

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

In the Matter of )
SHALOV STONE BONNER & ROCCO LLP ) FOIA Control No. 2009-147
On Request for Inspection of Records )

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2009

Released: September 30, 2009

By the Commission:

1. The Commission has before it an application for review (AFR) filed by Susan M. Davies of Shalov Stone Bonner & Rocco LLP (SSBR) of the decision of the Wireline Competition Bureau (the Bureau) responding to SSBR's Freedom of Information Act (FOIA) request for records related to the Rural Telephone Bank (RTB). For the reasons explained below, we deny the AFR.

2. The Bureau located and withheld nine pages of "predecisional e-mail communications" responsive to SSBR's FOIA request based on the deliberative process privilege of FOIA Exemption 5, 5 U.S.C. § 552(b)(5). The Bureau found that there were no segregable portions of the records that could be released. SSBR's AFR challenges the FOIA Decision because it claims the e-mails are not "deliberative."

3. The FOIA Decision did not discuss the predecisional or deliberative nature of the e-mails withheld by the Bureau. Our review of the withheld records indicates that four pages of the records withheld do qualify as deliberative materials under Exemption 5. These pages consist of internal exchanges asking for and transmitting comments on draft language concerning RTB stock related to

1 Letter from Susan M. Davies, SSBR, to Office of General Counsel (Mar. 3, 2009) (AFR).

2 Letter from Susan M. Davies, SSBR, to FCC (Dec. 17, 2008) (FOIA Control No. 2008-147) (FOIA Request). Specifically, SSBR sought records related to the discussion of RTB stock in the decision Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, 4 FCC Rcd 1697 (1989); communications with the National Exchange Carrier Association (NECA) or state regulators concerning the RTB; and records involving specified matters pending before the Regulatory Commission of Alaska, the New York Public Service Commission, and a proceeding in United States District Court for the Eastern District of Arkansas.

3 Letter from Kirk S. Burgee, Chief of Staff, Wireline Competition Bureau, to Susan M. Davies, SSBR (Feb. 18, 2009) (FOIA Decision), at 2.

4 Id.

5 AFR at 1-2.

6 Exemption 5 protects "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." It includes the deliberative process privilege, which is meant to "prevent injury to the quality of agency decisions." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975).

litigation in a sealed case. These four pages reflect the “give and take of the deliberative process” in arriving at the Bureau’s interpretation of applicable rules.<sup>7</sup> These four pages therefore may be withheld under the deliberative process privilege embodied in Exemption 5.

4. These four pages also may be withheld, along with the remaining five pages, under the attorney work product doctrine encompassed within Exemption 5. The purpose of the attorney work product doctrine is to protect the adversarial trial process by insulating materials reflecting an attorney’s preparation from scrutiny.<sup>8</sup> This aspect of Exemption 5 protects documents prepared by an attorney in contemplation of litigation,<sup>9</sup> and applies to the entire documents, including any factual portions.<sup>10</sup> The nine pages withheld by the Bureau were prepared by attorneys or those supervised by attorneys<sup>11</sup> and relate to litigation in a sealed case. All nine pages are therefore appropriately withheld under the attorney work product doctrine.<sup>12</sup>

5. We have examined the records at issue here to determine whether any portions could be segregated and released, or whether we should as a matter of our discretion release the records we have found are exempt from disclosure under the FOIA.<sup>13</sup> We conclude that no portions are segregable or should be released as a matter of our discretion.

6. IT IS ORDERED that the application for review by Shalov Stone Bonner & Rocco, LLP IS DENIED. Shalov Stone Bonner & Rocco, LLP may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

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<sup>7</sup> See *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980) (The deliberative process doctrine of Exemption 5 applies when a document “reflects the give-and-take of the consultative process . . . whether the document is recommendatory in nature or is a draft of what will become a final document, and whether the document is deliberative in nature, weighing the pros and cons of agency adoption of one viewpoint or another.”), cited by SSB in its AFR at 1-2.

<sup>8</sup> *Jordan v. U.S. Dep’t of Justice*, 591 F.2d 753, 775 (D.C. Cir. 1978).

<sup>9</sup> See Fed.R.Civ.P. 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). In *James Madison Project v. CIA*, 607 F.Supp.2d 109, 129 (D.D.C. 2009), the court explained that “[t]he [doctrine] encompasses ‘the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.’ *Id.* The purpose of the [doctrine] is to protect the adversarial trial process by insulating the attorney’s preparation from scrutiny. *Jordan*, 591 F.2d at 775.”

<sup>10</sup> *James Madison Project*, 607 F.Supp.2d at 129, citing *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1189 (D.C. Cir. 1987).

<sup>11</sup> See Fed. R. Civ. P. 26(b)(3) (attorney work product doctrine extends to documents prepared “by or for another party or by or for that other party’s representative”); *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (the attorney work product doctrine extends to material prepared by an attorney’s agents).

<sup>12</sup> See *Tompkins, McGuire, Wachenfeld & Barry, LLP*, 21 FCC Rcd 2851,2854 (2006); *Robert D. Frankfort, Esq.*, 2 FCC Rcd 1630 (1987); *Curran Communications, Inc.*, 86 F.C.C.2d 344 (1981) (all invoking the attorney work-product doctrine of Exemption 5 to withhold records prepared in contemplation of litigation).

<sup>13</sup> See *Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed. Reg. 4683 (2009) (President Obama’s memorandum concerning the FOIA); *The Freedom of Information Act (FOIA)*, available at <<http://www.usdoj.gov/ag/foia-memo-march2009.pdf>> (Attorney General Holder’s FOIA Memo).

7. The following officials are responsible for this action: Chairman Genachowski, Commissioners Copps, McDowell, Clyburn and Baker.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary