



PUBLIC NOTICE

Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

News Media Information 202 / 418-0500
Internet: <https://www.fcc.gov>
TTY: 1-888-835-5322

DA 20-579

Released: June 18, 2020

ENFORCEMENT BUREAU REMINDS PUBLIC THAT REQUESTS FOR CONFIDENTIALITY MUST COVER ONLY MATERIAL WARRANTING CONFIDENTIAL TREATMENT UNDER THE COMMISSION'S RULES

Persons responding to letters of inquiry from the FCC's Enforcement Bureau (Bureau) routinely submit confidentiality requests along with their responses. In recent years, the Bureau has received a significant number of casual confidentiality requests and blanket or overbroad confidentiality requests. This Public Notice reminds the public and the bar that this practice is not permitted under the Commission's rules and it detracts from the public's right to know about the bases on which the FCC makes its decisions.¹ The Enforcement Bureau issues this Public Notice to remind members of the public and their counsel that requests under section 0.459 of the Commission's rules² that materials be withheld from public inspection (be kept confidential) must comply with the requirements of that section. Specifically, such requests must address the substantive criteria in section 0.459(b) of the Commission's rules³ and must describe the specific portion(s) of the submitted material for which confidentiality is sought.

Casual Requests for Confidentiality

A casual request for confidentiality is one that does not address the specific factors set forth in section 0.459(b) of the Commission's rules. A casual request occurs when, for example, counsel simply requests in the cover letter that the entire response be treated as confidential, or when counsel stamps every page of the response "CONFIDENTIAL" without providing additional information. Pursuant to the Commission's rules, the Bureau *will not consider* casual requests for confidentiality.⁴

¹ See 47 U.S.C. § 503(b)(6)(B).

² 47 CFR § 0.459.

³ Section 0.459(b) requires that each request for confidentiality contain a statement of the reasons for withholding the materials from inspection (*see* § 0.457) and of the facts upon which those records are based, including: (1) Identification of the specific information for which confidential treatment is sought; (2) Identification of the Commission proceeding in which the information was submitted or a description of the circumstances giving rise to the submission; (3) Explanation of the degree to which the information is commercial or financial, or contains a trade secret or is privileged; (4) Explanation of the degree to which the information concerns a service that is subject to competition; (5) Explanation of how disclosure of the information could result in substantial competitive harm; (6) Identification of any measures taken by the submitting party to prevent unauthorized disclosure; (7) Identification of whether the information is available to the public and the extent of any previous disclosure of the information to third parties; (8) Justification of the period during which the submitting party asserts that material should not be available for public disclosure; and (9) Any other information that the party seeking confidential treatment believes may be useful in assessing whether its request for confidentiality should be granted.

⁴ 47 CFR § 0.459(c).

Blanket or Overbroad Requests for Confidentiality

A blanket or overbroad request does address the criteria set forth in section 0.459(b) but applies the rationale to the entire submission and/or does not identify the information covered by the request. A confidentiality request may also be overbroad if it merely parrots the criteria described in section 0.459(b) but does not actually provide the substantive explanation required. All such overbroad requests are unacceptable under the Commission's rules and will be dismissed if not appropriately narrowed in a timely manner.

Parties requesting confidential treatment of materials they submit to the Commission are required to identify the *specific* parts of the submission to which the confidentiality request applies. Sections 0.459(a)(1) and (b)(1) of the Commission's rules provide, in part:

If feasible, the materials to which the request applies shall be physically separated from any materials to which the request does not apply; if this is not feasible, the portion of the materials to which the request applies shall be identified. In the latter circumstance, where confidential treatment is sought only for a portion of a document, the person submitting the document shall submit a redacted version for the public file.⁵

and

[Each such request shall include] [i]dentification of the specific information for which confidential treatment is sought.⁶

Information for which confidential treatment is requested may be identified by use of highlighting, brackets, or any other means that clearly distinguishes between the confidential and non-confidential portions of the submission.

Information for Which Requests for Confidential Treatment Will Not Be Granted

In order to be withheld from routine public inspection under section 0.459 of the Commission's rules,⁷ the information must actually be confidential. We provide below some common examples of categories not warranting confidential treatment and for which requests for confidentiality will not be granted.

Public information. Information that has already been made public is not confidential, as that term is used in the Commission's rules. For example, information freely available on websites, contained in widely distributed brochures, publicly filed with other government agencies, or available from other public sources, such as newspapers, is not confidential information. Accordingly, the Bureau will not grant a request that public information be withheld from public inspection.

Legal arguments. Arguments contained in a party's response to the Bureau's inquiries are, by themselves, not confidential. While legal arguments contained in responses to letters of inquiry may sometimes contain confidential commercial or financial information, the Bureau will not grant requests that the arguments themselves be treated as confidential. Any commercial

⁵ 47 CFR § 0.459(a)(1).

⁶ 47 CFR § 0.459(b)(1).

⁷ 47 CFR § 0.459.

or financial information contained in an argument for which a party seeks confidential treatment must be specifically identified and clearly marked as such.

Existence of Investigation. The existence of an Enforcement Bureau or FCC inquiry or investigation is not a basis for a party to request that an entire submission be treated as confidential. The Commission may reveal to the public its actions, such as the initiation or results of an investigation. The Bureau therefore does not consider the mere existence of a Bureau inquiry to be a party's confidential business or financial information that is protected from public disclosure under section 0.459 of the Commission's rules.⁸ Accordingly, the Bureau will not grant requests for confidential treatment under section 0.459 for responses, or parts of responses, to letters of inquiry on the basis that they reveal the existence of a Bureau or Commission investigation. Additionally, the Bureau may, absent another reason for maintaining confidentiality, reveal information contained in responses to letters of inquiry in notices of apparent liability for forfeiture, other Bureau or Commission documents, or subsequent proceedings.⁹

For further information about this public notice, please contact Raphael Sznajder of the Enforcement Bureau, by e-mail at raphael.sznajder@fcc.gov, or Joel Rabinovitz of the Office of the General Counsel, by e-mail at joel.rabinovitz@fcc.gov.

Issued by: Chief, Enforcement Bureau

- FCC -

⁸ 47 CFR § 0.459.

⁹ Nonetheless, under section 0.457(g) of the Commission's regulations, 47 CFR § 0.457(g), materials compiled for law enforcement purposes, such as responses to letters of inquiry, are generally not placed in the Commission's public files and are not otherwise routinely available for public inspection so long as and to the extent that the Commission determines they meet the criteria set forth in the regulations.