

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

In the Matter of)	
)	
MICHAEL RAVNITZKY)	FOIA Control No. 2002-324
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 2002
By the Commission:

Released: November 14, 2002

1. The Commission has before it an application for review filed by Michael Ravnitzky seeking review of the decision of the Managing Director denying Mr. Ravnitzky's Freedom of Information Act (FOIA) request for copies of specified Daily Circulation Reports. For the reasons stated below, we deny the application for review.

2. Mr. Ravnitzky's FOIA request sought Daily Circulate Reports for the five-day period January 1-5 in each of the following years: 1992, 1994, 1996, 1998, and 2000-2002.¹ The Managing Director denied the request.² He explained that no Daily Circulate Reports existed for January 1st of the specified years (a Federal holiday), or for days the Commission was closed during the government shut-down (January 2-5, 1996).³ The reports for the remaining days were withheld pursuant to FOIA Exemption 5, 5 U.S.C. § 552(b)(5).⁴ The Managing Director noted that no factual portions could be segregated and released from the records.⁵ Mr. Ravnitzky then sought review.⁶

3. We find no reason to disturb the Managing Director's decision. The Daily Circulate Reports are lists of pending orders on circulation before the Commissioners for a vote.⁷ The reports contain docket numbers and titles, the name of the originating Bureau or Office, the date the item went on circulation, any deadlines for voting, and the names of Commissioners who have yet to vote. The Daily Circulate Report is thus similar to the report found exempt from disclosure pursuant to the deliberative process privilege of FOIA Exemption 5 in Wolfe v. Department of Health and Human Services, 839 F.2d

¹ Letter from Michael Ravnitzky, American Lawyer Media, to Kathy Abbate, FOIA Officer [sic] (July 3, 2002) (FOIA Request), *supplemented*, electronic mail (e-mail) from Michael Ravnitzky to FOIA Officer (July 10, 2002) (Supp. FOIA Request).

² Letter from Andrew S. Fishel, Managing Director, to Michael Ravnitzky (Aug. 14, 2002) (Decision).

³ Id. at 1. In addition, there are no reports for January 4-5, 1992; January 2, 1994; January 3-4, 1998; January 2, 2000; and January 5, 2002, all of which were weekend days when no Daily Circulate Reports are prepared.

⁴ Id. *citing* Wolfe v. Department of Health and Human Services, 839 F.2d 768 (D.C. Cir. 1988) (*en banc*) (Wolfe), and letter to Bill McConnell, Broadcasting & Cable, from Managing Director Fishel (FOIA Control No. 21-095) (May 2, 2001) (withholding the Daily Circulate Reports pursuant to FOIA Exemption 5).

⁵ Decision at 1-2.

⁶ Letter from Michael Ravnitzky to Office of General Counsel (Aug. 20, 2002) (Application for Review).

⁷ *See* 47 C.F.R. § 0.5(d) ("In appropriate circumstances, Commission action may be taken in between meetings 'by circulation' which involves the submission of a document to each of the Commissioners for his approval.").

768 (D.C. Cir. 1988) (*en banc*) (Wolfe).

4. In Wolfe, the FOIA requester sought records indicating what actions had been completed by the Food and Drug Administration (FDA) but were awaiting final approval by the Secretary of Health and Human Services (HHS). HHS maintained a log that was “an internal tracking device that allows the Secretary to monitor actions moving through the clearance process.”⁸ The court of appeals found the HHS logs were protected from disclosure under FOIA Exemption 5 for several reasons. Release of the information requested would reveal whether the FDA had decided to recommend regulation of a particular subject or not, whether HHS approved the recommendation or not, and whether the Office of Management and Budget (OMB) had approved a proposed regulation or not.⁹ It explained that “[t]he information would disclose that proposals have been made, and that these preliminary recommendations have been accepted or rejected, at various levels of review.”¹⁰ Moreover, “the information sought would reveal the timing of the deliberative process,” thus “disclos[ing] the recommended outcome of the consultative process at each stage of that process as well as the source of any decision not to regulate.”¹¹ Also, the court noted, “[d]isclosure of the information requested in this case would certainly reveal policies prematurely,”¹² and “could chill discussion at a time when agency opinions are fluid and tentative.”¹³ Finally, the court observed that “disclosure would force official to punch a public time clock” because FOIA requesters would be able to “attribute delay” and “identify and publicize the office or event he person they deem responsible,” leading to “hasty and precipitous decision-making.”¹⁴ In short, the court stated, “[it] is just such a fishbowl that Congress sought to avoid when it enacted Exemption 5.”¹⁵

5. Similar reasoning applies to the Commission’s Daily Circulate Reports. These reports reveal what decisions have been forwarded to the Commission for a vote by the originating Bureau or Office. As in Wolfe, release of this information would reveal tentative decisions to regulate in a particular area.¹⁶ The reports disclose which Commissioners have voted, and which have not. Again, as in Wolfe, this information, if made public, could lead to unnecessary speculation about delays in adoption or rejection of an item, and this speculation in turn could lead to precipitous decision making.¹⁷

6. Mr. Ravnitzky asserts without explanation that there are portions of the reports that are not predecisional, and therefore FOIA Exemption 5 does not apply.¹⁸ The court in Wolfe found similar records to be “unquestionably predecisional.”¹⁹ The court also found the records to be deliberative, contrary to Mr. Ravnitzky’s assertion in his application for review.²⁰ “Most of all,” Mr. Ravnitzky

⁸ Wolfe, 839 F.2d at 771.

⁹ Id.

¹⁰ Id. at 774.

¹¹ Id. at 775.

¹² Id.

¹³ Id. at 776, *citing* Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

¹⁴ Id. at 776.

¹⁵ Id.

¹⁶ Decision at 1.

¹⁷ Wolfe, 839 F.2d at 776; FOIA Control No. 21-095, *supra* n.4.

¹⁸ Application for Review.

¹⁹ Wolfe, 839 F.2d at 774.

²⁰ Id.

asserts, there are portions of the reports that should be released because they are “factual.”²¹ This argument, too, the Wolfe court rejected, observing, “[in] some circumstances, even material that could be characterized as ‘factual’ would so expose the deliberative process that it must be covered by the privilege. We know of no case in which a court has used the fact/opinion distinction to support disclosure of facts about the inner workings of the deliberative process itself.”²²

7. Mr. Ravnitzky urges that we use our discretion to release some of these records “to help illustrate the process and activities of the Commission.”²³ We decline to do so, as we are convinced that the harm to our deliberative processes far outweigh any information concerning our processes that would be revealed by release of the reports.²⁴ Our regulatory processes are, to the extent possible and consistent with our duties under the Communications Act of 1934, as amended, the FOIA, the Government in Sunshine Act, and the Administrative Procedure Act, conducted openly and subject to public scrutiny. However, release of these internal tracking reports would delve too deeply into our deliberative processes and harm our ability to efficiently perform our mission. Finally, we do not agree that the passage of time supports release of the reports.²⁵ The release of even the oldest of the reports sought by Mr. Ravnitzky could have a possible adverse effect on our decision making process.²⁶

8. Accordingly, IT IS ORDERED that the Application for Review in FOIA Control No. 2002-324 IS DENIED. Judicial review of this action may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene R. Dortch
Secretary

²¹ Application for Review.

²² Wolfe, 839 F.2d at 774, *citing* Mead Data Central, Inc. v. United States Department of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

²³ Application for Review.

²⁴ A similar request for discretionary release was denied in Michael Ravnitzky, 16 FCC Rcd 21745, 21748 (2001) in the context of FOIA Exemption 5 materials.

²⁵ Application for Review.

²⁶ See Fulbright & Jaworski v. Department of the Treasury, 545 F. Supp. 615, 618 (D.D.C. 1982) (withholding records 18 years old under FOIA Exemption 5 deliberative process privilege). Cf. Buckner v. IRS, 25 F. Supp.2d 893, 900 (N.D. Ind. 1998) (withholding documents under FOIA Exemption 5 attorney-client privilege despite the age of the documents).