

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

In the Matter of)	
)	
MICHAEL RAVNITZKY)	FOIA Control No. 2009-042
)	
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 Michael Ravnitzky¹ of the decision of the Public Safety and Homeland Security Bureau (PSHSB) responding to his Freedom of Information Act (FOIA) request for records related to the Emergency Broadcast System (EBS) and the Emergency Alert System (EAS). For the reasons explained below, we deny his AFR.

2. Ravnitzky's FOIA request sought "any and all EBS or EAS Authenticator Word Lists,"² and "a copy of the FCC rule, procedure, or policy that prevents a station from 'singing' the EAS announcements."³ The PSHSB responded that "the Commission no longer maintains custody, control or possession of any copies of" the authenticator lists because distribution of the lists was discontinued in 1998.⁴ The Bureau further responded that any rules governing the provision of EAS messages, and any interpretations of the rules, are set forth in Commission orders and decisions that are available on the Commission's website.⁵

3. Ravnitzky's AFR raises the question of the adequacy of the search performed by PSHSB in response to his FOIA request. He asserts that if PSHSB assumed the records did not exist, "and no search was in fact conducted, then the search ('such as it wasn't') was insufficient."⁶ Under the FOIA, an agency is required to conduct a search that is "reasonably calculated to uncover all relevant documents."⁷

¹ Letter from Michael Ravnitzky to Office of General Counsel (Dec. 15, 2008) (AFR).

² "EAS authenticator word lists were lists of words distributed annually by the Commission to the White House Communications Agency ('WHCA'), the Federal Emergency Management Agency, and all EAS participants. The lists were used by EAS participants to authenticate national-level EAS messages prior to activation of the EAS." *Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System*, 15 FCC Rcd 10159, 10159 (2000).

³ E-mail from Michael Ravnitzky to FOIA@fcc.gov (Oct. 28, 2008) (FOIA Request).

⁴ Letter from Thomas J. Beers, Chief, Policy Division, PSHSB to Michael Ravnitzky (Dec. 3, 2008) (Decision), *citing Commission to Discontinue Distribution of EAS Authenticator Lists*, Public Notice (Sept. 3, 1998), *available at* 1998 WL 556299.

⁵ Decision at 1, *citing* 47 C.F.R. Part 11 (EAS rules) and <hraunfoss.fcc.gov/edocs_public/> (Commission orders).

⁶ AFR at 1.

⁷ *See Weisberg v. United States Dep't of Justice*, 705 F.2d 1344, 1351 (D.C. Cir. 1983).

The reasonableness of a search depends, in part, on how the search was conducted in light of the scope of the request⁸ and the requester's description of the records sought.⁹ Disposition of the authenticator lists was governed by a records schedule that permitted the destruction of the records pertaining to EBS "when cancelled or modified."¹⁰ The Commission discontinued distribution of the authenticator lists in 1998¹¹ and thus PSHSB responded that the Commission no longer maintained custody, control or possession of such lists. Ravnitzky counters that "it does not logically follow that just because a program was discontinued that all records of that program would be destroyed" and that "some records are designated to be retained permanently."¹² We requested that PSHSB check whether any records responsive to this part of Ravnitzky's request exist in its files despite the fact that they were permitted to be destroyed under the record retention schedule. The Bureau informs us that it was unable to locate any responsive records.¹³

4. Ravnitzky also asked for any "rule, procedure or policy" concerning such prohibition of the singing of EAS alerts.¹⁴ PSHSB properly referred Ravnitzky to the Commission's rules and decisions, as any regulatory prohibition (if it existed) would be contained in such public documents.¹⁵ Ravnitzky challenges this part of the Bureau's decision stating that he believes such a prohibition "stemmed from General Counsel advice or memos" rather than Commission decisions or rules.¹⁶ Ravnitzky's subsequent direction to search "General Counsel advice and memos" was not logically encompassed in his original request for any "rule, procedure or policy," and the Commission could not reasonably have been expected to search Office of General Counsel (OGC) advice and memos on the basis of Ravnitzky's initial

⁸ See *Meeropol v. Meese*, 790 F.2d 942, 956 (D.C. Cir. 1986).

⁹ See *Leo A. Wrobel, Jr.*, 21 FCC Rcd 2848, 2849 n.15 (2006), citing 5 U.S.C. § 552(a)(3)(A).

¹⁰ Records Schedule NC-1-173-78-3, Item 12b (approved Aug. 3, 1978). While Ravnitzky is correct that some federal records are preserved and retained permanently, many federal records may be destroyed after a set period of time determined by federal agencies and approved by the National Archives and Records Administration. See 44 U.S.C. §§ 2901-2904, 3102, 3302-2203 (Federal Records Act). The appropriate response by an agency to a FOIA request for records destroyed under a NARA-approved records schedule is that there are no records responsive to the request. See *Roberts v. Dep't of Health and Human Svcs.*, 78 Fed. Appx. 146, 147 (2d Cir. 2003); *Bonner v. Social Security Admin.*, 574 F.Supp.2d 136, 140 (D.D.C. 2008).

¹¹ Decision at 1.

¹² AFR.

¹³ Even though the Commission does not maintain these records any longer and could not locate any copies, the authenticator lists can be found in publicly available sources. See, e.g., "The EBS Authenticator Word List and Other Old EBS Documents," available at <www.ae5d.com/ebs.html>; "Secret Safe-Words of the Emergency Broadcasting System," available at <www.boingboing.net/2008/01/31/secret-safewords-of.html>.

¹⁴ See FOIA Request.

¹⁵ See 5 U.S.C. § 552(a)(1)(2)(i) ("A final order, opinion, statement of policy, interpretation or staff manual or instruction that affects a member of the public may be relied upon, used, or cited as precedent by an agency against a party other than an agency only if it has been indexed and either made available or published as provided in this paragraph . . ."). Materials such as opinions, orders, and policy statements are routinely available for public inspection on the Commission's website, and in the FCC Record and the Federal Register. See generally 47 C.F.R. § 0.445. Records routinely available for public inspection are listed in 47 C.F.R. §§ 0.453 and 0.455, and are available at the places noted in those rules or through the procedures set forth in 47 C.F.R. § 0.460. Publicly available sources disclose a 1978 Public Notice that states that while "Part 73, Subpart G and the EBS checklist do not specifically prohibit the addition of any music, humming, singing, background noise, etc., to the EBS weekly test or test message . . . any form of a musical rendition or alteration of the weekly test would seem not to conform to the serious nature of the EBS and should be avoided." *Automated Transmission Systems for Emergency Broadcast Systems*, 72 F.C.C.2d 788, 789 (Defense Comm'r 1978).

¹⁶ See FOIA Request.

request.¹⁷ We nonetheless directed that OGC search its records, and we are informed that no such records were located.

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

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁷ See *Nurse v. Sec'y of the Air Force*, 231 F.Supp.2d 323, 330 (D.D.C. 2002) (declaring that an agency was not required to have "clairvoyant capabilities" in order to determine the nature of a FOIA request); *Hudgins v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985) (same).