

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

In the Matter of	)	
	)	
MICHAEL RAVNITZKY	)	FOIA Control Nos. 2007-397 and 2007-432
	)	
On Requests for Inspection of Records	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 5, 2008**

**Released: March 7, 2008**

By the Commission:

**I. INTRODUCTION**

1. The Commission has before it three applications for review (AFRs) filed by Michael Ravnitzky of the decisions denying in part his Freedom of Information Act (FOIA) requests for records related to the processing of the FOIA request filed by the National Association of Broadcasters (NAB) for certain records concerning XM Radio, Inc. and Sirius Satellite Radio, Inc.<sup>1</sup> We deny two of Ravnitzky's AFRs and dismiss the third AFR as moot.

**II. BACKGROUND**

2. On May 25, 2007, Ravnitzky filed a FOIA request seeking "the administrative tracking file" for the NAB FOIA (2007-235).<sup>2</sup> The Enforcement Bureau (EB) granted in part and denied in part his request, providing Ravnitzky with 28 pages of records, but withholding 34 pages of internal Commission e-mails pursuant to FOIA Exemption 5.<sup>3</sup> Ravnitzky filed an AFR of EB's decision.<sup>4</sup>

3. On July 16, 2007, Ravnitzky filed another FOIA request for NAB FOIA-related records, restricted to those records dated or originated after June 5, 2007.<sup>5</sup> EB responded that it located "no responsive records."<sup>6</sup> Ravnitzky filed an AFR of the second EB decision.<sup>7</sup> Upon receipt of this AFR, the Office of General Counsel (OGC) issued a supplemental response to the July 16, 2007 FOIA request providing Ravnitzky with nine additional records consisting of hundreds of pages of pleadings related to the application(s) for review filed with respect to the NAB-related FOIA but withholding approximately 60 internal agency e-mails pursuant to FOIA Exemption 5.<sup>8</sup> Ravnitzky sought review of OGC's

<sup>1</sup> Letter from David H. Solomon, Wilkinson Barker Knauer LLP, to Anthony J. Dale, Managing Director (Mar. 22, 2007) (FOIA Control No. 2007-235).

<sup>2</sup> Letter from Michael Ravnitzky to Shoko B. Hair, FOIA Officer (May 25, 2007) (FOIA Control No. 2007-397).

<sup>3</sup> Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, EB, to Michael Ravnitzky (July 12, 2007), *citing* 5 U.S.C. § 552(b)(5).

<sup>4</sup> Letter from Michael Ravnitzky to Office of General Counsel (rec'd July 25, 2007) (2007-397 AFR).

<sup>5</sup> E-mail from Michael Ravnitzky to FOIA@FCC.gov (July 16, 2007) (FOIA Control No. 2007-432).

<sup>6</sup> Letter from Kathryn S. Berthot to Michael Ravnitzky (Sept. 19, 2007).

<sup>7</sup> Letter from Michael Ravnitzky to Office of General Counsel (Sept. 22, 2007) (First 2007-432 AFR).

<sup>8</sup> Letter from Joel Kaufman, Associate General Counsel, to Michael Ravnitzky (Oct. 18, 2007) (1st Supplemental 2007-432 Response). The supplemental response also noted that three additional responsive records were submitted (continued....)

determination by filing another AFR.<sup>9</sup>

### III. DISCUSSION

4. We deny two of Ravnitzky's AFRs and dismiss the third AFR as moot. Ravnitzky offers three arguments in his AFRs. First, Ravnitzky's First 2007-432 AFR only claimed that it was unlikely that there were no records in response to his FOIA request, as stated by EB.<sup>10</sup> OGC's supplemental responses identified various records and provided Ravnitzky with hundreds of pages of records.<sup>11</sup> These responses moot Ravnitzky's First 2007-432 AFR claims, especially given that any continuing concerns by Ravnitzky are set forth in the Second 2007-432 AFR.

5. Second, he claims that portions of the 34 pages withheld by EB and the 60 e-mails withheld by OGC are either "are not actually deliberative," or "are not truly pre-decisional."<sup>12</sup> FOIA Exemption 5 permits the Commission to withhold documents that are part of a continuing process of agency decisionmaking.<sup>13</sup> The pages withheld by EB and OGC consist of e-mails among Bureau staff, or with other Bureaus and OGC, concerning the handling of the NAB FOIA. The e-mails contain staff advice and recommendations concerning the Bureau's proposed decision with respect to the NAB FOIA request and the AFRs in that FOIA proceeding. Therefore, the 34 pages withheld by EB and the 60 e-mails withheld by OGC are properly protected from disclosure under FOIA Exemption 5.<sup>14</sup>

6. Finally, Ravnitzky argues that portions of the records withheld by EB and OGC that are factual, non-deliberative or not pre-decisional should be segregated and released to him, or that as a matter of our discretion we should release the withheld records.<sup>15</sup> While FOIA Exemption 5 does not apply to purely factual materials, only factual materials severable from their context must be released.<sup>16</sup> There are indeed some factual statements in the 34 pages of records withheld by EB and the 60 e-mails withheld by OGC, but these materials are inextricably intertwined with the deliberative process portions of the records and cannot be practicably segregated and released. Our review of the records responsive

---

(...continued from previous page)

with requests for confidential treatment by unnamed XM employees. *Id.* at 2. Therefore, copies of Ravnitzky's FOIA request were served on the unnamed employees pursuant to 47 C.F.R. § 0.461(d)(3). Ravnitzky notified OGC that he did not wish to receive the confidential portions of these three records. *See* Letter from Michael Ravnitzky to Joel Kaufman (Oct. 21, 2007). Subsequently, both the unnamed XM employees and XM Radio submitted oppositions to the second Ravnitzky FOIA, indicating they opposed release of the unredacted records but did not oppose release of redacted records. *See* Letter from Lanny A. Breuer, Covington & Burling LLP, to Joel Kaufman (Nov. 1, 2007) (opposition of unnamed XM employees); Letter from Scott Blake Harris and Mark Grannis, Harris, Wiltshire & Grannis, LLP, to Joel Kaufman (Nov. 13, 2007) (opposition of XM). OGC then released redacted versions of these three records to Ravnitzky. *See* Letter from Joel Kaufman to Michael Ravnitzky (Nov. 18, 2007) (2nd Supplemental 2007-432 Response). Ravnitzky did not seek review of this decision.

<sup>9</sup> Letter from Michael Ravnitzky to Office of General Counsel (Oct. 21, 2007) (Second 2007-432 AFR).

<sup>10</sup> *See* First 2007-432 AFR, at 1 ("Where is the paper?").

<sup>11</sup> *See* 1st Supplemental 2007-432 Response; 2nd Supplemental 2007-432 Response.

<sup>12</sup> 2007-397 AFR at 1; Second 2007-432 AFR at 1.

<sup>13</sup> *See, e.g., Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 868 (D.C. Cir. 1980) (Exemption 5 is applicable to a document that is part of the course of the deliberative process); *see also Michael Ravnitzky*, 16 FCC Rcd 21745, 21747 (2001) (*Ravnitzky*) (same).

<sup>14</sup> *See Ravnitzky*, 16 FCC Rcd at 21747.

<sup>15</sup> 2007-397 AFR at 1; Second 2007-432 AFR at 1-2.

<sup>16</sup> *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).

to Ravnitzky's request here confirms that it would be impractical to segregate any factual or non-deliberative portions of the records withheld by the Bureau.<sup>17</sup> In addition, our review confirms that there are no post-decisional materials in the records withheld from Ravnitzky. We also conclude that discretionary disclosure of the records is not appropriate because "[d]isclosure of the information in question would harm the Commission's interest underlying the deliberative process privilege, which is intended to 'prevent injury to the quality of agency decisions.'"<sup>18</sup>

#### IV. ORDERING CLAUSES

7. IT IS ORDERED that the first application for review in FOIA Control No. 2007-432 by Michael Ravnitzky IS DISMISSED AS MOOT. IT IS FURTHER ORDERED that the application for review in FOIA Control No. 2007-397 and the second application for review in FOIA Control No. 2007-432 by Michael Ravnitzky ARE DENIED. Ravnitzky may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

8. 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

---

<sup>17</sup> Ravnitzky erroneously suggests (Second 2007-432 AFR) that the segregability requirement of the FOIA requires a line-by-line review of the records. See *Doherty v. U.S. Dep't of Justice*, 775 F.2d 49, 53 (2d Cir. 1985) ("[T]he fact that there may be some nonexempt matter in the documents which are predominantly exempt does not require the district court to undertake the burdensome task of analyzing approximately 300 pages of documents, line-by-line."); *Neufeld v. IRS*, 646 F.2d 661, 666 (D.C. Cir. 1981) (segregation is not required when it would "impose significant costs on the agency and produce an edited document of little informational value," citing *Mead Data Central*, 566 F.2d at 260), *overruled on other grounds*, *Church of Scientology of California v. IRS*, 792 F.2d 193 (D.C. Cir. 1986), *aff'd*, 484 U.S. 9 (1987).

<sup>18</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); see also *Ravnitzky*, 16 FCC Rcd at 21748. We note that Ravnitzky did not seek discretionary release of these records in his initial FOIA requests, and as we previously held in *Ravnitzky*, 16 FCC Rcd at 21748, we cannot fault the Bureau or Office handling the initial request for not considering discretionary release of the records. Further, a Bureau or Office handling an initial FOIA request is not authorized to release internal Commission records containing non-public information. See 47 C.F.R. § 19.735-203(a).