

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

In the Matter of	)	
	)	
TOMPKINS, MCGUIRE, WACHENFELD & BARRY, LLP	)	FOIA Control No. 2005-174
	)	
On Requests for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 7, 2006**

**Released: March 10, 2006**

By the Commission:

1. The Commission has before it an application for review filed by the law firm of Tompkins, McGuire, Wachenfeld & Barry, LLP (TMWB), seeking review of a decision by the Enforcement Bureau (EB) denying the Freedom of Information Act request (FOIA Request) made by Eugene Sullivan of TMWB.<sup>1</sup> For the reasons discussed below, the application for review is granted in part, and denied in part.

**I. BACKGROUND**

2. In its FOIA Request, TMWB sought Commission records relating to the Fax.com enforcement proceeding in which the Commission imposed a forfeiture of \$5,379,000 against Fax.com for violating provisions of the Telephone Consumer Protection Act of 1991 (TCPA) prohibiting the sending of unsolicited advertisements by means of facsimile machines.<sup>2</sup> TMWB specifically sought: (1) “[a]ll correspondence or communications between the Commission and Global Communications Consulting Corp. (“GCCC”) . . . regarding fax.com [sic] or any related companies, and/or in connection with the FCC Notice of Apparent Liability For Forfeiture issued to Fax.com. . . .”; and (2) “[d]ocuments discussing the question of what steps a common carrier can or might take to investigate illegal faxes in violation of TCPA . . . being sent through its network, in response to notices or complaints regarding illegal faxes.”<sup>3</sup>

3. In response to the FOIA Request, EB indicated that it did not locate any records responsive to the first part of its request. It did, however, locate 10 records totaling 19 pages, consisting of e-mails between Commission personnel and e-mails between Commission personnel

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<sup>1</sup> Electronic Mail Request from Eugene Sullivan, TMWB to FOIA@fcc.gov (Jan. 10, 2005) (FOIA Request); Letter from Lisa R. Marshall, TMWB to Larry Shecker [sic], Esq. (Mar. 10, 2005) (Application for Review).

<sup>2</sup> See *Fax.com, Inc.*, 17 FCC Rcd 15927 (2002) (Notice of Apparent Liability); *Fax.com, Inc.*, 19 FCC Rcd 748 (2004), *erratum*, 19 FCC Rcd 3680 (2004) (Forfeiture Order).

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

and two outside sources (one a confidential source (the Source)), in response to the second part of its request.<sup>4</sup> EB withheld this material pursuant to FOIA Exemptions 5, 7(A), and 7(D).<sup>5</sup> EB explained that the materials being withheld were created or compiled as part of an investigation into possible violations of the Communications Act that are the subject of administrative and possible judicial proceedings, that they were predecisional and deliberative, and that they constitute attorney work-product. EB further indicated that release of the documents would interfere with the ongoing case by revealing the government's work on it and could threaten the consultative process. Additionally, EB stated that disclosure of the material would tend to disclose the identity of a confidential source.

4. TMWB subsequently sought review of EB's decision. Specifically, TMWB questions EB's claim that there are no documents responsive to part one of its request, and accordingly renews its request for such documents.<sup>6</sup> TMWB also contends that EB failed to provide sufficient information to enable it to evaluate the propriety of withholding the documents that were responsive to part two of its request. TMWB suggests that a Vaughn Index would be an appropriate means for the Commission to provide sufficient information about the documents that were withheld.<sup>7</sup> TMWB further contends that EB did not sufficiently justify its reliance on the three FOIA exemptions cited as the basis for withholding documents. As to Exemption 5, TMWB asserts that EB failed to identify a specific agency decision that would prevent the requested documents from being disclosed, and thus argues that the allegedly predecisional, deliberative records of communications between the Commission and an outside source do not qualify under this exemption. TMWB also asserts that the Commission must provide more information to show that the inter-agency or intra-agency communications qualify under this exemption.<sup>8</sup> As to Exemption 7(D), TMWB maintains that EB did not indicate that disclosure of the documents would lead to identification of the confidential source or explain what serious consequences would result if the source were identified.<sup>9</sup> Finally, as to Exemption 7(A), TMWB submits that EB did not explain sufficiently how disclosure would interfere with specific enforcement proceedings.<sup>10</sup> More generally, TMWB questions why information concerning how

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<sup>4</sup> Letter from Colleen K. Heitkamp to Eugene Sullivan, Esq., TMWB (Feb. 11, 2005) (FOIA Decision).

<sup>5</sup> FOIA Exemption 5, 5 U.S.C. § 552(b)(5), exempts from disclosure "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." FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A), exempts from disclosure records or information compiled for law enforcement purposes that "could reasonably be expected to interfere with enforcement proceedings." FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), exempts from disclosure records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . . which furnished information on a confidential basis . . ." The Commission also relied on related provisions in its regulations. 47 C.F.R. §§ 0.457(g)(1), (4)-(5).

<sup>6</sup> See Application for Review at 1.

<sup>7</sup> See Application for Review at 2, citing *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). A Vaughn Index is used to describe withheld documents and explain why they are being withheld.

<sup>8</sup> Application for Review at 3.

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Id.* at 4-5.

carriers could investigate the use of their networks to transmit illegal faxes needs to or should be kept secret.<sup>11</sup>

## II. DISCUSSION

5. With regard to TMWB's renewed request for correspondence between the Commission and GCCC related to Fax.com, we find no basis for requiring EB to conduct another search for responsive records. TMWB simply states that it has reason to believe there are records responsive to part one of its FOIA request but does not supply any further explanation. TMWB provides no basis for us to question the adequacy of EB's search for documents responsive to the first part of its request. Under the FOIA, an agency is required to conduct a search that is "reasonably calculated to uncover all relevant documents."<sup>12</sup> The reasonableness of a search depends, in part, on how the search was conducted in light of the scope of the request.<sup>13</sup> Moreover, the inability to locate specific responsive documents does not render a search inadequate.<sup>14</sup> We therefore find that EB discharged its duty under the FOIA by conducting a thorough search of the files related to the Fax.com proceeding, and the offices of the staff involved in that proceeding.

6. With regard to the second part of its request, TMWB appears to be asking the Commission to prepare a Vaughn Index, explaining that it cannot evaluate the propriety of withholding the documents that EB located in response to its FOIA request without receiving more information on those documents. It is well-established that an agency is not required to prepare a Vaughn Index specifically describing in detail each withheld document and specifying why it was withheld when responding to an initial FOIA request.<sup>15</sup> Rather, an agency need only provide "a sufficiently detailed description of what it is refusing to produce and why so that the requestor and the court can have a fair idea of what the agency is refusing to produce and why."<sup>16</sup> This may be accomplished without a detailed index, and we find that EB provided adequate details about the withheld records in its FOIA Decision. Nevertheless, we provide a more detailed description of the withheld internal records below.

7. The ten withheld documents consist of 19 pages of internal Commission e-mails authored by EB staff, specifically two attorneys and one non-attorney staff person who is supervised by those attorneys. Two of the documents are internal e-mails that discuss information provided by the Source related to the Fax.com investigation. Six of the documents

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<sup>11</sup> See Application for Review at 5.

<sup>12</sup> See *Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

<sup>13</sup> See, e.g., *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986) ("[A] search need not be perfect, only adequate, and adequacy is measured by the reasonableness of the effort in light of the specific request.").

<sup>14</sup> See, e.g., *Duenas Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003) ("it is long settled that the failure of an agency to turn up one specific document in its search does not alone render a search inadequate . . .").

<sup>15</sup> See *Schwarz v. U.S. Dep't of Treasury*, 131 F. Supp.2d. 142, 147 (D.D.C. 2000), *aff'd*, No. 00-5453 (D.C. Cir. 2001).

<sup>16</sup> *Fiduccia v. United States Dep't of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999); see also *Wireless Consumer Alliance*, 20 FCC Rcd 3874, 3978 (2005) (citing *Fiduccia*).

contain e-mails directly from the Source. The two remaining documents consist of internal e-mails discussing material relevant to the Fax.com investigation provided by an individual outside the Commission and include e-mails from this individual. Further, six of the documents are dated between November 27, 2001 and March 25, 2002, prior to issuance of the notice of apparent liability in the Fax.com enforcement proceeding. Four of the documents are dated between March 15, 2004 and March 29, 2004, after issuance of the forfeiture order in the Fax.com proceeding and before the government's initiation of judicial enforcement proceedings against Fax.com.

8. The withheld documents containing discussions among EB staff reflect EB's internal deliberations with respect to the decisions to issue the notice of proposed liability and to undertake judicial proceedings against Fax.com. They contain staff impressions and opinions related to the Fax.com investigation, and reveal the staff's investigative and decision-making processes; thus they reflect the "agency give-and-take of the deliberative process by which the [agency] decision itself is made."<sup>17</sup> Moreover, all these withheld documents were generated prior to the initiation of the ongoing judicial enforcement proceedings against Fax.com and some were generated before issuance of the NAL. As such, they are both deliberative and predecisional.<sup>18</sup> The documents therefore fall within the deliberative process privilege embodied in Exemption 5, and may be withheld to preserve the integrity of the agency's decision-making process.<sup>19</sup>

9. Exemption 5 also encompasses the attorney work-product privilege,<sup>20</sup> which protects documents prepared by an attorney in contemplation of litigation.<sup>21</sup> The withheld documents containing discussions among EB staff include the mental impressions of EB staff attorneys recorded in the course of their investigation into possible violations by Fax.com. Moreover, these withheld internal documents also contain statements from the Source that were obtained by the attorneys as a part of their investigation of and in anticipation of litigation against Fax.com. These records therefore also may properly be withheld under the attorney work-product privilege embodied in Exemption 5.<sup>22</sup>

10. The e-mails from the Source and the internal staff e-mails discussing them are also exempt under FOIA Exemption 7(D), which protects information compiled for law enforcement

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<sup>17</sup> *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (citing *Vaughn v. Rosen*, 523 F.2d 1136, 1144 (D.C. Cir. 1975)).

<sup>18</sup> See *Mapother v. Dep't of Justice*, 3 F.3d 1533, 1537 (D.C. Cir. 1993) ("The deliberative process privilege protects materials that are both predecisional and deliberative.") (citations omitted); *Grand Central Partnership, Inc. v. Cuomo*, 166 F.3d 473, 482 (2d Cir. 1999) (citations omitted).

<sup>19</sup> See, e.g., *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) (stating that the general purpose of the deliberative process privilege is to "prevent injury to the quality of agency decisions").

<sup>20</sup> See *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 (1983) (citing *NLRB* at 154-155).

<sup>21</sup> See *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1946); *Judicial Watch, Inc. v. Dep't of Justice*, No. 04-5444 (D.C. Cir. Dec. 27, 2005) slip op. at 5 (describing the scope of the attorney work-product privilege).

<sup>22</sup> See FOIA Decision at 2 (explaining that "when individuals . . . provide information alleging a possible violation of law, information is compiled by staff in anticipation of correction/disciplinary action, up to and including possible litigation"). See also *Hickman v. Taylor*, 329 U.S. at 511 (work product includes "interviews," "statements," and "correspondence").

purposes that could reasonably be expected to disclose the identity of a confidential source. As an initial matter, we find that these records satisfy the first prong of Exemption 7(D) because they were generated as part of EB's investigation into possible violations of law by Fax.com.<sup>23</sup> EB indicates that the Source provided information pursuant to an express request for confidentiality.<sup>24</sup> The Source specifically informed EB that failure to maintain confidentiality could result in "severe repercussions." Given the specificity of the information provided by the Source, we are concerned that it may be possible for a person knowledgeable about Fax.com to deduce the Source's identity from the e-mails based on the Source's familiarity with Fax.com's affairs, even if any references to the Source's name were redacted<sup>25</sup> Accordingly, the Source's e-mails are also exempt under Exemption 7(D).

11. Finally, the records, with the exception of the two documents discussed in paragraph 13, below, may be withheld under FOIA exemption 7(A), which protects information that could reasonably be expected to interfere with enforcement proceedings.<sup>26</sup> Having already determined that the records were "compiled for law enforcement purposes,"<sup>27</sup> we must determine whether disclosure of the records could cause harm to the ongoing proceedings against Fax.com. Because Fax.com has failed to pay the \$5,379,000 forfeiture penalty levied by the Commission and has continued its unlawful faxing, the Commission is currently engaged in litigation against Fax.com in federal district court, seeking to obtain an injunction to prohibit Fax.com's unlawful fax advertising and to collect the assessed forfeiture penalty.<sup>28</sup> An agency may invoke Exemption 7(A) to withhold law enforcement records related to an investigation "until all reasonably foreseeable proceedings stemming from that investigation are closed."<sup>29</sup> Thus, until its pending enforcement proceedings against Fax.com are completed, these records may be withheld from

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<sup>23</sup> See, e.g., *Wireless Consumer Alliance*, FOIA Control No. 2004-069, 20 FCC Rcd 3874, 3881 (2005)(finding that records related to ongoing investigations conducted by EB were compiled for law enforcement purposes); see also *Cooper Cameron Corp. v. U.S. Dep't of Labor*, 280 F.3d 53, 545 n.24 (5<sup>th</sup> Cir. 2002)(law enforcement purpose under Exemption 7 includes civil and regulatory proceedings as well as criminal cases).

<sup>24</sup> EB's decision in this matter incorrectly stated that the request for confidentiality was implied. FOIA Decision at 2. A source is confidential within the meaning of Exemption 7(D) if the source provided information under an express assurance of confidentiality or in circumstances from which such assurance could reasonably be inferred. See *United States Dep't of Justice v. Landano*, 508 U.S. 165, 173 (1993) (citing the exemption's legislative history).

<sup>25</sup> See *Ibarra-Cortez v. DEA*, 36 Fed. Appx. 598, 598-99 (9th Cir. 2002) (Exemption 7(D) applicable even if the confidential source is not named in the records, if the source's identity might be inferred from the facts and circumstances described in the records).

<sup>26</sup> The analysis for determining whether Exemption 7(A) applies focuses on (1) whether a law enforcement proceeding is pending or prospective, and (2) whether release of information about the proceeding could reasonably be expected to cause harm. See, e.g., *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 224 (1978) (finding that the government must show how the records "would interfere with a pending enforcement proceeding").

<sup>27</sup> See *supra* note 23 and accompanying text.

<sup>28</sup> *State of California, et al. v. Fax.com, Inc., et al.*, Civ. No. 03cv1438-DMS (AJB) (S.D. Cal.).

<sup>29</sup> *Kay v. FCC*, 976 F. Supp 23, 38 (D.D.C. 1997)(finding that records may be withheld under Exemption 7(A), even when the investigation has been completed, to protect enforcement proceedings).

disclosure under FOIA Exemption 7(A) to the extent that it can be shown that their release could reasonably be expected to harm the ongoing proceedings.<sup>30</sup>

12. The Commission continues to investigate and prosecute its case against Fax.com, and we note that EB has stated that release of these records would interfere with its ongoing work on the case.<sup>31</sup> We agree that the information contained in the withheld internal records, except for those discussed in paragraph 13, would likely give Fax.com insights into the Commission's thinking and strategies and might allow Fax.com to anticipate Commission actions or arguments and develop effective counter-strategies. These are the types of harms that have been found to warrant exemption of law enforcement records under Exemption 7(A),<sup>32</sup> and we see no need to risk harm to the present proceedings by revealing these internal records at this time.<sup>33</sup> We therefore find that the requested materials, if disclosed, would interfere with the ongoing enforcement proceeding, and thus should be withheld under Exemption 7(A).

13. Finally, regarding the two internal records that contain e-mails from a non-confidential outside source, we will release these records in part to TMWB. Both of the embedded e-mails were sent by the sender to other outside parties and copied to EB staff. One contains what purports to be excerpts from a public FCC document, interpretations of that document, and views on GCCC's liability under the TCPA. The other contains similar statements concerning the sender's views on GCCC's liability under the TCPA. We therefore find that these embedded e-mails are not deliberative. Moreover, FOIA Exemption 5 does not apply to communications from outside the government by interested parties advocating a position.<sup>34</sup> Nor did the sender seek treatment as a confidential source. Because the embedded e-mails were directed to third parties and not to the Commission, we do not deem them to have been "compiled for law enforcement purposes" under Exemption 7(A). Redacted copies of these two records will therefore be provided to TMWB. We will, however, withhold information in these two records other than the embedded e-mail from the outside party as privileged under FOIA Exemptions 5 and 7(A) for the reasons discussed above.

14. Accordingly, IT IS ORDERED, that Tompkins, McGuire, Wachenfeld & Barry, LLP's application for review IS GRANTED IN PART AND DENIED IN PART. TMWB may seek judicial review of the denial of its Freedom of Information Act request pursuant to 5 U.S.C. § 552(a)(4)(B).

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<sup>30</sup> See *Kay*, 976 FCC Rcd at 38 ("the agency must demonstrate that disclosure would 'disrupt, impede or otherwise harm the enforcement proceeding or the investigation'")(citation omitted).

<sup>31</sup> See *FOIA Decision* at 1 (stating that release of these records would interfere with "the government's work on" the ongoing litigation against Fax.com).

<sup>32</sup> See, e.g., *Kay*, 976 F. Supp at 39 (finding that because the release of records could give rise to several harms, including giving plaintiff insight into and the ability to assess the FCC's evidence against him, the FCC had demonstrated that release of the withheld records would interfere with a pending proceeding).

<sup>33</sup> Also, we note that ongoing forfeiture collection action against Fax.com requires a trial *de novo* against Fax.com. 47 U.S.C. § 504(a). Thus, release of the records containing the opinions and recommendations of Commission staff members would carry a heightened potential for interference with successfully completing this action.

<sup>34</sup> See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 12 (2001).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary