

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

In the Matter of
ROCKY MOUNTAIN RADAR
On Request for Inspection of Records
FOIA Control No. 2006-076

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 2006

Released: October 27, 2006

By the Commission:

1. The Commission has before it an application for review filed by Rocky Mountain Radar (RMR) of the decision of the Enforcement Bureau (EB or Bureau) denying its Freedom of Information Act (FOIA) request seeking copies of all complaints alleged against [RMR] with the complaining party/parties clearly identified. For the reasons stated below, we deny the application for review.

2. The Commission received a complaint alleging that RMR was marketing devices designed to jam or interfere with police radar, and EB instituted an investigation. It is well established that radar jamming devices may not lawfully be marketed in the United States. The Bureau denied RMR's FOIA request to release copies of complaints against it because release of the records would interfere with the ongoing investigation.

3. Under FOIA Exemption 7(A), we may withhold 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. Exemption 7(A) is applicable if there is a pending or prospective law enforcement proceeding, and the release of the information or records about it could reasonably be expected to cause some articulable harm. As the Bureau stated, it has initiated investigations of Rocky Mountain Radar and others, including retailers distributing Rocky Mountain Radar products, in response to a complaint alleging that they are marketing RF devices that are designed to jam or interfere with police radar. The Bureau also explained that release of the information sought could interfere with the investigation. We have examined the facts and circumstances surrounding the complaint, and we agree with the Bureau that the complaint is properly

1 Letter from Michael B. Churchman, President, Rocky Mountain Radar, to Office of General Counsel, FOIA Control No. 2006-076 (Jan. 20, 2006) (AFR).

2 Letter from Michael B. Churchman to Michael Carowitz, Acting Chief [of Staff], Enforcement Bureau (Nov. 15, 2005). Although not styled a FOIA request, Churchman's letter was treated as such.

3 Rocky Mountain Radar, 12 FCC Rcd 22453 (1997) (Rocky Mountain Radar I), aff'd sub nom. Rocky Mountain Radar v. FCC, 158 F.3d 1118 (10th Cir. 1998), cert. den., 525 U.S. 1147 (1999).

4 Letter from Joseph P. Casey, Chief, Spectrum Enforcement Division, EB, to Michael B. Churchman (Dec. 28, 2005) (FOIA Response), citing 5 U.S.C. § 552(b)(7)(A) and 47 C.F.R. § 0.457(g)(1).

5 5 U.S.C. § 552(b)(7)(A).

6 Manna v. United States Dep't of Justice, 51 F.3d 1158, 1164 (3d Cir.), cert. den., 516 U.S. 975 (1995).

7 See FOIA Response; see also letter from Michael Carowitz to Senator John Cornyn (Oct. 20, 2005).

8 See FOIA Response.

withheld under FOIA Exemption 7(A). Release of the complaint against RMR at this phase of the Bureau's investigation could reasonably be expected to interfere with the Bureau's enforcement activities by potentially deterring cooperation by witnesses, by exposing witnesses to possible harassment or reprisal, and by allowing the possible destruction or alteration of evidence. Exemption 7(A) is therefore properly invoked here because "disclosure could reasonably be expected to interfere with enforcement proceedings."⁹

4. RMR proffers several reasons why the complaints should be released, but none has merit. First, RMR maintains that the only FCC order or citation against it was issued in 1997 and relates to the Spirit II device.¹⁰ However, the ongoing investigation that forms the basis for this denial is a different matter and RMR errs in suggesting that any investigations initiated against it have been completed. Second, RMR maintains that its devices are certified by the FCC and "comply with the existing code," and any claims of harm from the devices should be brought to its attention.¹¹ However, it is EB's responsibility to determine what procedures are most conducive to enforcing the Commission's rules.¹² EB's practice is to investigate complaints from the public, and, if found tenable, to take enforcement action. Otherwise, the matter is closed with no further action. If a Notice of Apparent Liability (NAL) is issued, at that time RMR would be made aware of the basis of the alleged violation and would have the opportunity to respond.¹³ As explained above, release at this time of the complaints could reasonably be expected to interfere with the Bureau's investigation. Third, RMR argues that any complaints lodged against it were submitted by its competitors for competitive advantage.¹⁴ Even if this allegation is true, it would not form the basis for disclosing records during an ongoing investigation. EB in the course of its investigation will determine whether there is any merit to the complaint against RMR, irrespective of whether or not the complainant is a competitor of RMR. Finally, RMR argues that FCC rules provide that the complaints are routinely available for public inspection.¹⁵ However, the cited rule applies to complaints against common carriers and therefore on its face is not applicable to complaints against RMR, a manufacturer and distributor of radar jamming devices.¹⁶

⁹ See *Church of Scientology of Texas v. IRS*, 816 F. Supp. 1138, 1156-57 (W.D. Tex. 1993) (Exemption 7(A) is properly invoked when "disclosure would inform the party being investigated of the scope or direction of the agency's investigation; potentially subject witnesses or others providing information to the agency to reprisal or harassment; permit the target of the investigation to develop defenses that would enable violations to go unremedied; permit the party being investigated to destroy or alter evidence; or chill the willingness of individuals providing information to the agency to do so."), citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-42 (1978); *North v. Walsh*, 881 F.2d 1088, 1097 (D.C. Cir. 1989); and *Alyeska Pipeline Co. v. United States EPA*, 856 F.2d 309, 312-13 (D.C. Cir. 1988).

¹⁰ AFR at 1. RMR refers to a prior investigation involving its marketing of the Spirit II radar jammer device. See *Rocky Mountain Radar I*, *supra*.

¹¹ AFR at 1.

¹² See 47 C.F.R. § 0.111(a)(4) (EB is "the primary Commission entity responsible for enforcement of the Communications Act . . . [and] the Commission's rules," including "resolv[ing] complaints regarding . . . radiofrequency equipment and devices . . ."); see also 47 U.S.C. § 147(j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

¹³ See 47 U.S.C. § 503(b)(4).

¹⁴ AFR at 2.

¹⁵ AFR at 2. RMR cites 47 C.F.R. § 0.455(b)(13), but there is no such section of our rules. The language RMR quotes is in fact from 47 C.F.R. § 0.453(a)(2)(ii)(F).

¹⁶ See *Establishment Of Rules Governing Procedures To Be Followed When Informal Complaints Are Filed By Consumers Against Entities Regulated By The Commission*, Notice of Proposed Rulemaking, 17 FCC Rcd 3919, 3922 (2002) ("[I]n the common carrier context, consumers and carriers often have a direct contractual relationship.

(continued....)

5. IT IS ORDERED that the application for review by Rocky Mountain Radar IS DENIED. Rocky Mountain Radar may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

6. The officials responsible for this action are the following Commissioners: Chairman Martin, Commissioners Copps, Adelstein, Tate and McDowell.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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No such relationship exists, for example, between broadcast licensees and consumers. Moreover, whereas consumers who file complaints against common carriers often seek monetary relief such as a refund or credit, consumers who file complaints against broadcast licensees typically have asked the Commission to exercise its discretion to take enforcement action such as a forfeiture or revocation of license.”).