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

In the Matter of	)	
	)	
WIRELESS CONSUMER ALLIANCE	)	**FOIA Control No. 2004-069**
	)	
On Request for Inspection of Records	)	
	)	
In the Matter of	)	
	)	
MOTOROLA, INC.	)	
	)	**EB-02-TS-719**
On Request for Confidential Treatment of Documents	)	
	)	
In the Matter of	)	
	)	
NOKIA, INC.	)	
	)	**EB-02-TS-718**
On Request for Confidential Treatment of Documents	)	
	)	
In the Matter of	)	
	)	
LG ELECTRONICS USA, INC.	)	
	)	**EB-02-TS-721**
On Request For Confidential Treatment of Documents	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 2005 **Released:** February 15, 2005

By the Commission:

1. This order grants in part and denies in part applications for review filed by the Wireless Consumer Alliance (WCA) seeking review of decisions of the Enforcement Bureau (EB) denying in part WCA's Freedom of Information Act (FOIA) request for records relating to the ability of cellular telephone users to complete 911 emergency calls. This order also grants in part and denies in part an application for review filed by LG Electronics USA, Inc. (LG), and denies applications for review filed by Nokia Inc. (Nokia), and Motorola, Inc. (Motorola) of EB's decision to deny in part their requests for confidential treatment of records submitted in connection with investigations of compliance with Commission regulations.

I. BACKGROUND

2. Under the Commission's rules, analog cellular telephones must have a separate capability to process 911 emergency calls.[1] Since the adoption of these rules, the Commission has conducted various investigations relating to the compliance of cell phone manufacturers with the rules. Three of the investigations have resulted in consent decrees with cell phone manufacturers.[2] Five investigations are still pending,[3] awaiting the outcome of a pending declaratory order proceeding.[4]

The FOIA Request

3. WCA filed a FOIA request seeking copies of documents relating to the compliance of cell phone manufacturers with the Commission 911 call processing requirements, the Commission's interpretation of these requirements, and internal and external communications concerning compliance and interpretation.[5] More specifically, WCA sought copies of records concerning: (1) the Second Report and Order, (2) Section 22.921,[6] (3) an order, 911 Call Processing Modes, 15 FCC Rcd 1911 (WTB 2000), which granted Nokia approval to use a modified 911 call processing method (Nokia Order), and (4) an order, 911 Call Processing Modes, 15 FCC Rcd 15671 (WTB 2000), which granted similar relief to Ericsson, Inc. (Ericsson Order). Additionally, WCA sought copies of (5) a May 27, 2003 letter from Robert L. Pettit of the law firm of Wiley, Rein and Fielding to John B. Muleta, the Chief of the Wireless Telecommunications Bureau (WTB), seeking clarification of the Nokia Order, (6) a May 30, 2003 letter from Muleta to Pettit clarifying the Nokia Order, and (7) drafts of these letters, and documents referring to or responding to the letters. Finally, WCA sought copies of (8) the Nokia Consent Decree order (regarding the noncompliance of a Nokia handset, Model 6385), (9) the associated consent decree, (10) an appendix to the consent decree entitled "Summary of Model 6385 Compliance Program," and (11) drafts of the foregoing and documents reflecting communications relating to the foregoing.

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[1] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 14 FCC Rcd 10954 (1999) (Second Report and Order).

[2] Motorola, Inc., 18 FCC Rcd 2503 (EB 2003) (Motorola Consent Decree); Nokia, Inc., 18 FCC Rcd 11395 (EB 2003) (Nokia Consent Decree); Samsung Telecommunications America, Inc. and Samsung Electronics Co., Ltd, 15 FCC Rcd 23236 (EB 2000) (Samsung Consent Decree).

[3] The following investigations are pending: File No. EB-02-TS-728 (Samsung Telecommunications America, Inc. and Samsung Electronics Co., Ltd. (Samsung)); File No. EB-02-TS-722 (Kyocera Wireless Corporation); File No. EB-02-TS-730 (Toshiba Corporation); File No. EB-02-TS-727 (Sanyo Electric Company, Ltd.); and File No. EB-02-TS-721 (LG Electronics USA, Inc.).

The following investigations are non-pending: File No. EB-02-TS-719 (Motorola, Inc.); File No. EB-02-TS-718 (Nokia, Inc.); File No. EB-02-TS-732 (Matsushita Electric Corporation of America); File No. EB-02-TS-729 (Mitsubishi Electric Corporation); and File No. EB-02-TS-720 (Ericsson, Inc.)

[4] See In re Wireless Telephone 911 Calls Litigation, MDL 1521, Civ. Action No. 03-CV-2597 (N.D. Ill. Sept. 3, 2003) (memorandum order); see also Joint Petition for Declaratory Ruling on 911 Call Processing Modes (filed Oct. 14, 2003); Petition of Wireless Consumers Alliance, et al., for a Declaratory Ruling Regarding Cellphone 911 Requirements in Response to Referral from the United States District Court for the Northern District of Illinois (filed Oct. 3, 2003).

[5] E-mail from Kathryn Schofield to FOIA@fcc.gov (November 2, 2003). The FOIA request does not identify WCA as the requestor. This was disclosed in subsequent communications. In its application for review, WCA indicates that its FOIA request is related to a lawsuit it filed to enjoin the manufacture of handsets not in compliance with the 17 second rule.

[6] 47 C.F.R. § 22.921. This section was adopted in the Second Report and Order.

4. In response to the FOIA request, EB issued two decisions. In its first decision, EB disclosed 60 documents and withheld 329 "internal FCC working papers."[7] The withheld documents consist of 16 "notes," 181 "electronic mail messages," 36 "memoranda," and 96 "drafts." EB explained that the withheld material was exempt from disclosure under FOIA Exemption 5, 5 U.S.C. § 552(b)(5), which permits nondisclosure of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with an agency." EB noted that Exemption 5 covers information that would be protected by the common law privileges in civil discovery cases: the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. EB also indicated that some documents could not be processed because they had not been received from their custodian and requested an extension of time to respond with respect to them. In its second decision, EB subsequently withheld an additional 19 documents, consisting of eight "notes," seven "electronic mail messages," and four "memoranda."[8]

5. An additional group of records responsive to WCA's FOIA request consisted of records submitted by cell phone manufacturers with requests for confidential treatment pursuant to 47 C.F.R. § 0.459. Pursuant to 47 C.F.R. § 0.461(d)(3), the manufacturers were provided with copies of WCA's FOIA request, and all but one (Kyocera) opposed the release of the records. The Second EB Decision ruled on both the FOIA request and the requests for confidential treatment of these records. EB withheld the manufacturers' responses to the letters of investigation (LOIs) in their entirety pursuant to FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A),[9] which permits nondisclosure of records or information compiled for law enforcement purposes to the extent that disclosure "could reasonably be expected to interfere with enforcement proceedings." EB also ruled on the confidentiality requests filed by the manufacturers, determining that portions of the responses to the LOIs submitted by all of the manufacturers (see n.3, supra) should be treated confidentially under FOIA Exemption 4, 5 U.S.C. § 552(b)(4), which permits nondisclosure of "commercial or financial information obtained from a person and privileged or confidential," but that the remainder of the LOI responses were not commercially confidential and could be released when the investigations had been terminated. EB also withheld two documents submitted by Samsung in their entirety pursuant to FOIA Exemption 4.[10] The manufacturers were provided with copies of the records with proposed redactions and given the opportunity to seek review pursuant to 47 C.F.R. § 0.461(i).

The Applications for Review

6. WCA's applications for review contend that the records it requested are not subject to Exemption 5 and, in particular, to the deliberative process privilege.[11] In any event, WCA maintains that EB's decision does not provide sufficient description of the materials that were withheld to know whether the deliberative process privilege applies.

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[7] Letter from Joseph P. Casey, Chief Spectrum Enforcement Division to Kathryn Schofield, Esq. (Jan. 20, 2004) (First EB Decision).

[8] Letter from Joseph P. Casey, Chief Spectrum Enforcement Division to Kathryn Schofield, Esq. (Feb. 10, 2004) (Second EB Decision).

[9] Second EB Decision at 3.

[10] Second EB Decision at 3 (referring to one Samsung document, dated May 22, 2000). In fact there was a second similar document, dated June 9, 2000, for which Samsung also sought confidential treatment. Both of these were withheld in their entirety by EB.

[11] Letter from Kathryn A. Schofield to the Office of General Counsel, Federal Communications Commission (Feb. 26, 2004); Letter from Kathryn A. Schofield to the Office of General Counsel, Federal Communications Commission (Feb. 17, 2004). WCA also addressed the applicability of the attorney work product privilege. We do not, however, rely on the work product privilege as the reason for withholding documents.

7. Motorola, Nokia and LG also filed applications for review.[12] All three manufacturers argued that their entire submissions contained commercially sensitive information that should be withheld from WCA. LG maintained that if the Commission decided nonetheless to release its submission, additional redaction of commercially sensitive information was necessary.[13] Alternatively, the three manufacturers argued that the records should be withheld under FOIA Exemption 7(A) because they are investigatory records that, if released, would interfere with enforcement proceedings. Samsung opposed release of the two letters withheld in their entirety by EB, arguing first that the records were not within the scope of WCA's FOIA request, and, even if they were, the records should be withheld under FOIA Exemption 4.[14] WCA replied to the four manufacturers' filings.[15]

II. DISCUSSION

8. On review, we affirm EB's decision in part and reverse it in part. We affirm EB's withholding of internal Commission records pursuant to FOIA Exemption 5, except for three records that we direct the Bureau to release to WCA. We modify EB's treatment of records provided by the cell phone manufacturers in response to LOIs. Unlike EB, which held that FOIA Exemption 7(A) applied to the responses in pending proceedings, we find that the exemption does not apply at all in the circumstances of this FOIA request. On the other hand, we affirm EB's conclusion that portions of the LOI responses from both pending and non-pending proceedings, as well as records related to the Samsung Consent Decree, should be withheld under FOIA Exemption 4 because they contain confidential material. We modify to some extent, however, the scope of the material withheld. Records that fall outside Exemption 4 must be released to WCA.

A. Internal Commission Records

9. FOIA Exemption 5 permits us to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." It has been interpreted to include the deliberative process privilege, which is intended to "prevent injury to the quality of agency decisions."[16] As WCA observes, the deliberative process privilege applies only to materials that are both "predecisional" and "deliberative."[17] In this regard, with respect to the former criterion, the privilege applies to staff communications made prior to the time a decision is made but not to postdecisional communications made after a decision and designed to explain it.[18] WCA asserts that

[12] See Letter from Robert L. Pettit, Wiley, Rein & Fielding LLP, to John A. Rogovin, General Counsel (Mar. 17, 2004) (Motorola Application for Review); Letter from Robert L. Pettit, Wiley, Rein & Fielding LLP, to John A. Rogovin, General Counsel (Mar. 17, 2004) (Nokia Application for Review); and Letter from Robert L. Pettit, Wiley, Rein & Fielding LLP, to John A. Rogovin, General Counsel (Mar. 17, 2004) (LG Application for Review). None of the other cell phone manufacturers sought review of EB's proposed release of redacted records.

[13] LG Application for Review at 3-5.

[14] See Letter from Tom W. Davidson, Akin Gump Strauss Hauer & Feld LLP to David S. Senzel, Esq., Office of General Counsel (Apr. 23, 2004) (Samsung Reply).

[15] See Letter from Kathryn A. Schofield to John A. Rogovin, Esq., General Counsel (Mar. 30, 2004) (First Reply); Letter from Kathryn A. Schofield to David S. Senzel, Esq., Office of General Counsel (May 6, 2004) (Second Reply).

[16] NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975) (Sears Roebuck).

[17] See Wolfe v. Dep't of Health and Human Svcs., 839 F.2d 768, 774 (D.C. Cir. 1988) (en banc). Congress adopted Exemption 5 because "the quality of administrative decision-making would be seriously undermined if agencies were forced to 'operate in a fishbowl' because the full and frank exchange of ideas would be impossible." Mead Data Central, Inc. v. United States Dep't of the Air Force, 566 F.2d 242, 256 (D.C. Cir. 1977).

[18] See Sears Roebuck, 421 U.S. at 151-52.

documents concerning the interpretation of and compliance with the 17 second rule are not predecisional because they are not related to any specific pending proceeding and because they concern existing policies. Moreover, WCA asserts that the deliberative process privilege does not apply to communications between an agency and outside parties, such as the cell phone manufacturers, and any such communications, as well as the records of any such communications, must be disclosed. WCA also asserts that the disclosure of a deliberative document to a third party waives the privilege and that the Commission may have disclosed deliberative documents to cell phone manufacturers. Finally, WCA contends that the deliberative process privilege does not apply when the integrity of an agency's deliberations are themselves at issue.

10. We disagree with WCA's proposition that any documents created subsequent to the Second Report and Order that deal with interpretation or compliance are necessarily post-decisional. As the Supreme Court has explained:

> Our emphasis on the need to protect pre-decisional documents does not mean that the existence of the privilege turns on the ability of an agency to identify a specific decision in connection with which a memorandum was prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies . . . .[19]

Commission consideration of the 911 call method question did not end with the adoption of the Second Report and Order; it remains the subject of ongoing deliberations. The Second Report and Order itself delegated authority to WTB "to consider and approve, deny, or approve with modifications new or revised 911 call processing modes." 14 FCC Rcd at 10995 ¶ 97. Moreover, the class of administrative actions that qualify as "decisions" also encompasses deliberations preliminary to interpretive rulings and enforcement actions such as the Nokia and Ericsson orders.

11. We have examined the documents withheld by EB and find that, with the few exceptions noted below, they are deliberative documents subject to Exemption 5. Preliminarily, we find that EB did not err in failing to provide WCA with a "Vaughn Index"[20] specifically describing each withheld document and specifying why it was withheld. It is well established that a Vaughn Index is not required in responding to an initial FOIA request.[21] An agency need only provide " a sufficiently detailed description of what it is refusing to produce and why so that the requester and the court can have a fair idea what the agency is refusing to produce and why."[22] This may be accomplished without a detailed index of the records. Here, EB's FOIA decision adequately identified the records withheld from WCA.

12. Our examination of the withheld documents indicates that the drafts in question are drafts of orders, letter rulings, and public notices. As such, these drafts reflect the preliminary thinking of Commission personnel responsible for drafting and reviewing these actions and are deliberative documents. The final orders, rulings, and public notices corresponding to these drafts are publicly available documents.

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[19] Sears Roebuck, 421 U.S. at 151 n.18. The privilege does not apply if the material is unrelated to current deliberations and merely might be related to possible future deliberations. See ITT World Comm., Inc. v. FCC, 699 F.2d 1219, 1239 (D.C. Cir. 1983).

[20] See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[21] See, e.g., Schwarz v. United States Dep't of Treasury, 131 F. Supp.2d 142, 147 (D.C. D.C. 2000), aff'd, No. 00-5453 (D.C. Cir. 2001).

[22] Fiduccia v. United States Dep't of Justice, 185 F.3d 1035, 1042 (9th Cir. 1999).

13. The remaining documents consist of notes, memoranda, and e-mails. We find that the subject matter of these documents is deliberative.[23] They concern the substance and status of pending 911 call mode issues, of orders and rulings regarding these issues, and of meetings and communications regarding these issues. They reflect the "agency give-and-take of the deliberative process by which the [agency] decision itself is made."[24]

14. The deliberative character of these documents is not lost to the extent that some describe the positions taken by private parties as communicated to the staff. We recognize, as WCA contends, that under some circumstances, reports of communications by private parties may be deemed factual and thus outside the scope of the deliberative process privilege.[25] As ITT itself indicates, however, "where analyses are prepared for the sole purpose of evaluating the relative factual merits of different positions in pending proceedings, disclosure would invite 'probing [of] the decision-making process itself.'"[26] We find that this principle applies here and that the docments are deliberative. As an additional matter, we have discovered no reason to believe that these internal documents themselves were disclosed to outside parties.

15. WCA contends that there has been a "vigorous and active" campaign by cell phone manufacturers to "re-write, change, alter, amend and confuse the 17 second rule."[27] February 17 Letter at 2. According to WCA, it is contrary to the public interest that such efforts have occurred outside of public scrutiny and therefore records of such contacts should be disclosed. Consequently, WCA asserts that this is a case where the deliberative process privilege should not apply because WCA's contention places the FCC's deliberative process itself at issue.

16. We find no merit to this argument. The case WCA relies on for the proposition that the privilege does not apply, Scott v. Board of Education of the City of East Orange, 219 F.R.D. 333 (D. N.J. 2004), is readily distinguishable. In that case, Scott sued the Board of Education for unlawfully terminating his employment in violation of his civil rights and filed discovery requests concerning the reasons he was fired. In ruling on the discovery request, the court held that, since the Board of Education's deliberations were the subject of the law suit, the privilege must give way to the overriding public policies expressed in the civil rights laws. 219 F.R.D. at 337. By contrast, in the FOIA context, the asserted needs of a particular requestor are not relevant to the Exemption's applicability and do not constitute a basis for denying the applicability of the Exemption.[28] Furthermore, as a general matter, the Commission's ex parte rules ensure fairness to the participants in FCC proceedings, and WCA does not make any specific allegations that demonstrate violations of these rules.[29]

17. Our review of the withheld documents, however, warrants modifying EB's decision in certain respects. We will release three items withheld by EB. The first is a memorandum, dated July 23, 2003,

[23] Additionally, some of the notes are handwritten notes intended solely for the personal use of the staff members who created them. These are not "agency records" subject to the FOIA. See Judicial Watch, Inc. v. Clinton, 880 F. Supp. 1, 11 (D.D.C. 1995), aff'd, 76 F.3d 1232 (D.C. Cir. 1996).

[24] Coastal States Gas Corp. v. Dep't of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).

[25] See ITT World Comm., Inc. v. FCC, 699 F.2d 1219, 1238 (D.C. Cir. 1983) (ITT).

[26] Id., 699 F.2d at 1239, citing Montrose Chem. Corp. of California v. Train, 491 F.2d 63, 68 (D.C. Cir. 1974).

[27] As an example, WCA submits that, pursuant to the Second Report and Order, WTB initiated a proceeding (WTB Docket No. 99-328) to consider new and amended 911 call processing methods. WCA alleges that Nokia's May 27, 2003, request for clarification, referred to above, was not filed in that docket, and that WTB's May 30, 2003 ruling was "negotiated in secret" with Nokia. February 17 Letter at 4.

[28] 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) (North).

[29] See paragraph 28, infra.

titled "Major Public Safety and Environmental Enforcement Actions: 1999-2003." As the title indicates, the memorandum briefly describes the outcome of a list of publicly announced enforcement actions and is primarily factual rather than deliberative.[30] The second is an e-mail, dated June 9, 2003, between WTB staff members. The e-mail simply transmits the entire text of a trade press article regarding a Commission enforcement decision. We find that the text and the e-mail are factual rather than deliberative. The third is an e-mail, from Robert Pettit of the law firm of Wiley, Rein & Fielding to Jim Schlichting, Deputy Chief WTB, dated March 27, 2003, regarding questions concerning Nokia 911 call modes. As WCA correctly notes, Exemption 5 does not apply to communications from outside the government by interested parties advocating a position.[31] Copies of these three items will be provided to WCA.

B. Manufacturers' Records

18. EB determined that records submitted in still pending proceedings could be withheld in their entirety under FOIA Exemption 7(A) but that records submitted in non-pending investigations were not entitled to Exemption 7(A) protection. Additionally, EB determined that records concerning both pending and non-pending investigations were subject to FOIA Exemption 4, relating to confidential, commercial information. With respect to the non-pending investigations, EB concluded that the records, specifically those relating to Motorola and Nokia, could be released to WCA after the redaction of confidential commercial information.[32] Similarly, EB concluded that a letter submitted by Samsung related to its non-pending investigation could be withheld in its entirety pursuant to FOIA Exemption 4.[33] Finally, with respect to the pending investigations, EB determined that the records submitted with requests for confidential treatment were entitled in part to confidential treatment under FOIA Exemption 4 (in addition to being subject to withholding in their entirety under FOIA Exemption 7(A)).[34]

19. As we discuss below, we disagree with EB and find that FOIA Exemption 7(A) does not apply either to the pending or non-pending investigations. To the extent we withhold material, we rely exclusively on Exemption 4. Thus, records in both pending and non-pending investigations should be released after redaction of portions that are commercially confidential. In this regard, we modify EB's confidentiality determinations in certain respects. Because we find that parts of the two Samsung documents are outside the scope of Exemption 4, we also conclude that these records, which EB withheld in their entirety, should be released in part to WCA. Finally, we affirm EB's partial grant of the requests of Motorola, Nokia and LG for confidential treatment of their records except that we agree with LG that some additional portions of its records should be granted confidential treatment.

Applicablity of Exemption 7(A) to Investigative Records

20. **Pending Proceedings.** FOIA Exemption 7(A) authorizes the withholding of "records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information . . . could reasonably be expected to interfere with enforcement proceedings." An investigatory record must meet two criteria to fall within Exemption 7(A): first, it must be "compiled for law enforcement purposes," and second, its release must "interfere with enforcement

[30] A typical entry reads in its entirety: "*T-Mobile* (July 2003): 1.1 million consent decree relating to compliance with E911 Phase II requirements for its GSM system."

[31] See Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 12 (2001).

[32] Second EB Decision at 2-3.

[33] Second EB Decision at 3. We note that EB referred only to the Samsung letter of May 22, 2000, when in fact there was a second letter, dated June 9, 2000, that received similar treatment. See Samsung Reply at 3 n.6.

[34] Second EB Decision at 3 (Exemption 4 analysis) and 5 (noting that the EB decision "also constitutes a ruling on the manufacturers' confidentiality requests"). Only Motorola, Nokia, and LG sought review of this determination.

proceedings."[35] The responses to the LOIs in the still-pending investigations meet the requirements of the first prong under Exemption 7(A).[36] Clearly the records are related to ongoing investigations.[37] The records withheld, however, do not meet the second criteria under FOIA Exemption 7(A) because no showing has been made that disclosure would interfere with the ongoing enforcement proceedings. In particular, the documents in question are already in the possession the targets of the respective investigations. As a general proposition, release of information already known to the target of an investigation would not be expected to result in interference.[38] While under some circumstances, the disclosure of information already known to the target of the investigation might result in interfence with an ongoing investigation,[39] no such circumstances have been demonstrated in this case. FOIA Exemption 7(A) therefore does not apply to these records.

21. **Non-pending proceedings.** Moreover, FOIA Exemption 7(A) does not "endlessly protect material simply because it is in an investigatory file."[40] It does not apply to investigations that have been completed. Motorola and Nokia urge that Exemption 7(A) applies to records from the Motorola Consent Decree and Nokia Consent Decree proceedings despite the fact that they have resulted in consent decrees.[41] But Exemption 7(A) may be invoked to withhold records from completed investigations only in limited circumstances, such as where the records would be relevant to additional prospective investigations.[42] We conclude that the now completed Motorola and Nokia enforcement proceedings do not involve the type of circumstances that would permit us to invoke FOIA Exemption 7(A). Accordingly, this additional reason makes Exemption 7(A) inapplicable to the now completed investigations.

22. We therefore turn to Motorola's and Nokia's assertions that the records from the Motorola Consent Decree and Nokia Consent Decree proceedings should be withheld pursuant to FOIA Exemption 4, WCA's contention that the two Samsung letters from the now concluded Samsung Consent Decree do not contain material that may be withheld under FOIA Exemption 4, and the confidentiality requests relating to the still-pending investigations.

Exemption 4 – Confidential Commercial Records

23. **Non-pending Proceedings.** Under FOIA Exemption 4, an agency may withhold from disclosure "commercial or financial information obtained from a person [that is] privileged or

[35] E.g., NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 224 (1978) (Robbins Tire); Edmonds v. FBI, 272 F. Supp. 2d 35, 54 (D.D.C. 2003).

[36] Neither Samsung nor the other cell phone manufacturers sought review of the EB decision.

[37] See n. 3, supra. These are not "hypothetical" enforcement proceedings, as WCA posits. WCA Reply at 3.

[38] See, e.g., Lion Raisins, Inc. v. United States Department of Agriculture, 354 F.3d 1072, 1085 (9th Cir. 2003); Wright v. OSHA, 822 F.2d 642, 646 (7th Cir. 1987).

[39] See Swan v. SEC, 96 F.3d 498, 500 (D.C. Cir. 1996).

[40] Robbins Tire, 437 U.S. at 230.

[41] Motorola Application for Review at 4-5; Nokia Application for Review at 4. LG argues that the exemption's applicability "does not terminate when the investigation terminates in cases, such as this, when the agency continues to have oversight with respect to the subject of the investigation." LG Application for Review at 3.

[42] See, e.g., Solar Sources, Inc. v. United States, 142 F.3d 1033, 1040 (7th Cir. 1998) (records were relevant to another ongoing investigation); ABC Home Health Servs. v. HHS, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) (records relevant to possible subsequent reevaluation of a consent order); Zeller v. United States, 467 F. Supp. 487, 501 (E.D.N.Y. 1979) (records relevant to a determination of future compliance with a consent order); New Eng. Med. Ctr. Hosp. v. NLRB, 548 F.2d 377, 386 (1st Cir. 1976) (records relevant to a related ongoing investigation). In this case, the records in question relate to the initiation of the closed proceedings and not to any ongoing or prospective proceeding.

confidential"[43] if disclosure would result in substantial competitive injury to the submitter.[44] The manufacturers had argued that their LOI responses contained "insight into their scientific or manufacturing processes, their financial situation and/or marketing strategy."[45] EB determined that the release of "some portions" of Motorola's, Nokia's, and LG's LOI responses would cause substantial harm to the competitive position of the manufacturers[46] and provided the manufacturers with copies of the records indicating which portions it determined would cause competitive harm if released to the public.

24. In their applications for review, the manufacturers assert that the responses to all of the questions in the LOIs "taken together are confidential."[47] Both Motorola and Nokia generally contend that disclosure of the information in the responses "would result in incalculable harm . . . in the wireless equipment manufacturing market."[48] The manufacturers's generalizations are insufficient to justify a finding that disclosure would result in substantial competitive harm and in any event ignore EB's careful review of the records and redaction of precisely the type of information that, if released, would cause competitive harm. The manufacturers also argue that disclosure of the fact that their products were being investigated would "harm . . . handset sales and competitive position in the marketplace."[49] However, EB's investigation of the cell phone manufacturers is already well known publicly in the case of the closed Motorola and Nokia investigations,[50] and even for the still-pending investigations.[51] In any event, courts have not extended the scope of Exemption 4 to consider whether or not the disclosure of allegations would result in adverse publicity.[52] Rather courts have focused on the competitve significance of the information contained in the relevant documents.

25. WCA seeks review of EB's withholding of two Samsung documents.[53] In response, Samsung argues that these documents if disclosed would cause substantial competitive harm because the documents contain "sensitive and detailed data regarding information on Samsung's internal business operations and staff organization."[54] The two documents consist of letters transmitting drafts of consent decrees that ultimately resulted in the Samsung Consent Decree but differ from the consent decree ultimately adopted by EB and Samsung. We do not believe that either document should have been withheld in full under

[43] 5 U.S.C. § 552(b)(4).

[44] National Parks and Cons. Ass'n. v. Morton, 498 F.2d 765, 770 (D.C. Cir. 1974).

[45] Second EB Decision at 3.

[46] Id.

[47] Motorola Application for Review at 2; Nokia Application for Review at 2.

[48] See Motorola Application for Review at 2; Nokia Application for Review at 2 (both referring to "sales volumes, manufacturing capabilities, hardware and software configuration, product specifications, testing methods and results, personnel names and locations, testing equipment and configurations, and other proprietary, confidential or competitively sensitive information).

[49] Motorola Application for Review at 2; Nokia Application for Review at 2.

[50] See Motorola Consent Decree and Nokia Consent Decree. See also WCA Second Reply at 2.

[51] See Hearing on Wireless E911 Before the Subcommittee on Communications, Committee on Commerce, Science and Transportation, United States Senate, 108th Cong., 1st Sess. (Mar. 5, 2003), at 9 reprinted at <http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-231759A1.pdf> and <http://commerce.senate.gov/pdf/abernathy030503.pdf > (Joint Written Statement of FCC Commissioners Kathleen Q. Abernathy and Jonathan S. Adelstein indicating that in December 2002 EB had launched "an investigation against ten equipment manufacturers regarding possible violations of the 911 call processing rule").

[52] See Occidental Petroleum Corp. v. SEC, 873 F.2d 325, 341 (D.C. Cir. 1989).

[53] WCA Second Reply at 1-2.

[54] Samsung Reply at 4.

Exemption 4. For example, the cover letters transmitting the drafts contain no confidential commercial information. The draft consent decrees, on the other hand, do contain privileged confidential commercial information that may be withheld under Exemption 4.[55]

26. Samsung argues that the documents should not released because the FOIA "[r]equest appears to have been filed solely in an attempt to circumvent the discovery process in pending civil litigation."[56] We do not agree with this argument. Under the FOIA, government records must be made available to "any person" upon request unless the records are protected from release by one or more of the FOIA exemptions.[57] The FOIA contains no provision prohibiting the use of records obtained under the FOIA for other litigation purposes, nor does the FOIA permit consideration of the requester's identity or the intended use of the agency records.[58]

27. **Confidentiality Requests in Pending Proceedings.** Finally, Motorola, Nokia and LG's applications for review generally address the confidentiality holdings of EB, and we therefore turn to EB's disposition of their requests for confidential treatment for the records from the pending investigations. We conclude that EB properly found only parts of the Motorola, Nokia, and LG records to be entitled to confidential treatment. We agree with LG, however, that EB should have found certain additional parts of its records to be entitled to confidential treatment.[59] LG explains that these parts of the records would cause it substantial competitive harm.[60] These additional redactions, which relate to technical details of LG's 911 call processing methods, are consistent with the type of material found to warrant confidential treatment for the other manufacturers and redacted from their submissions. We therefore direct that these additional parts of LG's records be afforded confidential treatment.[61] The remaining records from the pending investigations not subject to confidential treatment will be released to WCA

C. Ex Parte Allegations

[55] Additionally, we note that the drafts arise from settlement negotiations between Samsung and EB. As such, they may also be withheld under the settlement privilege of FOIA Exemption 5. See The Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc. d/b/a Heatway Systems, 332 F.3d 976 (6th Cir. 2003) (recognizing the settlement privilege in civil litigation).

[56] Samsung Reply at 4-6, citing In re Wireless Telephone 911 Calls Litigation, MDL 1521, Civ. Action No. 03-CV-2597 (N.D. Ill.).

[57] See 5 U.S.C. § 552(b).

[58] See Sears Roebuck, 421 U.S. at 143 n.10; North, 881 F.2d at 1096 citing, e.g., Comstock Int'l (U.S.A.), Inc. v. Export-Import Bank of the United States, 464 F. Supp. 804, 805 n.2 (D.D.C.1979) (because FOIA requester sought records for use in litigation "neither enhanced nor diminished" its rights under the FOIA); see also Washington Post Co. v. United States Dep't of Health and Human Svcs., 690 F.2d 252, 259 n.21 (D.C. Cir. 1982) (FOIA allows private litigants to use FOIA as a discovery tool, noting "[i]f abuse of FOIA is or becomes a problem, the appropriate recourse is an amendment to FOIA").

[59] LG Application for Review at 3-5.

[60] LG Application for Review at 4.

[61] Specifically, the following portions of LG's records should also receive confidential treatment. From the March 7, 2003 letter: (a) the last two sentences of the third paragraph of page one, (b) the last word on the second line of the second paragraph on page two through the end of the paragraph, and (c) the tenth word of the second line of the third paragraph through the end of the paragraph. From the March 17, 2003 letter, (a) the text after the word LG on the last line of the first page; (b) from page two, the text and the first and second lines, the last three words in the first line of the paragraph that begins 16 textual lines from the top of the page and the last three lines of that paragraph, and the last two words of the third line of the paragraph that begins 20 textual lines from the top of the page, the fourth and fifth lines of this paragraph, and all of the following paragraph; (c) from page three, the continued text from the last paragraph of page two; and (d) Attachments 1 and 2.

28. As an additional matter, as noted above, WCA alleges that there has been a campaign by cell phone manufacturers to engage in surreptitious communications with the Commission. WCA suggests that these efforts involve violations of the Commission's ex parte rules, [62] which govern the permissibility of communications between outside parties and Commission decision makers. We are committed to the enforcement of the ex parte rules, and WCA provides no specific evidence that any communications were made in violation of the rules. To the extent that some unreported communications may have occurred, they do not necessarily violate the ex parte rules. For example, communications that do not address specific pending rulemakings and that either involve all of the parties to individual enforcement proceedings or constitute general discussions of rule interpretations are not prohibited by the rules. The docket in WT Docket No. 99-328 reflects the filing of numerous ex parte notices, as required by the rules.

III. ORDERING PARAGRAPHS.

29. Accordingly, IT IS ORDERED that Wireless Consumer Alliance's application for review is GRANTED IN PART and DENIED IN PART to the extent described herein. WCA may seek judicial review of the denial in part of its FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).

30. IT IS FURTHER ORDERED that the applications for review of Motorola, Inc., and Nokia, Inc., are DENIED and the application for review of LG Electronics USA, Inc. is GRANTED IN PART AND DENIED IN PART. LG and Samsung Telecommunications America, Inc. and Samsung Electronics Co., Ltd. will be provided with copies of the records redacted as discussed in paragraphs 23-27 on the day of release of this decision. If Motorola, Nokia, LG or Samsung do not seek a judicial stay within 10 working days of the date of release of this decision, the redacted version of their respective records will be released to WCA. 47 C.F.R. § 0.461(i)(4). Judicial review may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[62] 47 C.F.R. §§ 1.1200-1.1216.