

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

In the Matter of
RUSSELL D. LUKAS
On Request for Inspection of Records
FOIA Control No. 2006-037

MEMORANDUM OPINION AND ORDER

Adopted: May 24, 2006

Released: May 26, 2006

By the Commission:

1. The Commission has before it an application for review (AFR) filed by Russell D. Lukas and David L. Nace, purportedly on behalf of Gulf Coast Wireless Partnership (GCW), of the decision of the Managing Director granting in part and denying in part a Freedom of Information Act (FOIA) request filed by Lukas seeking "to inspect the documents and records pertaining to the refunds that were due Meretel . . . under the Commission's amnesty option." GCW states it was "formerly named Meretel Communications Limited Partnership (Meretel)." For the reasons stated below, we determine that Lukas is the only proper applicant for review, and we grant in part and deny in part Lukas's application for review.

2. Under the Commission's C Block Restructuring Orders, carriers could seek refunds of all or part of their installment payment financing for loans under an "amnesty option." Meretel elected the amnesty option in 1998. Lukas's FOIA Request sought records concerning the refunds for five Meretel licenses. The Office of the Managing Director (OMD) located "approximately 104 pages of records" that it offered to make available to Lukas, or, alternatively, to copy and mail to him. It also located 103 pages of additional materials responsive to Lukas's request that it withheld pursuant to FOIA Exemption

1 Application for Review of Freedom of Information Action, FOIA Control No. 2006-037 (Jan. 27, 2006) (AFR).

2 Letter from Russell D. Lukas, Esq., Lukas, Nace, Gutierrez & Sachs, Chtd. to Managing Director (Oct. 27, 2005) (FOIA Request).

3 AFR at 1. But see letter from Mark Reger, Chief Financial Officer, FCC to David L. Nace, Esq., Lukas, Nace, Gutierrez & Sachs, Chtd. (Oct. 12, 2005)(CFO Letter) at 6-7, regarding License Nos. PBB032C, PBB034C, PBB180C, PBB236C, and PBB265C Request for Refunds (concluding GCW had not provided adequate proof that it is the legal successor in interest to Meretel), petition for reconsideration pending.

4 See Amendment of the Commission's Rules Regarding Installment Payment Financing for PCS Licensees, 12 FCC Rcd 16436, 16462-64 (1997) and Implementation Procedures for the Order on Reconsideration of the Second Report and Order Concerning the Broadband Personal Communications Services (PCS) C and F Block Installment Payment Plans, Public Notice, 13 FCC Rcd 13211 (WTB 1998).

5 WTB Announces Broadband PSC C Block Unconditional Elections, 13 FCC Rcd 17434 (WTB 1998).

6 License Nos. PBB034C, PBB265C, PBB032C, PBB180C, PBB236C. See FOIA Request at 1.

7 Letter from Andrew Fishel, Managing Director, to Russell D. Lukas, Esq. (Dec. 28, 2005) (FOIA Decision) at 1. On January 4, 2006, Lukas asked that the releasable materials be mailed to him. The Managing Director sent Lukas approximately 104 pages of records. Lukas indicates these materials were received on January 27, 2006. See AFR at 3 and Attachments F-J.

5, 5 U.S.C. § 552(b)(5).⁸ Finally, Lukas was informed that OMD had located approximately 44 boxes and four filing cabinets containing unindexed materials that it believed “may have materials that relate generally to the amnesty option.”⁹ It estimated that to search and review these records would cost \$1300, exceeding the \$700 maximum search fee Lukas agreed to pay in his FOIA Request. Therefore, the Managing Director requested that Lukas provide guidance on how he wished to proceed.¹⁰ Lukas did not respond to that request but instead filed an application for review of the Managing Director’s decision, purportedly on behalf of GCW.¹¹ The AFR argues in the main that “OMD produced no record whatsoever to show whether or not monies had been refunded to Meretel.”¹² Lukas also contends that the initial FOIA determination failed to justify withholding records under FOIA Exemption 5 and did not segregate and release the factual portions of the records withheld.¹³

Discussion

3. Identity of Applicant for Review. This FOIA request was filed by Lukas personally, not on behalf of GCW.¹⁴ Only Lukas’s name appears on the FOIA request; nowhere in the FOIA request does Lukas indicate that the request was filed on behalf of GCW.¹⁵ The AFR, in contrast, was purportedly filed on behalf of GCW “by its attorneys,” Lukas and Nace.¹⁶ Under our rules, with an exception not relevant here, an application for review may be “filed only by the person who made the [initial FOIA] request.”¹⁷ This is consistent with the FOIA itself, which provides that an initial FOIA decision must “notify the person making such request . . . of the *right of such person to appeal* to the head of the agency any adverse determination.”¹⁸ As Lukas was the only person who made the initial FOIA request in this matter, he is the only person who may file an application for review.¹⁹ GCW accordingly is not a proper party to the application for review. Nace, whose name appears with Lukas in the signatory block to the AFR, is also not a proper party to the application for review, as he was not a requesting party in the initial FOIA and claims only to represent GCW. We therefore consider the AFR to have been filed by Lukas in his personal capacity.

⁸ FOIA Decision at 1-2 (*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) and *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)).

⁹ FOIA Decision at 2.

¹⁰ *Id.* Under our FOIA rules, a requester must state the amount of FOIA fees it is willing to pay. 47 C.F.R. § 0.461(b)(2). If the estimated amount of the FOIA fees exceeds the amount stated by a requester, the requester is provided the opportunity to agree to pay the amount, or to clarify or limit its FOIA request. 47 C.F.R. § 0.467(e).

¹¹ AFR at 1.

¹² *Id.* at 3.

¹³ *Id.* at 4.

¹⁴ See FOIA Request at 2.

¹⁵ See generally 47 C.F.R. § 1.23(a) (permitting parties to be represented by counsel before the Commission) and 47 C.F.R. § 1.23(b) (“Further proof of authority to act in a representative capacity may be required.”).

¹⁶ See AFR at 1, 4.

¹⁷ 47 C.F.R. § 0.461(j). See also 47 C.F.R. §§ 0.461(a)(1), (a)(2), (b)(1) (all referring to “the person requesting” the records).

¹⁸ 5 U.S.C. § 552(a)(6)(A)(ii) (emphasis supplied).

¹⁹ See *McDonnell v. United States*, 4 F.3d 1227, 1237-38 (3d Cir. 1993) (holding that person whose name does not appear on the FOIA request does not have standing to seek review); *Archibald v. Roche*, No. 01-1492, slip op. at 1-2 (D.D.C. Mar. 29, 2002) (concluding that the FOIA request “appears to [have been] filed on behalf of the attorney” who signed the request, rather than on behalf of the client, because “nowhere in [the request] does [the attorney] ever state that he [was] filing this request on behalf of” the client).

4. Records That Should Have Been Released. We have reviewed the records withheld by the Managing Director. Among the 103 pages of records withheld we located 16 pages of records that were identical to those released to Lukas by the Managing Director and therefore should not have been counted among the withheld records. We also discovered 13 pages of records concerning Meretel derived from the Universal Licensing System (ULS) that are publicly available on the ULS. Lukas should have been informed of the availability of this material on ULS,²⁰ and the pages should not have been counted among the records withheld. Furthermore, we have determined that two pages among the records withheld are not responsive to Lukas' FOIA request.

5. This leaves 72 pages of withheld records. Based on our review, we determine that 18 pages should be released. Of these records, 16 pages are of a similar type to records already released to Lukas and should have been provided to him. Ten of these 16 pages are forms entitled "Amnesty" indicating refund amounts. Five pages are database screens reflecting information in the "Amnesty" forms. Finally, one page is a summary of the costs for UCC filings for Meretel loans. These 16 pages will now be provided to Lukas. We will also release two pages of OMD forms entitled "Bureau/Fee Section Two-Way Correspondence Form" that are used as cover sheets for documents supporting the decisionmaking process underlying the processing of refund requests. These two pages contain purely factual information about the amount claimed for the named licenses under the amnesty program (*see* paragraph 2, *supra*) and the UCC filing fees.

6. Records Properly Withheld. Of the remaining 54 pages of records, we agree with the Managing Director that six pages are deliberative process information properly withheld under FOIA Exemption 5. We further conclude that the other 48 pages are confidential commercial information properly withheld under FOIA Exemption 4, 5 U.S.C. § 552(b)(4).

7. 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.²¹ Such material may be withheld under Exemption 5 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.²² The six pages withheld here under Exemption 5 consist of staff analyses of GCW's correspondence with the Managing Director regarding refunds claims of Meretel.²³ These pages fall squarely within the scope of Exemption 5.

8. Lukas claims that OMD failed to release segregated factual portions of the materials withheld under FOIA Exemption 5.²⁴ The Bureau or Office handling the initial FOIA request routinely reviews all records to determine whether there are any segregable portions, as required by the FOIA, 5 U.S.C. § 552(b) (sentence immediately following exemptions).²⁵ The FOIA only requires "reasonable" segregation and the release of nonexempt materials. Thus, agencies are permitted to withhold the entire record where nonexempt material is so "inextricably intertwined" that disclosure would "leave only

²⁰ See <http://wireless.fcc.gov/auctions/default.htm?job=auctions_home> to search publicly available Form 175 data for Meretel.

²¹ See *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 150.

²² *Id.*

²³ See letter from Diane L. Crochet, Esq., Kantrow, Spaht, Weaver & Blitzer to Andrew Fishel (Mar. 17, 2005) (Crochet Letter) (concerning claims for refunds) and letter from David L. Nace to Rita Cookmeyer, FCC (Aug. 24, 2005) (notifying the Commission of change of counsel representing GCW).

²⁴ AFR at 4.

²⁵ See 47 C.F.R. § 0.461(f)(5) ("If there is a statutory basis for withholding part of a document only from inspection, that part will be deleted and the remainder will be made available for inspection.").

essentially meaningless words and phrases.”²⁶ We have again reviewed the six pages of records withheld from Lukas under Exemption 5. Based on our review of the records, with the exception of one e-mail transmitting the Crochet Letter²⁷ that is part of an e-mail chain and will be segregated and released, we conclude that there is no reasonably segregable factual material subject to release. Disclosure of even portions of these documents would result in an unwarranted intrusion into the Commission’s deliberative process.²⁸

9. The additional 48 pages of records withheld by OMD consist of two groups of records, both of which are withheld from disclosure pursuant to FOIA Exemption 4.²⁹ The first group of six pages consists of four pages of FCC Remittance Advice forms (FCC Form 159) and two pages of facsimile cover sheets naming Meretel as the applicant and identifying the payor and the payment history of the debt on the identified licenses. The second group of 42 pages consists of printouts of screens from the FCC’s collections databases that reflect both payor identification and payment history for the licenses that were the subject of Lukas’s FOIA. Payor identification information and payment history is confidential commercial information properly withheld from public release pursuant to FOIA Exemption 4.³⁰ Information concerning the identity of who makes payments on debt, and the timing of those payments, is the type of information private companies do not normally divulge publicly. For example, the fact that an entity other than the licensee is paying the debt, or the timing of the payment of the debt, could reflect confidential information regarding the licensee’s business relationships and financial status. While Meretel itself or its authorized representative is entitled to receive its own confidential commercial records in our possession, Lukas, the individual who filed the FOIA request and the applicant for review here, is not entitled to receive this confidential commercial information. We also note that even if GCW were the FOIA requester in this proceeding, GCW’s status as successor in interest to Meretel is in dispute in connection with claims concerning refunds under the C Block amnesty program.³¹ We are therefore withholding these 48 pages pursuant to FOIA Exemption 4. In addition, we have reviewed the Exemption 4 materials to determine if any parts may be released and determined that redaction of payor name and payment history information would leave essentially useless information. However, we will provide Lukas with a copy of a blank FCC Form 159 that was in effect in 1998.

10. Lukas also argues that “OMD produced no records whatsoever to show whether or not monies had been refunded to Meretel.”³² Lukas asserts that “it is highly unlikely” that the only records of attempts to wire funds to Meretel existed in the intra-Commission documents withheld by the Managing

²⁶ See *Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12731 (2004), citing *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981).

²⁷ See footnote 23, *supra*.

²⁸ 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).

²⁹ The Managing Director did not rely on Exemption 4 in his FOIA Decision. However, we may rely on a different FOIA exemption when we review initial FOIA decisions. See generally *Oglesby v. United States Dep’t of the Army*, 920 F.2d 57, 61 (D.C. Cir. 1990) (“The exhaustion requirement also allows the top managers of an agency to correct mistakes made at lower levels and thereby obviates unnecessary judicial review.”), citing *McKart v. United States*, 395 U.S. 185, 194 (1969).

³⁰ See generally *Qwest Commun. Internat’l, Inc. v. FCC*, 229 F.3d 1172, 1881 (D.C. Cir. 2000) (Commission has ordered the release of confidential financial information only in a proceeding in which a party has placed its financial condition at issue). Cf. *National Parks and Conservation Ass’n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) and *Timken Co. v. United States Customs Serv.*, 491 F. Supp. 557, 559-60 (D.D.C. 1980) (both indicating that business strategies and marketing plans exempt from disclosure under FOIA Exemption 4).

³¹ See CFO Letter, *supra* n. 3.

³² AFR at 3.

Director. As noted above, there remain a large volume of records not yet searched pending Lukas's agreement to pay the search and review fees³³ that may contain records pertaining to any attempts to wire refunds to Meretel.³⁴ In addition, our review of the records withheld under FOIA Exemption 5 indicates that these records address the Meretel request for refunds (*see* footnote 23, *supra*). The records we withhold under FOIA Exemption 4 involve payments on behalf of Meretel, and therefore do not include records of attempts to wire refund monies to Meretel.

11. IT IS ORDERED that the application for review by Russell D. Lukas IS GRANTED IN PART AND DENIED IN PART. Russell D. Lukas may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³³ See letter from Russell D. Lukas, Esq. to Marvin Washington, OMD (Jan. 4, 2006) and footnote 12, *supra*.

³⁴ AFR at 3.