

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

In the Matter of)	
)	
JOHN DUNBAR, THE ASSOCIATED PRESS)	FOIA Control No. 2007-461
)	
On Requests for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2008

Released: June 18, 2008

By the Commission:

1. The Commission has before it an application for review¹ (AFR) by John Dunbar of the Associated Press of the decision of the Public Safety and Homeland Security Bureau (the Bureau) denying his “request for a copy of the Second Report and Order regarding the service rules for the 700 megahertz auction . . . as approved by the Commission on July 31, 2007, prior to editorial revisions.”² We deny the AFR.

2. The Bureau withheld the 700 MHz draft voted by the Commission at its open meeting on July 31, 2007, pursuant to the deliberative process privilege of FOIA Exemption 5.³ The Bureau explained that “[t]he document that was before the Commission on July 31, 2007 is not the same document that was released to the public on August 10, 2007.⁴ The July 31, 2007 document was a draft generated as part of the continuing process of agency decision-making, whereas the publicly-released document⁵ reflects the Commission’s final deliberations and editorial changes.”⁶

3. The deliberative process included in FOIA Exemption 5 permits the Commission to withhold materials that both are predecisional and reflect the agency’s consultative process.⁷ The Bureau correctly concluded that the draft submitted to the Commission for the July 31, 2007 vote was a predecisional deliberative document properly withheld under FOIA Exemption 5. When the Commission votes to adopt an item at an open meeting, the Commission’s deliberations concerning the item are not at an end. Following adoption of an item, the Commissioners may continue to consider possible edits to the item until all Commissioners in the majority agree on the language of the draft to be released.⁸ This

¹ Letter from John Dunbar, Associated Press, to Laurence Schecker, Office of General Counsel (Oct. 2, 2007).

² E-mail from John Dunbar to FOIA@fcc.gov (Aug. 7, 2007) (FOIA Control No. 2007-461).

³ Letter from Thomas J. Beers, Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau, to John Dunbar (Sept. 6, 2007) (Decision), at 1, *citing* 5 U.S.C. § 552(b)(5) (FOIA Exemption 5) (“[I]nter-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”).

⁴ *Id.*

⁵ *Service Rules for the 698-746, 747-762 and 777-792 MHz Bands*, 22 FCC Rcd 15289 (Aug. 10, 2007) (*700 MHz Service Rules*).

⁶ Decision at 1.

⁷ *See, e.g., Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

⁸ *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17261 n.1396 (2003) (citing Commission precedent for post-adoption edit process and explaining that post-

practice is consistent with the practice of other agencies as confirmed by the courts.⁹ Thus, the fact that the Commission voted at the July 31, 2007 meeting to adopt the draft report and order does not, as Dunbar claims, make the draft a final, decisional document which would not be protected from release by Exemption 5.¹⁰ Further, it is the Commission's usual practice to withhold draft decisions that are subject to continued deliberations pursuant to FOIA Exemption 5 to protect the deliberative process of the agency.¹¹ We decline to depart from that practice here. We also disagree with Dunbar's contention that "not releasing the text of the rule at the meeting is detrimental to the public interest."¹² In fact, the final editorial process results in well thought-out decisions of a higher quality.¹³ Release of the item still in draft form, followed by a final version after all post-adoption editing is complete, could result in public confusion and would be contrary to the public interest.¹⁴

4. Finally, Dunbar asks that we release "any reasonably segregable portion[s]" of the item voted at the open meeting.¹⁵ While FOIA Exemption 5 does not apply to purely factual materials, only factual materials severable from their context must be released.¹⁶ There are some factual statements in the draft item, but these materials are inextricably intertwined with the deliberative process portions of the

(...continued from previous page)

adoption edits "improved this order and in turn resulted in a higher quality product"), *vacated in part on other grounds sub nom., U.S. Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied sub nom., NARUC v. U.S. Telecom. Ass'n*, 543 U.S. 925 (2004); *Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3021 (1987) ("[T]he 'deliberative process' does not end with the public announcement of the Commission's action, but only after release of the authoritative text of its decision. Oftentimes what ensues between these actions is an editorial process among the staff and individual Commission members that results in final refinements of the rules and the order itself."); *Addition of New Section 1.103 to the Commission's Rules of Practice and Procedures; Amendments to Section 1.4(b) of Those Rules*, 85 F.C.C.2d 618, 625 (1981) ("Oftentimes, an Order adopted at a Commission meeting becomes subject to editorial changes after its adoption but prior to its release.").

⁹ See, e.g., *LO Shippers Action Committee v. ICC*, 857 F.2d 802, 805 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1089 (1989) (rejecting petitioner's claim that the Interstate Commerce Commission's (ICC's) vote at a public conference was the decision and therefore the agency's subsequent published decision should be disregarded, noting that "[t]he ICC's formal opinion is its decision because the commissioners retained full authority to approve, disapprove, or modify it until published."). See also *Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (separate opinion of Randolph, J.) ("[I]t is a misnomer to call the vote after oral argument an agency 'decision' Up to the point of announcement, agency decisions are freely changeable, as are the bases of those decisions. . . . In agencies as in courts, votes are not final until decisions are final; and decisions do not become final until they are released, accompanied by an explanation of the reasons for the result."), *citing Pan American World Airways, Inc. v. CAB*, 684 F.2d 31, 36 n.12 (D.C. Cir. 1982) (per curiam).

¹⁰ See AFR at 2.

¹¹ Decision at 1, *citing Norcom Communications Corp.*, 14 FCC Rcd 8055, 8057 (1999). See also *Kansas State Network, Inc. v. FCC*, 720 F.2d 185, 191 (D.C. Cir. 1983) ("[T]he predecisional process leading to an agency decision . . . is worthy of protection where a formal opinion is issued."), *citing United States v. Exxon Corp.*, 87 F.R.D. 624, 636 (D.D.C. 1980).

¹² See AFR at 2.

¹³ *Review of the Section 251 Unbundling Obligations*, 18 FCC Rcd at 17261 n.1396.

¹⁴ See, e.g., *Jordan v. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc) (Exemption 5 "prevents public confusion from premature disclosure of agency opinions before the agency establishes final policy").

¹⁵ AFR at 2.

¹⁶ *EPA v. Mink*, 410 U.S. 73, 87-88 (1973); *Mead Data Central, Inc. v. U.S. Dep't of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

records and cannot be practicably segregated and released. Our review of the draft confirms that it would be impractical to segregate any factual or non-deliberative portions of the record withheld by the Bureau.

5. 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