

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

In the Matter of )  
 )  
Dateline NBC ) FOIA Control No. 2006-006  
 )  
On Request for Inspection of Records )

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2006

Released: May 30, 2006

By the Commission:

1. The Commission has before it an application for review filed by Dateline NBC (Dateline) seeking review of a decision by the Consumer and Governmental Affairs Bureau (CGB) granting in part and denying in part Dateline’s Freedom of Information Act (FOIA) request. For the reasons discussed below, we grant in part and deny in part the application for review.

I. BACKGROUND

2. In its FOIA request, Dateline sought records pertaining to alleged misuse and fraud involving Internet Protocol (IP) Relay, a form of Telecommunications Relay Service (TRS).<sup>1</sup> Specifically, Dateline sought five categories of documents:<sup>2</sup>

- All, memos, advisories, professional and legal opinions and related material pertaining to alleged misuse and/or fraud of the internet relay system for the hearing impaired;
- All complaints alleging misuse and/or fraud of [*sic*] the internet relay system for the hearing impaired;

<sup>1</sup> TRS permits a person with a hearing or speech disability to use the telephone system to call voice telephone users by contacting a communications assistant (CA), who completes the call via voice telephone and relays the call back and forth between the parties. See 47 U.S.C. § 225; 47 C.F.R. § 64.601 *et seq.* With IP Relay, the person with a hearing or speech disability uses a computer (or similar device) and the Internet to contact the CA, rather than a TTY and the PSTN. The Commission has received complaints from vendors, consumers, and TRS providers that people are using IP relay to make purchases by telephone using stolen or fake credit cards. Public Notice, *FCC Reminds Public of Requirements Regarding Internet Relay Service and Issues Alert*, 19 FCC Rcd 10740 (2004) (IP Relay Alert).

<sup>2</sup> Letter from Tim Sandler, Producer, Dateline NBC to Managing Director, Federal Communications Commission (Oct. 3, 2005) (FOIA Request) at 1.

- The per-minute cost paid to internet relay system contractors, such as Sprint and MCI, for relay calls;
- The total amount paid to internet relay contractors in each of the years that the system has been operating; and
- The total annual funding for the entire internet relay system for each of the years that it has been operating.

3. In response to the FOIA Request, CGB indicated that all but the first two categories of records were available on the website of the National Exchange Carrier Association (NECA), the Interstate TRS fund administrator.<sup>3</sup> With respect to the first category, CGB released 26 responsive records.<sup>4</sup> Additionally, CGB withheld 131 “draft letters, internal memoranda, e-mails, complaint summaries and briefing sheets prepared by agency attorneys. . . .” under FOIA Exemption 5, 5 U.S.C. § 552(b)(5).<sup>5</sup> CGB explained: “Correspondence, memoranda, or analyses that are part of an attorney’s deliberative processes, attorney work-product, or subject to attorney-client privilege are shielded from disclosure under Exemption 5.”<sup>6</sup> As to the second category, CGB found and released 129 complaints and inquiries filed by, or on behalf of, consumers, with personal identifying information redacted pursuant to FOIA Exemption 6, which protects personal privacy interests.<sup>7</sup>

4. Dateline seeks review of CGB’s decision with respect to the first category of documents, asserting that CGB has not adequately justified the applicability of Exemption 5.<sup>8</sup> Dateline contends that CGB failed to provide an adequate description of the withheld documents, that its analysis is conclusory, and that it did not apply the specific criteria relevant to a determination that a record was covered by the attorney-client privilege, the deliberative process privilege, or the attorney work-product privilege. In the absence of an adequate justification for withholding these records, Dateline asks that they be released.

5. Additionally, Dateline suggests that certain material “appears to be missing” from the documents that were released.<sup>9</sup> Dateline observes that among the documents disclosed were references to three Internet Relay meetings, which occurred in April 2004 as well as on May 18, 2004 and November 18, 2004. Dateline complains that no minutes or reports of these meetings were produced and no reason was given for withholding them.

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<sup>3</sup> Letter from Erica H. McMahon, Acting Chief, Consumer Policy Division, Consumer & Governmental Affairs Bureau to Tim Sandler, Producer, Dateline NBC (Dec. 2, 2005) (Response) at 3.

<sup>4</sup> *Id.* at 1-2.

<sup>5</sup> *Id.* at 3. Exemption 5 covers “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.”

<sup>6</sup> Response at 3.

<sup>7</sup> *Id.* at 3, citing 5 U.S.C. § 552(b)(6).

<sup>8</sup> Letter from Beth R. Lobel, Vice President Media Law, NBC to Sam Feder, Esq., Office of [the] General Counsel (Jan. 3, 2006) (Application for Review) at 1-2.

<sup>9</sup> *Id.* at 2.

## II. DISCUSSION

6. We find that, with the exceptions discussed below, the records in question were properly withheld pursuant to Exemption 5. Exemption 5 has long been interpreted to include the deliberative process privilege, which is intended to “prevent injury to the quality of agency decisions.”<sup>10</sup> As Dateline correctly observes, the deliberative process privilege applies to materials that are both predecisional and reflect the agency “give-and-take” of the consultative process.<sup>11</sup> The agency must establish what deliberative process is involved and the role played by the documents in the course of that process.<sup>12</sup> However, because not all memoranda containing recommendations ripen into agency decisions, the existence of the privilege does not turn on the ability of the agency to identify a specific decision in connection with which a document is prepared.<sup>13</sup>

7. *E-Mails and Drafts.* The documents withheld consist principally of e-mail communications among Commission staff members discussing issues relevant to IP Relay fraud and reflecting staff impressions and opinions pertaining to that topic.<sup>14</sup> These communications encompass deliberations that led to the issuance of the IP Relay Alert, *supra*, note 1, as well as ongoing deliberations relevant to other possible Commission actions. Some of the e-mails involved similar deliberative communications with personnel of the United States Department of Justice, the Federal Trade Commission, and NECA.<sup>15</sup> Other deliberative documents consist of written staff memoranda concerning the IP Relay fraud problem<sup>16</sup> and participants’ notes<sup>17</sup> about meetings<sup>18</sup> and discussions on the issue. Additionally, the withheld material includes preliminary drafts of the IP Relay Alert public notice and preliminary drafts of other possible action

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<sup>10</sup> See *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150-51 (1975).

<sup>11</sup> See *Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 585-86 (D.C. Cir. 1987).

<sup>12</sup> *Id.*

<sup>13</sup> *NLRB v. Sears Roebuck & Co.*, 421 U.S. at 151 n.18. The Supreme Court stated: “Agencies are, and properly should be, engaged in a continuing process of examining their policies. . . .”

<sup>14</sup> We reject any suggestion that we are required to justify the application of Exemption 5 to each withheld document individually. A listing and description of individual withheld documents, or “Vaughn Index,” is not required at the administrative level. 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>15</sup> NECA administers the TRS fund for the Commission, and our communications with NECA concerning TRS are intra-agency communications. See *Lead Industries Ass’n. v. OSHA*, 610 F.2d 70, 83 (2d Cir. 1979) (application of Exemption 5 to governmental communications with outside consultants).

<sup>16</sup> These include staff summaries and characterizations of complaints that reflect staff impressions and opinions. The complaints themselves have been released with personal information redacted.

<sup>17</sup> The participants’ handwritten notes intended solely for the staff members who created them 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 on other grounds*, 76 F.3d 1232 (D.C. Cir. 1996).

<sup>18</sup> They also include the written agenda of one inter-agency meeting. See also paragraph 9, *infra*.

documents related to the IP Relay fraud problem.<sup>19</sup> All of the aforementioned materials fall squarely within the scope of Exemption 5.<sup>20</sup>

8. However, our review of the documents withheld also indicates that some of the documents should be released either in whole or in part. Specifically, we direct CGB to release 22 records consisting of e-mails between Commission personnel and persons outside the Federal Government or which incorporate or attach such a communication. Communications between an agency and an outside party speaking in its own independent interest are not covered by the deliberative process privilege.<sup>21</sup> In the case of records containing both intra-agency and non-intra-agency communications, we will redact the exempt intra-agency portions of the records.<sup>22</sup> We will also redact personal information about private individuals pursuant to FOIA Exemption 6.<sup>23</sup> Furthermore, we will release six e-mails that simply forward to staff members copies of news articles, and one e-mail that lists the citations of news articles.<sup>24</sup> As before, we will redact any portions of these records that contain deliberative material.

9. *Meeting Records.* We have located records relating to the meetings that occurred on May 18, 2004 and November 18, 2004 referenced in Dateline's application for review, as well as other meetings or conference calls involving non-governmental parties that occurred on February 17, 2004, April 16, 2004, and April 13, 2005. The following records relating to these meetings will be released or are publicly available: (1) a 22-page ex parte notice, relating to a February 17, 2004 meeting between Sprint and CGB, including a six-page document concerning fraud, filed on February 18, 2004, by Sprint attorney, Michael B. Fingerhut, in CC Docket No. 98-67 and CG Docket No. 03-123, available for viewing on the Commission's Electronic Comment Filing System (ECFS); (2) an e-mail from an outside attorney to the FCC and a two-page document prepared by an outside party concerning an April 16, 2004 telephone conference call between CGB and AT&T, which concerned among other things, "suspicious calls over IP Relay Service;" (3) a two-page sign-in sheet for a May 18, 2004 meeting between CGB and TRS providers, listing the participants at the meeting; and (4) a sheet containing photocopies of the business cards of the MCI participants in an April 13, 2005 meeting between CGB and MCI.

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<sup>19</sup> See *Horowitz v. Peace Corp.*, 428 F.3d 271, 276-77 (D.C. Cir. 2005) (draft decision covered by Exemption 5).

<sup>20</sup> In many cases the authors of documents and the participants in e-mail exchanges and meetings were Commission attorneys. In those instances, the records are also covered by the attorney-client privilege. See, e.g., *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 253 (D.C. Cir. 1977) (attorney-client privilege covers information in documents communicated to or by an attorney as part of a professional relationship in order to provide the agency with confidential legal advice).

<sup>21</sup> See *Dep't of the Interior v. Klamath WaterUsers Protective Ass'n*, 532 U.S. 1, 12 (2001).

<sup>22</sup> See 47 U.S.C. § 552(b) (Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection).

<sup>23</sup> See 5 U.S.C. § 552(b)(6) (disclosure would constitute a clearly unwarranted invasion of personal privacy).

<sup>24</sup> See *E.P.A. v. Mink*, 410 U.S. 73, 87-88 (1973) (Exemption 5 does not cover memoranda that consist only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context).

10. Other records relating to these meetings will not be released. Specifically, we will not release handwritten notes by a participant in the February 17, 2004 conference call, which are personal notes and not agency records.<sup>25</sup> Moreover, even if they were agency records, they would be deliberative under Exemption 5, because they contain the impressions and opinions of the staff member regarding the matters discussed during the call.<sup>26</sup> Similarly, we will not release the personal handwritten notes of a participant in the November 18, 2004 meeting or a participant in the April 13, 2005 meeting. In addition, we will also not release a three page memorandum, dated November 18, 2004, authored by a CGB staff member, summarizing the May 18, 2004 meeting, because it reflects the author's impressions and opinions of the discussion at the meeting and is therefore a deliberative document under Exemption 5.<sup>27</sup>

11. Accordingly, IT IS ORDERED, that the Application for Review, filed by Dateline NBC, IS GRANTED IN PART AND IS DENIED IN PART. Dateline NBC may seek judicial review of the denial in part of its Freedom of Information Act Request pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>25</sup> See *Judicial Watch, Inc. v. Clinton*, 880 F.Supp. at 11.

<sup>26</sup> See *Senate of the Commonwealth of Puerto Rico v. U.S. Dep't of Justice*, 823 F.2d at 585-86.

<sup>27</sup> *Id.*