

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

In the Matter of)
)
DANIEL A. EDELMAN, ESQ.) FOIA Control Nos. 2004-113, 2004-114
)
On Requests for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2004

Released: July 7, 2004

By the Commission:

1. This order denies two related applications for review filed by Daniel A. Edelman, Esq. (Edelman), seeking review of decisions of the Enforcement Bureau (EB) denying in part his Freedom of Information Act (FOIA) requests.

I. Background

2. Edelman sought Commission records relating to enforcement proceedings that involve alleged violations of provisions of the Telephone Consumer Protection Act of 1991 (TCPA) prohibiting the use of unsolicited advertisements by means of facsimile machine (“junk faxing”).¹ In these proceedings, the EB sent citations and letters of inquiries to two entities, New Century Mortgage Corporation (NCMC) and Bridge 21/Financial Management Solutions (Bridge 21)² regarding their alleged transmission of “junk faxes” by means of a company called Fax.com, itself the subject of an enforcement proceeding.³ Edelman’s FOIA requests asked for the files concerning NCMC⁴ and Bridge 21,⁵ respectively. Both NCMC and Bridge 21 were notified of the FOIA requests, and indicated that a portion of their responses to the citations were confidential.⁶ The EB responded to Edelman’s requests by disclosing 17 records relating to

¹ 47 U.S.C. § 227(b)(1)(C).

² See Bridge 21 Citation and Letter of Inquiry, <hraulffoss.fcc.gov/edocs_public/attachmatch/DOC-241111A1.pdf> and <hraulffoss.fcc.gov/edocs_public/attachmatch/DOC-240950A1.pdf>, and New Century Mortgage Citation and Letter of Inquiry, <www.fcc.gov/eb/Orders/2003/DOC-241048A1.html>.

³ Fax.com, Inc., 19 FCC Rcd 748 (2004).

⁴ Letter from Daniel A. Edelman to Managing Director (Nov. 29, 2003) (FOIA Control No. 2004-113).

⁵ Letter from Daniel A. Edelman to Managing Director (Nov. 29, 2003) (FOIA Control No. 2004-114).

⁶ Facsimile from John Crigler, Garvey Schubert Barer, to Johnny Drake, EB (Dec. 19, 2003) (Bridge 21); Facsimile from Charles H. Kenendy, Morrison & Foerster LLP to Johnny Drake, Telecommunications Consumers Division, EB (Dec. 24, 2003) (NCMC) (noting NCMC’s prior request for confidential treatment of its response to the citation),.

NCMC and seven records concerning Bridge.⁷ In each case, however, the EB redacted portions of the records pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4), which exempts from disclosure “trade secrets and commercial or financial information obtained from a person and privileged or confidential.”⁸ The EB stated that the redacted material consisted of confidential commercial and financial information and that would likely cause competitive harm to NCMC and Bridge 21,⁹ because the material shows the amounts that NCMC and Bridge spent on advertising and the scope of their advertising, and thus could be used to adjust their competitors’ marketing strategies.

3. Edelman sought review of the EB’s decisions, and NCMC and Bridge 21 filed responses.¹⁰ Edelman contends that EB should not have redacted information as to: (1) the amounts that NCMC and Bridge 21 paid to Fax.com for unlawful junk faxing; and (2) the amount and details of the illegal junk faxing ordered. Edelman asserts that Exemption 4 should not be used to “reward” a junk faxer for breaking the law by keeping the extent of its illegal activity confidential. According to Edelman, the law does not protect confidential information produced by the violation of a law, and any evidentiary privilege must give way where it is used in furtherance of illegal activities. Edelman urges that competitors should have a right to know the extent of NCMC’s and Bridge 21’s illegal activities so that they can adjust their marketing strategies. He also submits that disclosure will further the private enforcement of the TCPA and that disclosure may serve to deter others from violating the TCPA.

4. NCMC and Bridge 21 respond that Edelman relies on legal precedent not related to the FOIA and that they are entitled to the protection of Exemption 4. In this regard, they note that Edelman admits that the information withheld could be used by NCMC’s and Bridge 21’s competitors to adjust their marketing strategies, thus underscoring the competitive harm they would face if the FOIA requests were granted.

II. Discussion

5. We find no reason to disturb the EB’s decisions. Edelman cites two cases involving the question of whether the equitable doctrine of “unclean hands” bars the protection of a trade secret.¹¹ We agree with NCMC and Bridge 21 that the case law relied on by Edelman has no relevance to a determination of whether the EB properly applied Exemption 4. The “unclean

⁷ Letter from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumer Division, EB to Daniel A. Edelman, Esq. (Jan. 20, 2004); Letter from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumer Division, EB to Daniel A. Edelman, Esq. (Feb. 3, 2004).

⁸ The letters of inquiry seeking information from NCMC and Bridge 21 informed them that they could submit information accompanied by a request for confidential treatment, and NCMC and Bridge 21 did so. Under the Commission’s rules, a request for confidentiality will be granted if it presents by a preponderance of the evidence a case for nondisclosure consistent with the FOIA. 47 C.F.R. § 0.459(d)(2).

⁹ See generally National Parks and Conservation Association v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

¹⁰ Facsimile from Daniel A. Edelman to Office of General Counsel (Jan. 27, 2004); Facsimile from Daniel A. Edelman to Office of General Counsel (Feb. 9, 2004); Facsimile from John Crigler (counsel for Bridge) to Laurence H. Schecker (Mar. 15, 2004); Letter from Charles H. Kennedy (counsel for NCMC) to Laurence H. Schecker (Apr. 1, 2004).

¹¹ Cataphote Corp. v. Hudson, 422 F.2d 1290 (5th Cir. 1970); American Cyanimid Co. v. Power Conversion, Inc., 336 N.Y.S. 2d 6 (N.Y. Sup. Ct. 1972).

hands” doctrine “closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief.”¹² NCMC and Bridge, however, do not seek equitable relief from disclosure, but rather rely on a statutory exemption.¹³ The EB found that Exemption 4 is applicable here since the information in question was “confidential” and disclosure was likely to cause competitive harm to NCMC and Bridge 21.¹⁴ In this regard, we agree with the EB that information concerning the advertising practices of NCMC and Bridge 21 could be used by their competitors in formulating their marketing strategies to the competitive disadvantage of NCMC and Bridge 21.

6. Edelman further asserts that “[g]enerally, any privilege can be defeated by evidence that it was used in furtherance of illegal activity.” He cites the example of the “crime-fraud” exception to the attorney-client privilege, under which the privilege does not apply where an attorney’s advice to a client relates to the client’s prospective commission of a crime.¹⁵ Whether or not such considerations are relevant to the applicability of an evidentiary privilege in litigation, they are irrelevant to the application of Exemption 4 in this case, which does not involve “privileged” information. Rather, our role in applying Exemption 4 here is to “determine whether any non-public information contained in those documents is competitively sensitive, for whatever reasons.” See, e.g., Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir. 1989) (emphasis in original). Similarly, the FOIA requestor’s need for disclosure is irrelevant to whether a FOIA exemption applies. See Petroleum Info. Corp. v. Dep’t of Interior, 976 F.2d 1429, 1437 (D.C. Cir. 1992); North v. Walsh, 881 F.2d 1088, 1096 (D.C. Cir. 1989).

7. Accordingly, IT IS ORDERED that Daniel A. Edelman, Esq.’s applications for review are DENIED. Edelman may seek judicial review of the denial in part of his Freedom of

¹² Precision Instrmt Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 815 (1945).

¹³ Indeed, the courts have not recognized equitable exemptions from disclosure under the FOIA in addition to the enumerated statutory exemptions. See O’Rourke v. United States Department of Justice, 684 F. Supp. 716, 719 (D.C. D.C. 1988).

¹⁴ Edelman states that “I also question . . . whether [NCMC and Bridge have] in fact shown that any competitive harm is likely . . .” Edelman neither elaborates upon nor supports this point, which we note contradicts other statements in his applications for review (see ¶4, supra) and we give it no further consideration. Moreover, Edelman does not dispute that the information could be used by the competitors of NCMC and Bridge in fashioning their marketing strategies. Edelman also “questions” whether the contested material has been disclosed in unredacted form as part of the record in the Fax.Com proceeding. We find that it has not been.

¹⁵ See United States v. Zolin, 491 U.S. 554, 562-63 (1989) (“It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the ‘seal of secrecy’ between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud’ or crime. [citations omitted]”).

Information Act requests pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary