the Commission's denial of confidential treatment.

This action is taken under delegated authority pursuant to Section 0.331 of the Commission's rules.⁴⁹

Sincerely,

Blaise A. Scinto
Chief, Broadband Division
Wireless Telecommunications Bureau

⁴⁴ 47 C.F.R. § 0.459(g).

⁴⁵ 47 C.F.R. § 0.459(g).

⁴⁶ 47 C.F.R. § 0.459(g).

⁴⁷ 47 C.F.R. § 0.459(g).

⁴⁸ 47 C.F.R. §§ 0.459(g), 0.461.

⁴⁹ 47 C.F.R. § 0.331.