



Federal Communications Commission
Washington, D.C. 20554

August 3, 2017

DA 17-731

Mr. James Chelmowski
6650 N. Northwest Hwy
Chicago, IL 60631
jchelmowski@comcast.net

Re: FOIA Control No. 2017-000511

Dear Mr. Chelmowski:

This is in response to your application for review¹ of the Office of General Counsel's (OGC's) decision² addressing your Privacy Act request insofar as FCC policy construes it to include a request under the Freedom of Information Act (FOIA) request seeking "all records about [you] . . . and/or indexed to [your] . . . name (James Chelmowski, Jim Chelmowski, Mr. Chelmowski, Chelmowski, etc.) in all databases from January 1, 2011 to date of search and production."³ The FOIA Decision addressed this matter only insofar as it is construed as a FOIA request, and explained that your request is also being processed under the Privacy Act by the Office of Managing Director (an office distinct from OGC), which would respond separately.

In particular, you requested records regarding:

1. FCC Informal Complaints in 2011 and 2014
2. FCC Formal Complaint File No. EB-14-MD-016
3. D.C. Appellate Court case number 15-1425
4. United States District Court Northern Illinois case number 16-5887
5. FCC FOIA requests 15-768, 15-769, 16-435 & 16-665

¹ See *FOIA Decision Appeal* (FOIA Control Number 2017-000633: submitted and perfected May 16, 2017) (*AFR*).

² See letter from Elizabeth Lyle, Assistant General Counsel, OGC, FCC, to James Chelmowski (Apr. 18, 2017) (*FOIA Decision*).

³ See letter from Mr. Chelmowski to Leslie Smith, Privacy Act Officer, FCC (submitted Apr. 3, 2017, and perfected Apr. 6, 2017) (*Request*) (*citing* "list of databases from . . . www.fcc.gov/general/privacy-act-information and full all [*sic*] FCC email systems which FCCC [*sic*] Assistant General Counsel referred to [in] her August 5, 2016 letter to me plus all other databases like FOIAonline, FCC reporting databases to other government agencies, FOIA reporting to the Attorney General, etc. . . . Also, include the all [*sic*] records about me and/or indexed to my name from the following FCC staff including but not limited to Michael Hennigan, Nancy Stevenson, Joanne Wall, . . . etc.").

6. FCC FOIA administrative appeals and application of review for these FOIA requests

7. Names [*sic*] FCC identified that worked on things related to the Privacy [*sic*] Chelmowski include [*sic*] but not limited to: Michael Hennigan, Nancy Stevenson, Joanne Wall, . . . etc.”⁴

As explained below, we dismiss your application for review.

In the *FOIA Decision*, we stated that the documents that you request are substantially similar to the documents that you requested in your two previously-filed FOIA requests which were assigned FOIA Numbers 2016-000345⁵ and 2016-000665”⁶ (*FOIA 2016-345* and *FOIA 2016-665*, respectively). In *FOIA 2016-345*, you requested all documents from 2011 to February 10, 2016, between the FCC and AT&T, Inc. (or its subsidiaries) regarding: (1) various permutations of your name; (2) informal complaint 11-C00292341-1 (filed March 3, 2011); (3) informal complaint 11-C00325771-1 (filed August 31, 2011); (4) formal complaint, File No. EB-14-MD-016, FCC No. 14-260 (filed December 11, 2014); and/or (5) D.C. Circuit Case No. 15-1292. On March 11, 2016, the Commission’s Consumer & Governmental Affairs Bureau (CGB) advised you that it had conducted a search and located no responsive records other than those documents that CGB had already provided to you in response to two of your earlier FOIA requests that were assigned FOIA Control Numbers 2015-000768 and 2015-000769.⁷ You filed an administrative appeal of CGB’s decision.

In *FOIA 2016-665*, you requested “all internal and external communications including but not limited to emails, email attachments, faxes, conversation logs, letters, memos, handwritten notes, communication records to FOIAonline, communications to OGIS, AT&T, all internal communications within the FCC, etc. related to the name Chelmowski and/or his FCC FOIA request and appeals by James Chelmowski[.]” On June 17, 2016, CGB notified you that the applicable implementing regulations require the Commission to charge for all search time beyond the first two hours, that the estimated time to process *FOIA 2016-665* is 14 hours, and that the estimated fee for processing the request is \$917.28.⁸ CGB further notified you that, because the estimated fees associated with this request exceed \$250.00 and because you have no history of payment of FOIA fees, you are required to pay in advance the estimated fees before the Commission could process this FOIA request. You filed with the OGC an administrative appeal challenging the estimated search fees in *FOIA 2016-665*.

⁴ *Id.* at 1.

⁵ See FOIAonline (*FOIA Request 2016-345*) (submitted Feb. 10, 2016, and perfected Feb. 11, 2016).

⁶ See FOIAonline (*FOIA Request 2016-665*) (submitted June 2, 2016, and perfected June 6, 2016).

⁷ See letter from Nancy Stevenson, Deputy Chief, Consumer Policy Division (CPD), CGB, FCC, to James Chelmowski (Mar. 11, 2016) (*March 11, 2016 FOIA Decision*).

⁸ See letter from Ms. Stevenson, Deputy Chief, CPD, CGB, FCC, to Mr. Chelmowski (June 17, 2016) (*June 17, 2016 FOIA Decision*).

On August 4, 2016, OGC responded to your administrative appeals in *FOIA 2016-345* and *2016-665* by notifying you that OGC had determined that *FOIA 2016-345* substantially overlaps with *FOIA 2016-665*, so the FCC consolidated its review of these two appeals, and that OGC has determined that a further search of FCC databases, including the FCC's email system, is necessary to respond fully to *FOIA 2016-345* and *2016-665*.⁹ OGC also informed you that FOIA and the applicable implementing regulations require the FCC to charge for all search time beyond the first two hours; that the estimated search fee for processing these requests (either individually or together, given the substantial overlap) is \$917.28; and that the FCC will fully and promptly process the requests upon receiving payment of the required fees. OGC also provided a further explanation of how the estimated search fees were calculated and why these FOIA requests could not reasonably be processed in a less expensive manner.

You declined to pay the required search fees and appealed the denial of these two previous FOIA requests to the United States District Court for the Northern District of Illinois, Eastern Division (the District Court). The District Court, among other things, ruled that the Commission can require you to pay the \$917.28 search fee before processing the FOIA requests at issue in *FOIA 2016-345* and *FOIA 2016-665*.¹⁰ To date, you have not paid the search fee.

As we explained in the *FOIA Decision* that is the subject of this appeal, the documents you request in *FOIA 2017-511* are substantially similar to the documents that you requested in *FOIA 2016-345* and *FOIA 2016-665*. We stated that we therefore base our fee estimate for the purposes of *FOIA 2017-511* on our estimated search fee for processing *FOIA 2016-345* and *FOIA 2016-665* (i.e., \$917.28). We further explained that for the same reasons outlined in the *June 17, 2016 FOIA Decision* and the *August 4, 2016 FOIA Decision* and because the District Court has found that the Commission can require you to pay the search fee before processing *FOIA 2016-345* and *FOIA 2016-665*, we will not process *FOIA 2017-511* until you have paid the \$917.28 search fee at issue here.¹¹

We also noted that the \$917.28 fee is only an estimate of the search fee that we may incur in processing *FOIA 2017-511*. In particular, we observed that although the three FOIA requests substantially overlap in terms of subject matter, *FOIA 2017-511* covers a longer period of time than the two earlier-filed FOIA requests, a period of time which includes potentially voluminous records associated with the litigation involving those FOIA requests. In addition, we stated that the Commission recently increased the hourly fees

⁹ See letter from Elizabeth Lyle, Assistant General Counsel, OGC, FCC, to Mr. Chelmowski (Aug. 4, 2016) (*August 4, 2016 FOIA Decision*).

¹⁰ See Docket Entry 62, *Chelmowski v. FCC*, No. 1:16-cv-05587 (N.D. Ill. Mar. 10, 2017). You did not appeal that decision.

¹¹ See *FOIA Decision* at 3.

charged for the staff's searching for (and reviewing) agency records in connection with FOIA requests.¹²

The *FOIA Decision* thus explained that, to the extent your request could be treated as a FOIA request, we are unable to process it under FOIA unless you pay the \$917.28 search fee that applies under FOIA and the Commission's implementing regulations.¹³ We stated that if OGC does not hear from you within 30 days, we will consider *FOIA 2017-511* closed and that the time period for processing your FOIA request is tolled until we have received payment of the \$917.28 fee.¹⁴

As noted above, we also explained in the *FOIA Decision* that although you filed your request for records under the Privacy Act,¹⁵ it is the Commission's policy to treat Privacy Act requests as requests under *both* the Privacy Act *and*, separately, under the Freedom of Information Act (FOIA),¹⁶ consistent with Department of Justice guidance on such requests.¹⁷ In the *FOIA Decision*, OGC (which is the office that processes FOIA requests) addressed your request only under FOIA. Your request was also processed separately under the Privacy Act by the Office of the Managing Director, which is the office with authority to address requests under the Privacy Act.¹⁸

In your *AFR*, you assert that the "FCC [has] no authority to demand search fees for a Privacy Act request for records related to the requester."¹⁹ You also maintain that the Commission "demanded a 30 day deadline for Chelmowski to pay \$917.28 in illegal search fees that the FCC does not have authority to charge or authority to illegally deposit into the US General Fund."²⁰

On May 25, 2017, citing the Note to Section 0.461(i) and (j) of the Commission's rules,²¹ we provided you with additional information and clarification in an effort to resolve the concerns raised in your appeal.²² We stated that "the \$917.28 search fee recited in the *FOIA Decision* **does not apply to the processing of your request under the Privacy Act**, which is being addressed by a separate office, but instead applies only to the separate processing of your request under FOIA."²³ We also pointed out that (as

¹² See *Modification of the Freedom of Information Act Fee Schedule*, DA 17-30, 2017 WL 83668 (Jan. 9, 2017).

¹³ *Id.* at 3.

¹⁴ See *id.* (citing 47 C.F.R. § 0.469(c)).

¹⁵ See 5 U.S.C. § 552a.

¹⁶ See 5 U.S.C. § 552.

¹⁷ See *FOIA Decision* at 1.

¹⁸ *Id.* at 2.

¹⁹ *AFR* at 4.

²⁰ *Id.* at 6.

²¹ See 47 C.F.R. § 0.461(i) & (j), Note ("The General Counsel may review applications for review with the custodian of records and attempt to informally resolve outstanding issues with the consent of the requester").

²² See letter from Brendan Carr, General Counsel, OGC, FCC, to Mr. Chelmowski, n.10 (May 25, 2017) (citing 47 C.F.R. § 0.461(i) & (j), Note) (*May 25, 2017 Letter*).

²³ See *May 25, 2017 Letter* at 1 (emphasis in the original).

discussed in the *FOIA Decision*) the Commission has the authority to require advance payment of estimated FOIA fees where “the Commission estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250.00 and the requester has no history of payment.”²⁴ We explained that in exercising this authority under section 0.469(a) of the Commission’s rules, we are not “subject to or otherwise constrained by any prescribed time limitations with respect to requiring a response from a FOIA requester regarding the payment of an estimated search fee.”²⁵ We also said that 30 calendar days is a reasonable period of time in which to request a response to the *FOIA Decision* before closing *FOIA 2017-511*.²⁶ We further stated that if we did not hear from you by June 26, 2017, we would consider your appeal resolved and would close it accordingly.

In correspondence to the Commission dated June 25, 2017, you indicate that the *May 25, 2017 Letter* did not resolve the concerns raised in your *AFR* and that you consider your appeal still pending.²⁷ You also list the following questions:

- “1) What was this May 25, 2017 letter and where was that clearly stated in the FCC Attorneys’ letter and email?
- 2) FCC legal authority for the May 25, 2017 letter;
- 3) FCC legal authority for the June 26, 2017 deadline; &
- 4) FCC legal authority for such extreme consequences if I did not contact the FCC by June 26, 2017.”²⁸

As outlined above, we explained in detail in the *FOIA Decision* the basis for our fee estimate for *FOIA 2017-511* and why we will not process *FOIA 2017-511* until you have paid the \$917.28 search fee. In doing so, we noted the District Court’s decision that we can require you to pay the \$917.28 search fee in advance. We discussed in the *FOIA Decision* and at greater length in the *May 25, 2017 Letter* that your *Request* would be processed under both the FOIA and separately under the Privacy Act. We also explained in the *May 25, 2017 Letter* the basis for the 30-day deadline for you to respond to the *FOIA Decision* before we closed the *FOIA 2017-511*. In addition, we cited in the *May 25, 2017 Letter* the specific rule section providing the Office of General Counsel the authority to attempt to informally resolve your appeal to the full Commission.²⁹

In your *AFR* and *June 25, 2017 Letter*, you provide no specific grounds for disputing the amount of the search fee itself or the legality of our requiring advance payment of that fee. You do not elaborate on the reason for your appeal or how you believe the Commission erred in responding to your request. You have not presented any argument upon which you request that the Commission rule. Therefore, we dismiss your

²⁴ See 47 C.F.R. § 0.469(a).

²⁵ See *May 25, 2017 Letter* at 2.

²⁶ *Id.*²⁶

²⁷ See letter from Mr. Chelmowski to Joanne Wall, *et. al.*, (June 25, 2017) (*June 25, 2017 Letter*).

²⁸ See *June 25, 2017 Letter* at 1.

²⁹ See *May 25, 2017 Letter* at note 10 (citing 47 C.F.R. § 0.461(i) & (j), Note); see also *supra* note 21.

application for review under section 0.251(j) of the Commission's rules for failure to articulate specific grounds for review.³⁰

Pursuant to 5 U.S.C. § 552(a)(6)(A)(ii), we notify you of the provisions for judicial review under paragraph (a)(4) of the Freedom of Information Act.³¹ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect your right to pursue litigation. You may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road—OGIS
College Park, MD 20740-6001
202-741-5770
877-684-6448
ogis@nara.gov
ogis.archives.gov

Sincerely,

Brendan Carr
General Counsel
Office of General Counsel

cc: FOIA Officer

³⁰ See 47 C.F.R. § 0.251(j) (as the Commission's Chief FOIA Officer, "the General Counsel is delegated authority to dismiss FOIA applications for review that are untimely, repetitious, or fail to articulate specific grounds for review").

³¹ See 5 U.S.C. § 552(a)(4)(B) ("On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.")