

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

In the Matter of
Electronic Privacy Information
Center
On Request for Inspection of Records
FOIA Control No. 2005-441

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2006

Released: May 26, 2006

By the Commission:

I. BACKGROUND

1. By this order, we grant in part and deny in part an application for review filed September 29, 2005 by the Electronic Privacy Information Center (EPIC) of the denial in part of its request under the Freedom of Information Act (FOIA). In its FOIA request, EPIC sought information related to Commission proceedings involving the provision of enhanced 911 (E911) services by voice over internet protocol (VoIP) providers. Specifically, EPIC requested: (1) communications between FCC employees and representatives of the telecommunications industry regarding the development of a method for determining a customer's location during an E911 call, with or without the customer having to self report the information; (2) communications between FCC employees and policy researchers concerning technology that would allow determination of a customer's location during an E911 call, with or without the customer having to self report the information; and (3) policy or legal memoranda reflecting final determinations about methods for determining a customer's location during an E911 call, with or without the customer having to self report the information.

2. In its response, the Commission's Wireline Competition Bureau (WCB) withheld several categories of records pursuant to the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). Among the records withheld under Exemption 5 were several characterized

1 Letter from Joseph T. Hall, Assistant Bureau Chief, Management, Wireline Competition Bureau to Jessica Shannon, Electronic Privacy Information Center (Sept. 6, 2005) ("WCB's Ruling").

2 Letter from Jessica Shannon, EPIC, to Managing Director [FCC] (Jun. 3, 2005).

3 See id. at 1.

4 See WCB's Ruling at 2-3. Exemption 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." See, e.g., NLRB v. Sears Roebuck & Co., 421 U.S. 132 (1975) (continued . . .)

as “Other Advisory Documents.” As to these records, WCB stated: “The documents provide background information as well as analysis and proposed strategies with respect to the E911 matter. Disclosure of such materials would negatively impact the open and candid internal discussions among Commission personnel that are so necessary to the day-day function of the government.” *Id.* at 5.

3. In its application for review, EPIC argues that at least portions of these records do not fall within Exemption 5 and should have been disclosed. In particular, EPIC states, “The reference to ‘background information’ [in WCB’s Ruling] indicates that factual information is contained within these documents, and has not been adequately segregated from truly deliberative materials.”⁵ EPIC observes that the FOIA requires that “[a]ny reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt under this subsection,” citing 5 U.S.C. § 552(b). EPIC further argues that factual material is distinct from and not included within deliberative material.⁶ Moreover, EPIC argues that because factual material was improperly withheld from records in the “Other Advisory Material” category, all withheld records should be reviewed for segregable factual material.

II. DISCUSSION

4. We find no reason to disturb WCB’s ruling in most respects, but modify it to release ten pages that WCB withheld. As an initial matter, we disagree with EPIC that the reference to “background information” in WCB’s Ruling necessarily implies that segregable factual material was improperly withheld as Exemption 5 deliberative process material. Deliberative process material consists of documents reflecting advisory opinions, recommendations, and deliberations comprising part of the process by which governmental decisions and policies are formulated.⁷ Such material may be withheld because its disclosure would tend to inhibit the frank discussion of legal and policy matters and government decision making would be poorer as a result.⁸ The deliberative process privilege, however, does not include documents consisting only of compiled factual material or purely factual material that is severable from its context.⁹

5. But under some circumstances, factual material may nevertheless fall within the scope of the deliberative process privilege. Where, for example, an agency’s staff has prepared summaries of evidence to assist the agency in its decision making process, courts have held that disclosure of such summaries would represent an unwarranted intrusion into the agency’s deliberative process since it would tend to reveal thinking as to the importance or unimportance

(Continued from previous page) (Exemption 5 encompasses confidential intra-agency opinions, disclosure of which would be injurious to the consultative functions of government).

⁵ Application for Review at 2.

⁶ *Id.*, citing *EPA v. Mink*, 410 U.S. 73, 89 (1973).

⁷ See *NLRB v. Sears Roebuck & Co.*, 421 U.S. at 150.

⁸ *Id.*

⁹ See *EPA v. Mink*, 410 U.S. at 87-88.

of certain facts.¹⁰ In such situations, courts have pointed out that the fact/opinion test must not be applied mechanically.¹¹

6. Consistent with these principles, we find that, with the exceptions noted below, the entirety of the records characterized as “Other Advisory Documents” fall within the scope of the deliberative process privilege encompassed by Exemption 5. The records in question consist of ten documents totaling 103 pages of memoranda and “briefing sheets.” The documents contain discussion of pending VoIP E911 issues, including how various technical options would work, staff advice, and summaries of factual material prepared by staff members of WCB intended to assist in the resolution of VoIP E911 issues. In nearly all cases, release of these materials would tend to reveal the staff’s view of the facts and the law. The disclosure of such documents would thus represent an unwarranted intrusion into the Commission’s deliberative process and they accordingly will be withheld pursuant to Exemption 5. The “briefing sheets,” however, have three appendices that contain segregable factual material. Accordingly, we will release six pages of factual material concerning the deployment of VoIP E911 technology. This information was compiled from publicly available sources, was not manipulated for purposes of staff analysis, and is in the form of charts that can be readily segregated from the deliberative portions of the briefing sheets without revealing their context. In addition, we will release two press releases, each two pages in length that were improperly withheld because they were attached to exempt documents. These documents will be redacted to remove internal Commission notations.

7. EPIC also contends that because, according to its reading of WCB’s Ruling, WCB improperly withheld segregable portions of the records in the “Other Advisory Documents” category, we should review all categories of records for segregable material. In processing a FOIA request, staff routinely reviews all records so that it may redact segregable portions and disclose material not covered by Exemption 5, as required by the FOIA. We have reviewed staff’s determination and found no segregable material other than that described in the last paragraph. The documents in question consist of staff memoranda, drafts of Commission orders, internal staff e-mails, and staff notes regarding VoIP E911 issues. For the reasons discussed in paragraphs 5-6, above, disclosure of such documents, or portions thereof, would represent an unwarranted intrusion into the Commission’s deliberative process.

8. Accordingly, IT IS ORDERED that the application for review, filed September 29, 2005, by the Electronic Privacy Information Center IS GRANTED IN PART AND DENIED IN PART. EPIC may seek judicial review of the denial in part of its FOIA request pursuant to 5 U.S.C. § 552(a)(4)(B).

¹⁰ See *Mapother v. Dep’t. of Justice*, 3 F.3d 1533, 1538 (D.C. Cir. 1993); *Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68-71 (D.C. Cir. 1974).

¹¹ See *Mapother*, 3 F.3d at 1537.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary