

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

In the Matter of)	
)	
FINKELSTEIN THOMPSON LLP and)	FOIA Control No. 2008-416
)	
ROSEMARY RIVAS)	
)	
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 Finkelstein Thompson LLP (FT LLP) of the decision of the Mobility Division of the Wireless Telecommunications Bureau (WTB) granting in part and denying in part a Freedom of Information Act (FOIA)¹ request filed by Rosemary Rivas of FT LLP. For the reasons described below, we grant in part and deny in part the AFR.

2. Rosemary Rivas filed a FOIA request² seeking documents relating to written and oral presentations to the Commission by seven companies³ regarding the Advanced Mobile Phone Service Analog Cellular Compatibility Standard (AMPS Standard), 47 C.F.R. § 22.901, in three Commission proceedings.⁴ The Request covered the period from September 26, 2000 to April 22, 2008 and excluded documents posted on the Commission's website.⁵ With its response,⁶ WTB released 11 pages of documents either submitted to the Commission by outside parties or between Commission staff and third parties. WTB, however, withheld 91 pages of electronic mail (e-mail), prepared memoranda, and briefing sheets under the deliberative process and attorney-client privileges and the attorney work product

¹ 5 U.S.C. § 552.

² See FCC FOIA No. 2008-416, Letter from Rosemary Rivas, FT LLP, to FOIA Officer (April 22, 2008) (FOIA Request). Additionally, the FOIA Request withdrew an earlier FOIA request that been assigned FOIA No. 2008-295. *Id.* at 1.

³ The FOIA Request identified the following seven companies: Mercedes-Benz USA LLC; ATX Technologies; Sprint PCS; Verizon Wireless; Cingular; T-Mobile; and AT&T Wireless. FOIA Request at 1.

⁴ The three FCC proceedings include: Common Carrier Bureau Docket No. 00-175; Wireless Telecommunications Bureau Docket No. 01-108; and a proceeding addressing a petition for rulemaking, RM-11355. *Id.*

⁵ FOIA Request at 1. In response to WTB's request for clarification, on May 22, 2008, the requester advised by e-mail that the FOIA Request did not cover the redacted portions of certain Analog Cellular Status reports that the Commission had received and posted on its website.

⁶ FCC FOIA No. 2008-416, Letter from Roger S. Noel, Chief, Mobility Division, WTB, to Rosemary Rivas, FT LLP (May 28, 2008) (WTB Response).

doctrine, each of which is protected under FOIA Exemption 5⁷ and § 0.457(e) of the Commission's rules.⁸ WTB explained that it withheld internal e-mail, certain memoranda, and briefing sheets "because they include staff advice and recommendations that were part of our Commission's continuing process of deciding the appropriate responses to submissions by some of the Companies and others on the AMPS Standard and related issues."⁹ WTB further explained that certain memoranda, briefing sheets, or e-mail prepared by staff attorneys were also withheld because they are part of those attorneys' deliberative processes and work product, or are otherwise subject to the attorney-client privilege.¹⁰

3. FT LLP seeks review of WTB's decision with respect to the withheld documents, asserting that WTB has not adequately justified the applicability of Exemption 5.¹¹ FT LLP contends that WTB failed to provide an adequate description of the withheld documents, that its analysis was conclusory, and that it did not apply the appropriate criteria relevant to a determination that a record was covered by the attorney-client or deliberative process privileges or the attorney work product doctrine.¹² In the absence of an adequate justification for withholding these records, FT LLP asks that they be released.¹³

4. We find that, with the exceptions discussed below, WTB properly withheld the records in question pursuant to Exemption 5.¹⁴ Exemption 5 has long been interpreted to include the deliberative

⁷ 5 U.S.C. § 552(b)(5).

⁸ 47 C.F.R. § 0.457(e).

⁹ See WTB Response at 3.

¹⁰ *Id.*

¹¹ FOIA No. 2008-416, Letter from FT LLP to the FCC (dated June 26, 2008 and received June 30, 2008) (Application for Review or AFR). An argument may be made that the AFR does not comply with 47 C.F.R. § 0.461(j) on two grounds. First, an application for review may be filed only by the person who made the request. See 47 C.F.R. § 0.461(j). Because the FOIA request was submitted by Rosemary Rivas individually, using FT LLP letterhead, and the AFR was filed by FT LLP through Rosemary Rivas, the AFR arguably was not filed by the proper entity. Although the signature of the FOIA request and the AFR differed, we believe that it would be overly strict to dismiss the AFR where Ms. Rivas signed the AFR on behalf of FT LLP. Second, an application for review shall be delivered or mailed to the General Counsel and shall be filed within 30 calendar days after the date of the written ruling. 47 C.F.R. § 0.461(j). The first day to be counted is the day after the date of the written ruling. *Id.* In this case, the written ruling was on May 28, 2008, and the deadline to file was by June 27, 2008. Although the AFR was sent electronically to FOIA@fcc.gov on June 26, 2008 and the certificate of service reflects that it also was sent by overnight express delivery to the Office of General Counsel and WTB, the FCC mail room did not date stamp the filing until June 30, 2008 – the Monday after the 30-day deadline, which expired on Friday, June 27, 2008. While the Commission no longer accepts electronically filed AFRs, see *Implementation of Interim Electronic Filing Procedures for Certain Commission Filings*, FCC 07-115, 22 FCC Rcd 11381 (2007), the timely e-mail, combined with the timely certificate of service stating that the AFR was timely sent by overnight mail, leads us to conclude that the paper copy was likely received in a timely manner.

¹² See AFR.

¹³ *Id.* at 1.

¹⁴ We reject the suggestion of FT LLP that WTB was required to justify the application of Exemption 5 to each withheld document individually. It is well-established that a listing and description of individual withheld documents, or "Vaughn Index," is not required at the administrative level. See *Dateline NBC*, 21 FCC Rcd 6675, 6677 n.14 (2006) (citing *Schwarz v. U.S. Dep't of Treasury*, 131 F.Supp.2d 142, 147 (D.D.C. 2000), *aff'd*, No. 00-5453 (D.C. Cir. 2001)). Rather, at that level, an agency need only provide "a sufficiently detailed description of what it is refusing to produce and why so that the requester and the court can have a fair idea of what the agency is refusing to produce and why." *Wireless Consumer Alliance*, 20 FCC Rcd 3874, 3878 (2005) (citing *Fiduccia v. U.S. Dep't of Justice*, 185 F.3d 1035, 1042 (9th Cir. 1999)). We find that WTB provided adequate details about the

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process privilege, which is intended to “prevent injury to the quality of agency decisions.”¹⁵ The deliberative process privilege applies to materials that are both predecisional and reflect the agency “give-and-take” of the consultative process.¹⁶ The agency must establish what deliberative process is involved and the role played by the documents in the course of that process.¹⁷

5. In this case, each of the documents in question was prepared by staff prior to, and in contemplation of, Commission action in one or more of the three proceedings identified by the requester or in matters relating to those proceedings. The documents reflect staff’s internal advice and therefore fall within the deliberative process privilege embodied in Exemption 5. Accordingly, they may be withheld to encourage such “give and take” and otherwise to preserve the integrity of the agency’s decision making process.¹⁸

6. *E-mails and briefing sheets.* WTB withheld 83 pages of e-mail communications among Commission staff members that refer to or otherwise relate to presentations regarding the AMPS Standard by one or more of the companies identified in the FOIA request, and reflecting staff impressions and opinions pertaining to that topic. The e-mails contain staff analysis of e-mail correspondence from some of these company representatives. These communications encompass deliberations that led to reconsideration of the analog cellular service requirement as well as ongoing deliberations regarding other possible Commission actions. Additionally, some of the withheld e-mails included preliminary draft (redlined) briefing sheets regarding the sunset of the cellular analog service requirement.¹⁹ Because they are both predecisional and deliberative, all of the aforementioned materials fall squarely within the scope of Exemption 5.

7. However, our review of the documents withheld also indicates that some should be released in redacted form because they include responsive e-mails exchanged between Commission staff and persons outside the Federal Government that do not appear to be covered by any FOIA exemptions. Specifically, we direct WTB to partially release three pages of e-mails exchanged between Commission personnel and persons outside the Federal Government which incorporate or attach such a communication. Communications between an agency and an outside party speaking in its own independent interest are not covered by the deliberative process privilege.²⁰ To the extent two of these pages contain both intra-agency and non intra-agency communications, we will redact the exempt intra-agency portions of the records, including internal staff comments.²¹

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withheld records in its Response. Nevertheless, to provide some context for our decision in response to the AFR, we provide more detailed descriptions of some of the withheld internal records below.

¹⁵ *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 151 (1975).

¹⁶ *See Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 585-86 (D.C. Cir. 1987).

¹⁷ *Id.*

¹⁸ *See NLRB*, 421 U.S. at 151. Because each of the documents in question falls within the deliberative process exception, we need not analyze if they also fall within the attorney-client or attorney work product exceptions.

¹⁹ *See Horowitz v. Peace Corp.*, 428 F.3d 271, 276-77 (D.C. Cir. 2005) (draft decision covered by Exemption 5); *see also In re Evans*, 17 FCC Rcd 15146 (2002).

²⁰ *See Dep’t of the Interior v. Klamath Water Users Protective Ass’n*, 532 U.S. 1, 12 (2001).

²¹ *See* 5 U.S.C. § 552(b) (“Any reasonable segregable portion of a record shall be provided to any person requesting such records after deletion of the portions which are exempt under this subsection.”).

8. *Memorandum.* Another withheld document consists of an eight-page staff memorandum containing advice, opinions and recommendations regarding whether to modify or eliminate the “cellular analog” rules that incorporate the AMPS analog compatibility standard. Because this internal memorandum is both predecisional and deliberative, it is properly withheld under the deliberative process privilege encompassed within Exemption 5.

9. *Personal notes.* We also identified nine pages of a Commission staff attorney’s handwritten notes taken at meetings with representatives of two of the seven companies (Verizon and AT&T) regarding the cellular analog sunset issues and at internal staff meetings. These notes were prepared solely for personal use. Thus, they are not agency records and will not be released.²² Moreover, even if the notes were found to be agency records, they would be protected under Exemption 5 because they reflect the attorney’s opinion of the discussions at the meetings and are therefore deliberative.²³

10. 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.²⁴ We have reviewed the records responsive to FT LLP’s request to determine whether any additional portions may be segregated and released, and have found none. Accordingly, with the additional redactions we order here, our disposition fulfills the mandate of the FOIA and Attorney General Holder’s FOIA Memo to release segregable portions of the records.

11. The Application for Review by FT LLP is GRANTED IN PART AND DENIED IN PART. WTB will release three pages of e-mails in redacted form, as described above. FT LLP may seek judicial review of the portion of this order constituting a denial pursuant to 5 U.S.C. § 552(a)(4)(B).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²² See *Dateline NBC*, 21 FCC Rcd 6675, 6678 (2006) (citing *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995), *aff’d on other grounds*, 76 F.3d 1232 (D.C. Cir. 1996)).

²³ Indeed, WTB treated the notes as non-agency records, and the nine pages therefore are not included in the count of withheld pages.

²⁴ 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).