

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the matter of )  
 )  
MICHAEL RAVNITZKY ) FOIA Control Nos. 21-076, 21-078, and  
 ) 21-153  
On Requests for Inspection of Records )

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2001

Released: September 28, 2001

By the Commission:

I. Introduction

1. The Commission has before it an application for review by Michael Ravnitzky of American Lawyer Media seeking review of the partial denial by the Enforcement Bureau (Bureau) of his Freedom of Information Act (FOIA) requests for records regarding “number stations.” For the reasons stated below, we deny Mr. Ravnitzky’s application for review.

II. Background

2. Mr. Ravnitzky filed two FOIA requests for records concerning number stations. Number stations use high-power transmitters to transmit short-wave radio broadcasts of strings of numbers, sometimes along with sounds ranging from yodeling or a repeated flute melody to electronic tones or bursts of information-filled noise, on strange frequencies with no known schedule. The first FOIA request sought copies of communications dated January 1, 1980 to January 1, 2000, between the Commission and any foreign governments or broadcasters relating to interference from number stations; correspondence between the Commission and other federal government agencies concerning number stations; and records from five named Commission offices regarding number stations.<sup>1</sup> The second FOIA request sought a copy of any policy, procedure, or directive to Commission staff regarding how to address inquiries concerning number stations.<sup>2</sup> Mr. Ravnitzky then filed a third FOIA request seeking records concerning the processing of his first two FOIA requests.<sup>3</sup>

3. In response to the two FOIA requests about number stations, the Bureau provided Mr. Ravnitzky with records concerning number stations but redacted portions of the records pursuant to FOIA Exemption 1, 5 U.S.C. § 552(b)(1) (withholding national security information concerning the national defense or foreign policy properly classified under an executive order).<sup>4</sup> The Bureau redacted “non-responsive” materials from the pages provided to Mr. Ravnitzky.<sup>5</sup> It also withheld five pages of

<sup>1</sup> Letter from Michael Ravnitzky, Editor, American Lawyer Media to FOIA Officer (Mar. 14, 2001) (FOIA 21-076).

<sup>2</sup> Letter from Michael Ravnitzky, Editor, American Lawyer Media to FOIA Officer (Mar. 15, 2001) (FOIA 21-078).

<sup>3</sup> Letter from Michael Ravnitzky, Editor, American Lawyer Media to FOIA Officer (May 10, 2001) (FOIA 21-153).

<sup>4</sup> Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau, to Michael Ravnitzky (June 15, 2001) (Bureau Decision – 21-076 and 21-078) at 1.

<sup>5</sup> Id.

correspondence between the Commission and foreign government offices pursuant to FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), and 47 C.F.R. § 0.457(g)(4) (withholding records that would disclose the identity of a confidential source).<sup>6</sup> Finally, the Bureau informed Mr. Ravnitzky that there were no intergovernmental correspondence or directives to FCC staff concerning number stations.<sup>7</sup>

4. As to the third FOIA request, the Bureau provided Mr. Ravnitzky with various records concerning the processing of his FOIA requests, but withheld internal Commission electronic mail messages pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5) (withholding of internal deliberative process materials).<sup>8</sup>

### III. Discussion

5. Mr. Ravnitzky seeks review of the Bureau decisions on several grounds that we address below.<sup>9</sup>

#### A. Exemption 1 Claims

6. Mr. Ravnitzky seeks review of the redaction of portions of the released records pursuant to FOIA Exemption 1 because he claims “the records are not properly and currently classified.”<sup>10</sup> FOIA Exemption 1 permits the nondisclosure of documents properly classified under criteria established by Executive Order.<sup>11</sup> At this time, the governing executive order is Executive Order 12,958.<sup>12</sup> Executive Order 12,958 provides that, if information has not been publicly disclosed, it may be classified after an agency has received a FOIA request for it.<sup>13</sup> Prior to responding to the FOIA request, the Bureau was directed to exercise derivative classification authority for the portions of the records redacted before release.<sup>14</sup> The Bureau properly exercised this authority, segregating and redacting only those portions of the records falling under Exemption 1.<sup>15</sup> We therefore agree with the Bureau’s reliance on FOIA Exemption 1 to withhold portions of the records sought by Mr. Ravnitzky.

#### B. Confidential Sources

7. The Bureau withheld five pages of correspondence pursuant to FOIA Exemption 7(D), which permits the Commission to withhold the name and identifying data which could reasonably be expected to lead to the disclosure of a confidential source when there was an expressed or implied

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<sup>6</sup> Id. at 2.

<sup>7</sup> Id.

<sup>8</sup> Letter from Joseph P. Casey, Chief, Technical and Public Safety Division, Enforcement Bureau to Michael Ravnitzky (June 15, 2001) (Bureau Decision – 21-153).

<sup>9</sup> Letter from Michael Ravnitzky to Office of General Counsel (June 21, 2001) (App. for Rev.).

<sup>10</sup> Id.

<sup>11</sup> See Pan American Satellite Corporation, 2 FCC Rcd 483 (1987).

<sup>12</sup> Executive Order 12,958, Classified National Security Information, 60 FR 19825 (Apr. 17, 1995), amended, 60 FR 48863 (1995), amended, 64 FR 66089 (1999).

<sup>13</sup> Executive Order 12,958, Part 2, at § 1.8(d), 60 FR at 19829.

<sup>14</sup> See id. at § 2.2, 60 FR at 19830.

<sup>15</sup> See, e.g., Oglesby v. United States Dep’t of the Army, 79 F.3d 1172, 1180-81 (D.C. Cir. 1996) (applying segregation requirement to Exemption 1 documents); Center for Auto Safety v. EPA, 731 F.2d 16, 21 (D.C. Cir. 1984) (segregation requirement applies to all documents and exemptions in FOIA).

assurance of confidentiality.<sup>16</sup> Mr. Ravnitzky challenges this determination because, he claims, “there would be no foreseeable harm caused by the release of these portions.”<sup>17</sup> Exemption 7(D) provides perhaps the most comprehensive protection of all of the FOIA exemptions to ensure that confidential sources are not lost.<sup>18</sup> The Bureau relies on cooperation from these sources. Release of the name and identifying information about any confidential sources would harm the Commission’s working relationships with those sources. We therefore disagree with Mr. Ravnitzky that there would be no “foreseeable harm” resulting from the release of this information.

### C. “Not Responsive” Redactions

8. The Bureau redacted portions of the records produced to Mr. Ravnitzky that it determined were not responsive to the FOIA requests.<sup>19</sup> The requestor challenges this action because the Bureau cited no FOIA exemption.<sup>20</sup> The Bureau searched for and located the records concerning number stations sought by Mr. Ravnitzky. Some portions of the records located during the search were not within the scope of the FOIA request. In particular, several of the pages containing information about number stations also contained information about broadcasts that were unrelated to the subject matter of the request. This material was properly redacted as non-responsive to the request because these materials were not within the scope of the FOIA request.<sup>21</sup> The Bureau did not have to cite a FOIA exemption to exclude this material from the response. We find, however, that two redactions marked “not responsive” by the Bureau did involve number stations. These withheld portions are notations of Bureau personnel containing their impressions of monitored number station activities and are part of the Bureau’s deliberative process concerning possible further action regarding these broadcasts. We therefore conclude these portions of the records should be withheld under FOIA Exemption 5.

### D. Materials Withheld Under the Deliberative Process Privilege

9. In response to Mr. Ravnitzky’s request for records concerning the processing of his number station FOIAs, the Bureau produced 14 pages of records but withheld 10 pages pursuant to FOIA Exemption 5.<sup>22</sup> FOIA Exemption 5 permits the Commission to withhold documents that are part of a continuing process of agency decisionmaking.<sup>23</sup> These pages consist of e-mails between the Bureau, other Bureaus, and the Office of General Counsel concerning the handling of FOIAs 21-076 and 21-078. Mr. Ravnitzky claims the e-mails are not deliberative or pre-decisional.<sup>24</sup> We disagree. The e-mails contain staff advice and recommendations concerning the Bureau’s proposed decisions with respect to the FOIA requests. Therefore, they are properly protected from disclosure under FOIA Exemption 5.

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<sup>16</sup> See WXGI AM 950 Richmond, Virginia, 14 FCC Rcd 3720 (1999) (citing United States Department of Justice v. Landano, 508 U.S. 165, 171-72 (1993)); Barry A. Stevenson, 8 FCC Rcd 5151 (1993); Jimmy Shillington, 7 FCC Rcd 903 (1992); Duane Delorey, 4 FCC Rcd 5412 (1989); William Rondini, 3 FCC Rcd 2590 (1988).

<sup>17</sup> App. for Rev.

<sup>18</sup> See, e.g., Brant Construction Co. v. EPA, 778 F.2d 1258, 1262 (7th Cir. 1985).

<sup>19</sup> Bureau Decision – 21-076 and 21-078 at 1.

<sup>20</sup> App. for Rev.

<sup>21</sup> See, e.g., Public Employees for Environmental Responsibility, Rocky Mountain Chapter v. United States Environmental Protection Agency, 978 F. Supp. 955, 965 (D. Colo. 1997) (records not responsive to FOIA request need not be disclosed).

<sup>22</sup> Bureau Decision – 21-153.

<sup>23</sup> E.g., Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980) (Exemption 5 is applicable to a document that is a part of the course of the deliberative process).

<sup>24</sup> App. for Rev.

10. Mr. Ravnitzky also asserts that the e-mails contain factual material that could be segregated and released in the e-mails.<sup>25</sup> The FOIA requires that “any reasonably segregable portion of a record” must be released after appropriate application of the FOIA exemptions.<sup>26</sup> Factual or public information contained in these documents is so entwined with the materials being withheld that segregation is impractical.<sup>27</sup>

11. Finally, Mr. Ravnitzky seeks discretionary release of these withheld records.<sup>28</sup> The Commission’s rules provide that with respect to information that may be withheld under the FOIA, “considerations favoring disclosure and non-disclosure will be weighed in light of the facts presented.” 47 C.F.R. § 0.461(f)(4). We note that Mr. Ravnitzky’s initial FOIA request did not seek discretionary release.<sup>29</sup> In any event, we conclude that discretionary disclosure of the records is not appropriate here. Disclosure of the information in question would harm the Commission’s interest underlying the deliberative process privilege, which is intended to “prevent injury to the quality of agency decisions.”<sup>30</sup> This FOIA request involved sensitive records with controversial aspects. The staff’s ability to provide candid opinions and analysis is of the utmost importance in such proceedings. Further, the materials at issue are less than a year old. Discretionary release of these Exemption 5 materials would diminish the quality of the deliberative process in FOIA proceedings. Discretionary disclosure of these materials “would actually inhibit candor in the decision-making process.”<sup>31</sup> We therefore disagree with the requestor that no foreseeable harm will result from disclosure of the documents.

#### IV. ORDERING PARAGRAPHS

12. Accordingly, IT IS ORDERED, that the Application for Review IS DENIED. Judicial review of this action may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

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<sup>25</sup> Id.

<sup>26</sup> Under 5 U.S.C. § 552(b) (emphasis supplied), “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.”

<sup>27</sup> See Mead Data Central, Inc. v. United States Dep't of Air Force, 566 F.2d 242, 260 (1977) (“non-exempt portions of a document must be disclosed unless they are inextricably intertwined with exempt portions”).

<sup>28</sup> App. for Rev. citing Attorney General’s Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act (Oct. 4, 1993) (Attorney General’s Memorandum), *reprinted at* <<http://www.usdoj.gov/04foia/931004a.htm>>; and Attorney General’s Follow-Up Memorandum for Heads of Departments and Agencies Regarding the Freedom of Information Act (Sept. 3, 1999) (Follow-Up Memorandum), *reprinted at* <<http://www.usdoj.gov/ag/readingroom/990903.htm>>.

<sup>29</sup> See Media Access Project, Consumers Union, and Consumer Federation of America, FOIA Control No. 20-125, FCC 01-52 (Feb. 15, 2001) at ¶7 citing Norcom Communications, Inc., 14 FCC Rcd 8055, 8056 (1999) (Bureau did not err in failing to consider releasing documents withheld under Exemption 5 when requestor did not request discretionary disclosure).

<sup>30</sup> NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

<sup>31</sup> Follow-Up Memorandum, *supra* n.29, at 3-5.

13. The officials responsible for this action are the following Commissioners: Chairman Powell, Commissioners Abernathy, Copps and Martin.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary