

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

In the Matter of)	
)	
DANIEL E. RIORDAN,)	
ON-TECH CONSULTING, INC.,)	FOIA Control No. 2006-364
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 2007

Released: February 27, 2007

By the Commission:

1. The Commission has before it an application for review filed by Daniel E. Riordan, President of On-Tech Consulting, Inc., of the denial by the Wireline Competition Bureau (WCB or Bureau) of his Freedom of Information Act (FOIA) request. We deny the application for review.

I. BACKGROUND

2. Riordan initially filed a FOIA request for “the application processing procedures which the Wireline Competition Bureau recently . . . approved for use by the Schools and Libraries Division (SLD) of the Universal Service Administrative Company (USAC) in processing applications for funding under the Schools and Libraries Program of the Universal Service Fund [USF] . . . for Program Year 2006.”¹ WCB denied his request and withheld the Schools and Libraries Program Integrity Assurance FCC Form 471 Review Procedures for Fiscal Year 2006 (*PIA Form 471 Procedures*)² pursuant to FOIA Exemptions 2 and 7(E), 5 U.S.C. §§ 552(b)(2) and 552(b)(7)(E).³ The Bureau explained that release of these records “would supply detailed information concerning the review process and provide a blueprint for those wishing to frustrate or defeat such reviews.”⁴ WCB stated release “would undermine USAC’s (acting on behalf of the Commission) investigatory process.”⁵

3. Riordan then filed a second FOIA request.⁶ This request posed questions seeking “clarification” of the response to his earlier FOIA request.⁷ He also asked for the release of any

¹ FOIA Control No. 2006-221 (Mar. 6, 2006).

² USAC asserted the confidentiality of the PIA Form 471 Procedures when it submitted the document to the Bureau. *See* Letter from Mel Blackwell, Acting Vice President, Schools and Libraries Division, USAC to Narda Jones, Chief, Telecommunications Access Policy Division, WCB (Jan. 20, 2006), at 2 (the document “relates to [USAC’s] internal operating procedures in the Schools and Libraries program and public disclosure of those procedures would compromise program integrity and compromise USAC’s ability to protect the USF against waste, fraud and abuse”).

³ Letter from Kirk S. Burgee, Associate Bureau Chief, WCB, to Dan Riordan (Apr. 4, 2006).

⁴ *Id.*

⁵ *Id.* (citing *Inter-Tel Technologies, Inc.*, 19 FCC Rcd 5204, 5206 (2004)).

⁶ FOIA Control No. 2006-364 (May 17, 2006). Riordan could have filed an application for review of FOIA 2006-221, *see* 47 C.F.R. § 0.461(j), but chose to file this second request.

⁷ Specifically, he asked for confirmation that procedures used by USAC are internal FCC procedures under FOIA Exemption 2, and that under FOIA Exemption 7(E) USAC had been given law enforcement responsibility. *Id.*

segregable portions of the record and the total number of pages withheld in FOIA Control No. 2006-221. WCB again denied his request, restating the conclusions it had reached earlier as to why it would not release the *PIA Form 471 Procedures*.⁸ The Bureau refused to respond to Riordan's questions because "[t]he FOIA is a means to obtain records from a federal agency, not to obtain answers to questions."⁹ The Bureau also reviewed the *PIA Form 471 Procedures* and determined that there were no segregable portions that could be released.¹⁰ WCB did, however, indicate that a total of approximately 700 pages were withheld.¹¹ Riordan sought review of the Bureau's decision.¹²

II. DISCUSSION

4. We find no reason to disturb the Bureau's determination that the *PIA Form 471 Procedures* should be withheld under FOIA Exemption 7(E) or alternatively under FOIA Exemption 2.

A. Exemption 7(E)

5. Exemption 7(E) protects all law enforcement "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."¹³ This exemption provides categorical protection to information related to law enforcement techniques.¹⁴

6. Exemption 7(E) is applicable to the *PIA Form 471 Procedures* because the term "law enforcement" as used in that exemption includes the FCC's enforcement responsibilities under Section 254 of the Communications Act, as amended.¹⁵ The manual sought here is used to review applications for funding from the USF to protect the integrity of the program. That review ensures that the program is administered and applications are granted in accordance with the law and implementing regulations. Violations noted in this review process often result in enforcement pursuant to section 254.¹⁶

7. As we have discussed twice before, the procedures used by USAC to review applications for funding from the USF and the records of those reviews are highly sensitive and, if released, would cause great damage to the e-rate program.¹⁷ In both *Inter-Tel Technologies* and *Harrington-Lueker*, we

⁸ Letter from Kirk Burgee to Dan Riordan (June 13, 2006), citing FOIA Exemptions 2 and 7(E).

⁹ *Id.* (citing *Zemansky v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985)).

¹⁰ *Id.*

¹¹ *Id.* See 5 U.S.C. § 552(a)(6)(F) (requiring that if records are withheld an agency must provide an estimate of the amount of denied information, unless doing so would undermine the protection provided by the exemption).

¹² Letter from Daniel E. Riordan, President, On-Tech Consulting, Inc., to Office of General Counsel (June 26, 2006) (AFR).

¹³ 5 U.S.C. § 552(b)(7)(E).

¹⁴ *Fisher v. U.S. Dep't of Justice*, 772 F. Supp. 7, 12 n.9 (D.D.C. 1991), *aff'd*, 968 F.2d 92 (D.C. Cir. 1992).

¹⁵ 47 U.S.C. § 254. See *Schiller v. INS*, 205 F. Supp. 2d 648, 659 (W.D. Tex. 2002) (law enforcement for purposes of FOIA includes regulatory proceedings); see also *J. David Stoner*, 5 FCC Rcd 6458, 6460 (1990) ("Exemption 7 threshold met because enforcement of relevant law is within the statutory authority" of the Commission); *RCA Global Communications, Inc.*, 83 F.C.C.2d 356, 357 (1980) (same).

¹⁶ See *Schools and Libraries Universal Service Support Mechanism*, 19 FCC Rcd 15808, 15813-22 (2004) (*Fifth Report & Order*) (discussing section 254 enforcement in the context of the schools and libraries program "to ensure program integrity and to detect and deter waste, fraud and abuse").

¹⁷ *Inter-Tel Technologies*, 19 FCC Rcd at 5205-06; *Donna Harrington-Lueker*, 16 FCC Rcd 16591 (2001).

withheld records that were part of the Schools and Library Division's selective review process because release of the individual review records would reveal the techniques and guidelines for conducting reviews of applications.¹⁸ Riordan provides no reason to depart from our precedents. The manual at issue here contains guidelines for both application review and PIA review. Thus, there is an even more compelling reason to withhold the record than in prior cases because Riordan here seeks the guidelines for review themselves, not just records from which such guidelines could be gleaned. It is hard to imagine a clearer "blueprint for those wishing to frustrate or defeat such reviews."¹⁹

8. Riordan claims that the exemption is not applicable to this record because it is "used for routine audit and compliance purposes" and not yet "used for a law enforcement purpose."²⁰ However, as we have explained, the *PIA Form 471 Procedures* are used for law enforcement purposes. It thus meets the threshold criteria of Exemption 7.²¹ Therefore, the document at issue here is compiled for a law enforcement purpose.

9. Riordan asserts that Exemption 7(E) does not apply to this record because USAC is either "a private company that has been named administrator of the program" or "a private subcontractor" and therefore does not qualify as a law enforcement agency under the FOIA Exemption.²² It is true that USAC is a not-for-profit corporation appointed by the FCC as the "permanent Administrator of the federal universal service mechanisms."²³ Contrary to Riordan's assertion, however, this fact does not render Exemption 7(E) inapplicable to his request. USAC must act in accordance with the Commission's orders, rules and directives, and it is clear that the FCC has authorized USAC to review applications in the course of its administration of the program.²⁴ In this regard, USAC acts under the FCC's oversight²⁵ and its actions regarding applications are subject to FCC review.²⁶ Thus, USAC's actions in reviewing applications are performed under the FCC's authority to ensure that the e-rate program is administered in accordance with all applicable law. Indeed, the *PIA Form 471 Procedures* document sought by Riordan was reviewed and approved by WCB.²⁷ It is therefore an agency record that was created or obtained by

¹⁸ *Inter-Tel Technologies*, 19 FCC Rcd at 5205-06; *Harrington-Lueker*, 16 FCC Rcd at 16592.

¹⁹ *Inter-Tel Technologies*, 19 FCC Rcd at 5206, citing *Harrington-Lueker*, 16 FCC Rcd at 16592.

²⁰ AFR at 2, citing *John Doe Agency v. John Doe Corp.*, 493 U.S. 146 (1989) (*John Doe Agency*). *John Doe Agency* held that documents originally compiled for non-law enforcement purposes could be gathered later for law enforcement purposes. 493 U.S. at 154. In reaching this conclusion, the Court observed that the FOIA requester itself recognized that the documents compiled once for the purpose of routine audits was not disqualified from being compiled again later for a different purpose. *Id.* The Court did not say that a routine audit manual could never have a law enforcement purpose. Other cases have recognized that guidelines that serve an auditing function can fall into the category of law enforcement material. See, e.g., *Dirksen v. United States Dep't of Health and Human Svcs*, 803 F.2d 1456, 1459 (9th Cir. 1986) (*Dirksen*) (Exemption 2 case).

²¹ See *Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002) (under Exemption 7(E), "an agency may seek to block the disclosure of internal agency materials relating to guidelines . . . and procedures for law enforcement investigations and prosecutions, even when the materials have not been compiled in the course of a specific investigation. See, e.g., *PHE, Inc. v. Dep't of Justice*, 983 F.2d 248, 250-51 (D.C. Cir. 1993) . . ."). This formulation is consistent with *John Doe Agency*, 493 U.S. at 153, where the Court observed that "[t]he objects sought merely must have been 'compiled' when the Government invokes the Exemption."

²² AFR at 1, 2.

²³ 47 C.F.R. § 54.701.

²⁴ See *Fifth Report & Order*, 19 FCC Rcd at 15810.

²⁵ See *id.*, 19 FCC Rcd at 15808, 15809, 15811, 15817 & n.49, 15819, 15830 and 15835.

²⁶ 47 C.F.R. §§ 54.722 and 54.723.

²⁷ See *Fifth Report & Order*, 19 FCC Rcd at 15809 and 15835.

the FCC and is under the agency's control.²⁸ Therefore, we do not agree with Riordan that Exemption 7(E) is inapplicable.

B. Exemption 2

10. Alternatively, we believe the *PIA Form 471 Procedures* may properly be withheld pursuant to FOIA Exemption 2, which exempts from mandatory disclosure records that are "related solely to the internal personnel rules and practices of an agency."²⁹ Riordan claims Exemption 2 is not applicable here because the relevant document does not involve "'personnel' policies or procedures."³⁰ However, the courts have made clear that the language of Exemption 2 embraces a variety of internal rules, procedures, and guidelines, and does not reach only "personnel" matters.³¹ Thus, we conclude the *PIA Form 471 Procedures* qualifies for consideration under Exemption 2.

11. Exemption 2 encompasses two types of records – records of internal matters of a relatively trivial nature, often referred to as "low 2" records, and records of more substantial internal matters that, if disclosed, would risk circumvention of a statute or agency regulation, commonly referred to as "high 2" records.³² The *PIA Form 471 Procedures* document sought by Riordan is properly withheld under the standards of "high 2."³³ Under the "high 2" analysis, sensitive materials are exempt from mandatory disclosure if the requested document is predominantly internal,³⁴ it involves no "secret law" of the agency,³⁵ and disclosure "significantly risks circumvention of agency regulations or statutes."³⁶ Whether there is a public interest in disclosure is not determinative,³⁷ instead, we must determine whether disclosure would "benefit those attempting to violate the law and avoid detection."³⁸

12. Contrary to Riordan's assertion,³⁹ the *PIA Form 471 Procedures* is a "predominantly internal" document that qualifies for exemption from disclosure under the "high 2" analysis.⁴⁰ Riordan

²⁸ See, e.g., *Burka v. Dep't of Health & Human Svcs*, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding data tapes created and possessed by a contractor to be agency records because of extensive supervision exercised by agency which evidenced "constructive control").

²⁹ 5 U.S.C. § 552(b)(2).

³⁰ AFR at 1.

³¹ E.g., *Founding Church of Scientology v. Smith*, 721 F.2d 828, 829-30 & n.2 (D.C. Cir. 1983) citing *Crooker v. ATF*, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (*en banc*) (*Crooker*); see also *Dawson B. Nail*, 6 FCC Rcd 7014 (1991).

³² See, e.g., *Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992) (describing "low 2" and "high 2" aspects of Exemption 2).

³³ We agree with Riordan (AFR at 1) that "low 2" is not applicable to the manual.

³⁴ See, e.g., *Crooker*, 670 F.2d at 1074; see also *Kaganove v. EPA*, 856 F.2d 884, 886-87 (7th Cir. 1988) (noting that subsequent amendment of FOIA codified *Crooker*), *cert. den.*, 488 U.S. 1011 (1989) (*Kaganove*).

³⁵ *Crooker*, 670 F.2d at 1073.

³⁶ *Crooker*, 670 F.2d at 1074; *Schiller v. NLRB*, 964 F.2d at 1208.

³⁷ See *Voinche v. FBI*, 940 F. Supp. 323, 328 (D.C. Cir. 1996), *aff'd per curiam*, No. 96-5304 (D.C. Cir. June 19, 1997), citing *Kaganove*, 856 F.2d at 888-89 and *Institute for Policy Studies v. Dep't of the Air Force*, 676 F. Supp. 3, 5 (D.D.C. 1987). See also *Crooker*, 670 F.2d at 1074 (it is not up to a court to balance public interest against any reason for avoiding disclosure). Thus, Riordan's assertion (AFR at 1) regarding the "genuine and significant public interest" in the e-rate program is not determinative.

³⁸ *Crooker*, 670 F.2d at 1054.

³⁹ AFR at 1.

⁴⁰ See *Crooker*, 670 F.2d at 1074.

asserts that the record does not meet this standard because it is used “in deciding whether to proceed against or to take action affecting members of the public.”⁴¹ But the legal standards for e-rate applications are set forth in the regulations and applications, not in the *PIA Form 471 Procedures*. The *PIA Form 471 Procedures* establishes staff review techniques for e-rate applications and is thus much like the Medicare Policy Guidelines found to be exempt from disclosure under Exemption 2 in *Dirksen*.⁴² The guidelines at issue in *Dirksen* were designed “to determine whether, at the first stage of claims processing, claims for billed services should be paid, denied, or reviewed more closely.”⁴³ The court readily found these guidelines to be internal, noting “they merely categorize for speed in processing, which claims are to be automatically granted, denied, or reviewed in more detail.”⁴⁴ The *PIA Form 471 Procedures* document is also like the guidelines for oversight of student financial aid programs found by the court in *Wiesenfelder* to be predominantly internal under FOIA Exemption 2 because the guidelines were used for enforcement purposes only. The guidelines in *Wiesenfelder* “alerted the Department that an educational institution may be seriously mismanaging its Title IV funds,” and provided “internal guidance to staff about how, when and where they should concentrate their regulatory oversight.”⁴⁵

13. We also conclude that the *PIA Form 471 Procedures* satisfies the second part of the “high 2” analysis – that disclosure would “significantly risk[] circumvention of agency regulations or statutes.”⁴⁶ As we have already explained, release of the *PIA Form 471 Procedures* would reveal the techniques and guidelines for conducting reviews of applications.⁴⁷ Thus, in addition to Exemption 7(E), the record is properly withheld under Exemption 2.

⁴¹ AFR at 1, citing *Crooker v. ATF* [sic], 601 F.2d 1, 5 (D.C. Cir. 1979). The name of the case cited by Riordan in the AFR is actually *Cox v. United States Dep’t of Justice*, an Exemption 2 decision that was later specifically rejected by the District of Columbia Circuit on other grounds in *Benavides v. Bureau of Prisons*, 993 F.2d 257, 258-59 (D.C. Cir. 1993). Riordan cites *Cox*, 601 F.2d at 5, for the proposition that a record cannot be deemed predominantly internal “if it sets standards used ‘in deciding whether to proceed against or take action affecting members of the public.’” We note that *Cox* held that the manual in question was exempt from disclosure under Exemption 2. 601 F.2d at 5. See also *Crooker*, 670 F.2d at 1081 (MacKinnon, J., concurring) (“no federal court has ever required the disclosure of a law enforcement manual, such as we have here, where the court found that disclosure would enable violators to escape detection”). In addition we note that, the United States District Court for the District of Columbia has subsequently recognized that Exemption 2 guidelines may provide guidance to staff about how, when, and where they should concentrate regulatory oversight. See *Wiesenfelder v. Riley*, 959 F. Supp. 532, 535-37 (D.D.C. 1997) (*Wiesenfelder*).

⁴² 803 F.2d 1456 (9th Cir. 1986). See also *Crooker*, 670 F.2d at 1073 .

⁴³ *Dirksen*, 803 F.2d at 1457.

⁴⁴ *Id.* at 1458.

⁴⁵ 959 F. Supp. at 536-37. See also *Windels, Marx, Davies & Ives v. Dep’t of Commerce*, 576 F. Supp. 405, 412 (D.D.C. 1983) (computer program predominantly internal where it detects possible violations but makes no attempt to modify or regulate public behavior).

⁴⁶ See *Crooker*, 670 F.2d at 1073-74 (BATF manual on investigative techniques could be used to evade the law); *Dirksen*, 803 F.2d at 1458-59 (“Nor is it difficult to believe that, upon the submission of a barrage of claims fashioned to conform to the [Medicare Policy] Guidelines, the Guidelines would lose the utility they were intended to provide”); *Ginsburg, Feldman & Bress v. Federal Energy Admin.*, 591 F.2d 717, 730 (D.C. Cir.) (“To turn such manuals over to those who are the subject of regulatory supervision is to dig a den for the fox inside the chicken coop”), *aff’d en banc and per curiam by an equally divided court*, 591 F.2d 752 (D.C. Cir. 1978), *cert. den.*, 441 U.S. 906 (1979).

⁴⁷ See paragraphs 6-7, *supra*, citing *Inter-Tel Technologies*, 19 FCC Rcd at 5205-06 and *Harrington-Lueker*, 16 FCC Rcd at 16592.

C. *Segregability of Records*

14. Finally, Riordan seeks release of “reasonably segregable portions of the guidelines which do not pose a risk of circumvention of the law” if released.⁴⁸ Agencies may withhold the entire record where nonexempt material is so “inextricably intertwined” that disclosure would “leave only essentially meaningless words and phrases.”⁴⁹ As one court recently observed in declining to order the agency to segregate nonexempt information, “[t]he necessary redaction would require the agency to commit significant time and resources to a task that would yield a product with little, if any, informational value.”⁵⁰ We have reviewed the *PIA Form 471 Procedures* and conclude that each page is replete with details of the process for reviewing the many categories of applications. Our review of the document confirms that there are no reasonably segregable portions that may be released to Riordan without revealing the procedures utilized by USAC that could be used to circumvent the law. Moreover, our review of the documents confirms that each page is replete with details of the process for reviewing the many categories of applications. We therefore deny Riordan’s request for release of any portions of the record.

III. ORDERING CLAUSES

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

16. 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

⁴⁸ AFR at 2.

⁴⁹ *E.g., Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981).

⁵⁰ *Assassination Archives & Research Center v. CIA*, 177 F. Supp.2d 1, 9 (D.D.C. 2001).