

IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

James Chelmowski,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 15-1425
	)	
Federal Communications Commission	)	
and the United States of America,	)	
	)	
Respondents.	)	

**OPPOSITION TO MOTION FOR REQUEST FOR  
DOCUMENTS AND MOTION FOR A VAUGHN INDEX**

The Federal Communications Commission opposes petitioner James Chelmowski's Motion for Request Documents/Records from Respondent and Intervenor that Should have been in Petitioners Possession Under Freedom of Information Act 5 U.S.C. §552 and FCC Rules and Laws, and Motion for a Vaughn Index. These defective motions are not properly presented to this Court in this case. They essentially (and inappropriately) seek review of the FCC's response to petitioner's Freedom of Information Act ("FOIA") requests relating to informal complaints to the Commission, the same complaints that underlie the order issued by the FCC's Enforcement Bureau that petitioner seeks review of in this appeal. Just as this Court lacks jurisdiction over Mr. Chelmowski's petition, *see* FCC's January 5, 2016 Motion to Dismiss, this Court lacks jurisdiction to grant the relief sought in these Motions and they should be dismissed.

## BACKGROUND

### A. The Petition for Review

On October 16, 2015, the FCC's Enforcement Bureau issued an Order on Reconsideration, denying a petition for reconsideration of the Enforcement Bureau's July 10, 2015 Memorandum Opinion and Order dismissing Mr. Chelmowski's formal Complaint against AT&T Mobility LLC. *In the Matter of James Chelmowski v. AT&T Mobility*, Order on Reconsideration, DA 15-1175 (EB Oct. 16, 2015) (*Order on Reconsideration*). On November 18, 2015, Mr. Chelmowski filed a petition for review of the staff-level Order on Reconsideration in this Court. On January 5, 2016, the FCC moved to dismiss the petition on the grounds that the staff-level order is not a final "order of the Commission" as required by 47 U.S.C. § 402(a), and consequently, the Court lacks jurisdiction over Mr. Chelmowski's petition. *See* 47 U.S.C. § 155(c)(7). The FCC's motion remains pending.

### B. Chelmowski's Pending Motions

Relating to the pending motions, on September 11, 2015, petitioner filed two requests with the agency under FOIA seeking documents concerning informal complaints he made to the Commission. These complaints are based on the same set of facts that underlie the Order on Reconsideration that is the subject of this appeal. On September 17, 2015, the Commission's Consumer and Governmental

Affairs Bureau, acting under delegated authority, responded to petitioner's FOIA requests. See, Exhibit A, September 17, 2015 Letter from FCC's Consumer and Governmental Affairs Bureau to James Chelmowski, re: FOIA Request Nos. 2015-768 and 2015-769.<sup>1</sup> The only information withheld was FCC employee names, which were redacted based on FOIA Exemption 6, 5 U.S.C. § 552(b)(6). *Id.*

On September 30, 2015, Mr. Chelmowski appealed to the FCC's Office of General Counsel the September 17, 2015 FOIA response claiming that documents had been withheld without explanation. In response to his appeal, additional documents were provided, and again, the only information withheld was FCC staff identifying numbers and names. Exhibit B, October 20, 2015 Letter from FCC's Consumer and Governmental Affairs Bureau to James Chelmowski, re: FOIA Request Nos. 2015-768 and 2015-769. Additionally, petitioner was advised to contact the Consumer and Governmental Affairs Bureau by November 20, 2015 if he was not satisfied with the response or the appeal would be considered resolved. *Id.* Mr. Chelmowski did not timely respond to the FCC's Consumer and Governmental Affairs Bureau as required by the October 20, 2015 letter.<sup>2</sup> Instead,

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<sup>1</sup> The documents produced in response to petitioner's FOIA requests are attachments to Exhibits A and B. These attachments are not being filed with this opposition to protect petitioner's privacy, because certain of these documents contain confidential information, such as petitioner's unlisted telephone numbers.

<sup>2</sup> Petitioner sought assistance from the Office of Government Information Service to mediate his concerns with the FCC's response to his FOIA requests. See 5

Mr. Chelmowski filed motions in this appeal seeking release of records withheld by the FCC as exempt from disclosure under FOIA, and a Vaughn index of the documents and portions thereof withheld by the FCC.

### ARGUMENT

At the threshold, Chelmowski has not properly sought judicial review of the agency's FOIA decisions in any court of competent jurisdiction. This Court lacks jurisdiction over petitioner's motion seeking review of the FCC's response to his FOIA request. Initial review of an agency's response to a FOIA request lies in the district court:

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.

5 U.S.C. § 552(a)(4)(B). The Supreme Court, citing this statute, stated, "The Freedom of Information Act (FOIA) vests jurisdiction in the federal district courts to enjoin "an agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136, 139 (1980).

Petitioner, in the first instance, must seek review of the FCC's action on his FOIA

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U.S.C. § 552(h)(3). This mediation service is a non-exclusive alternative to litigation. As of the filing of this Opposition, this mediation process is ongoing.

requests in the district court. Petitioner has not instituted such an action in district court. The statute and case law bar review of the FCC's response directly by this court. Consequently, this Motion must be dismissed because this court lacks jurisdiction over petitioner's request.

Petitioner's request for a Vaughn index is similarly defective. Petitioner cites no authority that gives this court jurisdiction to require the FCC to produce a detailed list of documents withheld, or "Vaughn Index," in response to petitioner's FOIA request. Moreover, it is well established that a Vaughn Index is not required at the administrative level. *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp.2d 142, 147 (D.D.C. 2000), *aff'd*, No 00-5453 (D.C. Cir. 2001), reported at 2001 WL 674636. An agency need only provide a "sufficiently detailed description of what it is refusing to produce and why so that the requestor and the court can have a fair idea what the agency is refusing to produce and why." *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1042 (9<sup>th</sup> Cir. 1999). The responses to petitioner's FOIA requests provide a clear description of what is being withheld, specifically FCC staff names and identifying numbers, and recite the exemption which justifies withholding of this information. Exhibits A and B. This is all the law requires. Thus, even if this Court had jurisdiction over petitioner's request (which it does not), he is not entitled to the Vaughn index he seeks. More importantly, the

requested information has already been provided to petitioner, and no further relief is warranted.

### CONCLUSION

For the foregoing reasons, the Court should deny petitioner's Motion for Request Documents/Records from Respondent and Intervenor that Should have been in Petitioners Possession Under Freedom of Information Act 5 U.S.C. §552 and FCC Rules and Laws, and Motion for a Vaughn Index.

Respectfully submitted,

Jonathan B. Sallet  
General Counsel

David M. Gossett  
Deputy General Counsel

Richard K. Welch  
Deputy Associate General Counsel

*/s/ Hillary B. Burchuk*

Hillary B. Burchuk  
Counsel

Federal Communications Commission  
Washington, D.C. 20554  
(202) 418-1719

January 15, 2016

# **EXHIBIT A**





Federal Communications Commission  
Consumer & Governmental Affairs Bureau  
Washington, D.C. 20554



September 17, 2015

James Chelmowski  
jchelmowski@comcast.net

FOIA Nos. 2015-768 and 2015-769

Dear Mr. Chelmowski:

This letter responds to your recent Freedom of Information Act ("FOIA") request received by the Federal Communications Commission ("FCC" or "Commission") and assigned to the Consumer & Governmental Affairs Bureau ("CGB"). Among other things, you are requesting copies of all documents related to consumer complaint numbers 11-C00292341 and 11-C00325771 that you filed with the FCC. You have requested expediting processing of your request. Also, we are responding to your request electronically.

Please be advised that your two FOIA requests were aggregated for calculation of the FOIA fees. Therefore, CGB conducted a search of the databases in which we maintain the records of informal complaints filed by, or on behalf of, consumers. Our search revealed records that are responsive to your request, which are attached. Also, your FOIA included a request for expedited processing pursuant to 5 U.S.C. § 552(a)(6)(E)(v). By responding to your FOIA request within 10 days of the filing of your request, your request for expedited processing is granted.

On September 14, 2015, you spoke with Mike Hennigan of my staff regarding your request. At that time, Mr. Hennigan advised you that since you did not supply us with proof of your identity, the documents being provided to you would be redacted. Generally, my staff would redact all personal identifying information based on Exemption 6 of FOIA, which permits agencies not to disclose files that would clearly invade personal privacy. However, on September 15, 2015, since you submitted proof of your identity pursuant to Section 0.554(b)(1) of the Commission's rules, 47 C.F.R. § 0.554(b)(1), we are providing copies of your records on file with the FCC that includes your information. Some FCC employee names have been redacted based on Exemption 6.



Please be advised that the Commission receives many complaints and comments that do not involve violations of the Communications Act or any FCC rule or order. Thus, the existence of a complaint filed against a particular carrier or business entity does not necessarily indicate any wrongdoing by any individuals or business entities named in the complaint.

FOIA and FCC rules require the FCC to charge requesters for time spent searching for and reviewing responsive documents, and for copying them. Based on your classification as an "all other" requester, the FCC does not charge you for the first two hours of search time and the first 100 pages of copying. Because preparing the response to your request falls within these limits, the FCC is not charging you for processing it.

If you consider this to be a denial of your FOIA request, you may seek review by filing an application for review with the Office of General Counsel. An application for review must be *received* by the Commission within 30 calendar days of the date of this letter<sup>1</sup>. You may file an application for review by mailing the application to Federal Communications Commission, Office of General Counsel, 445 12th St SW, Washington, DC 20554, or you may file your application for review electronically by e-mailing it to FOIA-Appeal@fcc.gov. Please caption the envelope (or subject line, if via e-mail) and the application itself as "Review of Freedom of Information Action."

Sincerely,



Nancy Stevenson  
Deputy Chief  
Consumer Policy Division  
Consumer & Governmental Affairs Bureau

Attachments

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<sup>1</sup>. 47 C.F.R. §§ 0.461(j), 1.115; 47 C.F.R. § 1.7 (documents are considered filed with the Commission upon their receipt at the location designated by the Commission).

## **EXHIBIT B**



Federal Communications Commission  
Consumer & Governmental Affairs Bureau  
Washington, D.C. 20554

**CGB**

October 20, 2015

James Chelmowski  
[jchelmowski@comcast.net](mailto:jchelmowski@comcast.net)

FOIA Nos. 2015-768 and 2015-769

Dear Mr. Chelmowski:

We have received your appeal of your Freedom of Information Act (FOIA) request, FOIA Control Nos. 2015-768 and 2015-769. In your appeal, you claim that the Consumer & Governmental Affairs Bureau (CGB) withheld without explanation documents you sought in your initial FOIA requests.

Mike Hennigan of my staff conducted a further search of the databases in which we maintain the records of informal complaints filed by, or on behalf of, consumers, and located additional documents related to your initial FOIA requests, which we attached. Specifically, we are releasing to you 13 documents reflecting telephone calls from you to CGB between 2011 and 2014. We have redacted Commission staff names and identifying numbers from these documents based on Exemption 6 of the FOIA. See 5 U.S.C. § 552(b)(6). We are also releasing to you documents you sent to the Commission on September 15, 2015.

I hope this response provides you with the information you need. If not, please contact us by November 20, 2015. If we do not hear from you by then, we will consider your appeal resolved and will close it accordingly. If you have any questions, please contact [ryan.yates@fcc.gov](mailto:ryan.yates@fcc.gov) or via postal mail at Ryan Yates, Office of General Counsel, Federal Communications Commission, 445 12th St SW, Washington, DC 20554.

Sincerely,

Nancy Stevenson  
Deputy Chief  
Consumer Policy Division  
Consumer & Governmental Affairs Bureau

Attachments

CC: FOIA Office  
OGC FOIA Officer

**CERTIFICATE OF SERVICE**

I hereby certify that on January 15, 2016, a copy of the foregoing Opposition To Motion For Request For Documents and Motion For A Vaughn Index was served on petitioner via email to [jchelmowski@comcast.net](mailto:jchelmowski@comcast.net), and via U.S. Mail, postage prepaid, at the following address:

James Chelmowski  
6650 N Northwest Highway #300  
Chicago, IL 60631

*/s/ Hillary B. Burchuk*