

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

In the Matter of	)	
	)	
Media Access Project,	)	
Consumers Union and	)	FOIA Control No. 20-125
Consumers Federation of America	)	
	)	
on Request for Inspection	)	
of Records	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 12, 2001**

**Released: February 15, 2001**

By the Commission:

1. The Commission has before it an application for review filed by Media Access Project, Consumers Union, and Consumer Federation of America (jointly referred to as the requestors) of a decision of the Cable Services Bureau (CSB or Bureau) granting in part and denying in part their Freedom of Information Act (FOIA) request for inspection of records related to *ex parte* presentations made during the AT&T/MediaOne proceeding.<sup>1</sup> For the reasons stated below, we deny the application for review.

2. The requestors filed a FOIA request for records concerning *ex parte* presentations made by or on behalf of AT&T Corporation, MediaOne Group, Inc., Time Warner Inc. or its subsidiaries, in the AT&T/MediaOne proceeding.<sup>2</sup> The requestors indicated they were “concerned exclusively with the facts presented to the Commission” and “not with the Commission staff’s impressions or predecisional recommendations.”<sup>3</sup>

3. The Bureau granted in part and denied in part the FOIA request.<sup>4</sup> It indicated that

<sup>1</sup> See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations From MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee, 15 FCC Rcd 9816 (2000), petitions for reconsideration pending.

<sup>2</sup> See Letter from Andrew Jay Schwartzman, Harold Feld, and Cheryl A. Leanza, attorneys for the requestors, to Andrew S. Fishel, Managing Director (May 9, 2000) (FOIA Request). The requestors also sought expedited treatment of their FOIA request and a FOIA fee waiver or treatment as news media for FOIA fee purposes. See FOIA Request at 1-2 and letter from Messrs. Feld and Schwartzman and Ms. Leanza to Managing Director Fishel (May 11, 2000). The request for expedited treatment and for a FOIA fee waiver was denied, but the request for treatment as news media for FOIA fee purposes was granted. See Letter from Susan H. Steiman, Associate General Counsel, to Messrs. Feld and Schwartzman and Ms. Leanza (May 24, 2000).

<sup>3</sup> FOIA Request at 1.

<sup>4</sup> Letter from Michael S. Perko, Director, Office of Government Outreach, CSB, to Messrs. Schwartzman and Feld and Ms. Leanza (June 8, 2000) (Bureau Decision).

handwritten staff notes compiled for the personal convenience of the authors and maintained by the author were not agency records subject to the FOIA.<sup>5</sup> The Bureau withheld approximately 20 electronic mail messages, approximately 30 staff summaries of the *ex parte* meetings, and approximately 110 position memoranda, policy option papers, and charts, all of which contained information from the *ex parte* meetings, pursuant to the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5), and the confidential commercial information exemption of FOIA Exemption 4, 5 U.S.C. § 552(b)(4).<sup>6</sup> The Bureau noted that there were commercial or proprietary documents provided at the *ex parte* meetings that were available for inspection pursuant to the protective order in the AT&T/MediaOne proceeding.<sup>7</sup> Finally, the Bureau noted that the *ex parte* filings were publicly available.<sup>8</sup>

4. After its decision, the Bureau continued to review the documents withheld to determine if additional portions could be released.<sup>9</sup> It subsequently determined that portions of the staff summaries of *ex parte* meetings were primarily factual and should be released. It provided redacted versions of those documents to the requestors.<sup>10</sup> As part of its review, the Bureau also asked AT&T, MediaOne and Time Warner to confirm that some of the factual information reflected in the staff's summaries of the *ex parte* meetings was subject to requests for confidentiality under Exemption 4. AT&T, MediaOne, and Time Warner generally confirmed the proprietary status of the materials but concluded that they would not seek confidential treatment for some of the information. All of the non-exempt materials were provided to the requestors on August 10, 2000.

5. Before the release of the redacted summaries, the requestors filed an application for review.<sup>11</sup> The requestors argued that the Bureau "made no effort to balance the public interest in making a voluntary disclosure under Exemption 5" and failed to identify with specificity which materials were withheld under Exemption 4.<sup>12</sup> The requestors also argued that the Bureau failed to segregate and release factual portions of the records.<sup>13</sup>

6. We have reviewed the record and documents in this proceeding and deny the requestors'

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<sup>5</sup> Id. at 2 *citing* Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995) and Sibille v. Federal Reserve Board of New York, 770 F. Supp. 134, 136-39 (S.D.N.Y. 1991).

<sup>6</sup> Id. at 2-3.

<sup>7</sup> Id. at 3.

<sup>8</sup> Id. at 4. The Bureau also noted a request for confidential treatment of one document was withdrawn, and therefore the document was publicly available. Id.

<sup>9</sup> See 47 C.F.R. § 0.461(g)(3) (Custodian of records should continue to search for and assess records beyond statutory period for responding to request, but application for review may be filed in meantime).

<sup>10</sup> See Letter from Associate General Counsel Steiman to Messrs. Feld and Schwartzman and Ms. Leanza (Aug. 2, 2000).

<sup>11</sup> Letter from Messrs. Schwartzman and Feld and Ms. Leanza to Christopher Wright, General Counsel (June 30, 2000) (Application for Review).

<sup>12</sup> Id. at 2-4, 5-6.

<sup>13</sup> Id. at 4-5.

application for review. As discussed above, some of the requestors' objections have been resolved by the staff, as they continued to review the documents during the pendency of this appeal. The requestors were provided with the factual portions of the staff summaries of the *ex parte* meetings. The withheld portions of these documents were clearly marked, as required by the FOIA. See 5 U.S.C. § 552(b) ("The amount of information deleted shall be indicated on the released portion of the record . . . . If technically feasible, the amount of the information deleted shall be indicated at the place in the record where such deletion is made."). The requestors were notified of the applicable FOIA exemption in the Bureau's decision and on the released documents.<sup>14</sup> The Bureau's decision also sufficiently identified the documents.<sup>15</sup>

7. The requestors also maintain that the Bureau as a matter of discretion should have released the documents withheld under Exemption 5. 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). The Bureau did not err in not expressly addressing discretionary disclosure of the documents here because the requestors' initial FOIA request indicated that they were not seeking materials covered by Exemption 5. See Norcom Communications, Inc., 14 FCC Rcd 8055, 8056 (1999) (Bureau did not err in failing to release documents withheld under Exemption 5 when no request for discretionary disclosure was made).

8. Nonetheless, we will address the issue of whether disclosure should be made because disclosure would not result in "foreseeable harm" to the policies underlying Exemption 5.<sup>16</sup> We conclude that discretionary disclosure of the records is not appropriate here. In assessing whether there would be "foreseeable harm" from the release of Exemption 5 materials under the Attorney General's Memorandum, we review the nature of the decision involved, the nature of the decisionmaking process, the status of the decision, the status of the personnel involved, the potential for process impairment, the significance of any process impairment, the age of the information, and the sensitivity of individual record portions.<sup>17</sup> Applying these factors, we conclude that disclosure of the information in question and not already released would foreseeably harm the institutional interest underlying the deliberative process privilege. The AT&T/MediaOne proceeding is a sensitive proceeding with controversial aspects. The staff's ability to provide candid opinions and analysis is of the utmost importance in such proceedings. The proceeding is still ongoing before the Commission, and the materials at issue are less than a year old. Discretionary release of these recent and still applicable Exemption 5 materials at this stage of the proceeding would

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<sup>14</sup> See Bureau Decision at 2 (electronic mail messages withheld under Exemption 5) and 3 (analytic documents withheld under Exemptions 4 and 5). The redactions on the released staff summaries of the *ex parte* meetings were subsequently marked to indicate whether the material was withheld pursuant to Exemption 4 or Exemption 5.

<sup>15</sup> See Bureau Decision at 2-3. Contrary to the requestors' suggestion (Application for Review at 2, 5), a Vaughn Index under Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), is not required at the administrative level. See, e.g., Almiria Capital Corporation, 11 FCC Rcd 6710 n.4 (1996) (citing cases).

<sup>16</sup> Application for Review at 2-4 *citing* 47 C.F.R. § 0.461(f)(4); 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>17</sup> See Freedom of Information Act Guide & Privacy Act Overview (DOJ Office of Information and Privacy May 2000 ed.) at 276-77 *reprinted at* <<http://www.usdoj.gov/oip/foi-act.htm>>.

diminish the quality of the deliberative process. The materials withheld under FOIA Exemption 5 contain staff analysis and opinion concerning sensitive matters raised at the *ex parte* meetings. Discretionary disclosure of these materials at this time “would actually inhibit candor in the decision-making process.”<sup>18</sup> We therefore disagree with the requestors that no “foreseeable harm” will result in disclosure of the documents.

9. The requestors also maintain that discretionary disclosure is required because our *ex parte* rules, 47 C.F.R. § 1.1206(b)(2), require this material to be made public. Specifically, section 1.1206(b)(2) requires persons making oral *ex parte* presentations to submit a memorandum summarizing new data or arguments made at the presentation. In a separate complaint, the requestors have argued that the *ex parte* summaries submitted by AT&T and MediaOne provided insufficient information. The General Counsel, however, has concluded the summaries were sufficient.<sup>19</sup> Even if it had been determined that AT&T and MediaOne’s *ex parte* summaries were inadequate, however, appropriate remedial measures could have been taken without requiring the disclosure of internal staff memoranda revealing the staff’s deliberations, analysis and recommendations. Moreover, as we have noted, since filing their application for review, the requestors were provided with the factual portions of the staff summaries of the *ex parte* meetings. Therefore, we conclude that the requestors have not provided a sufficient public interest basis to warrant further disclosure of the documents in question.

10. 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).

11. The officials responsible for this action are the following Commissioners: Chairman Powell, and Commissioners Ness, Furchtgott-Roth, and Tristani.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>18</sup> Follow-Up Memorandum at 3-5.

<sup>19</sup> See Letter from Christopher J. Wright, General Counsel, FCC, to Andrew J. Schwartzman, Media Access Project (Jan. 19, 2001).