

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

In the Matter of )
)
NATIONAL ASSOCIATION OF ) FOIA Control No. 2007-235
BROADCASTERS )
)
On Request for Inspection of Records )
)
U.S. ELECTRONICS, INC. )
)
On Request for Inspection of Records ) FOIA Control No. 2008-190
)
)

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2009

Released: September 30, 2009

By the Commission:

I. INTRODUCTION

1. The Commission has before it five applications for review ("AFRs") of the decision of the Chief of the Spectrum Enforcement Division of the Enforcement Bureau ("the Bureau") granting in part and denying in part the Freedom of Information Act (FOIA) request of the National Association of Broadcasters ("NAB") for records concerning the Bureau's then-pending investigation of Sirius Satellite Radio, Inc. ("Sirius") and XM Radio, Inc. ("XM"). The Commission also has before it six applications for review of the decision of the Bureau granting in part and denying in part the FOIA request of U.S. Electronics, Inc. ("USE") for similar records.

II. BACKGROUND

A. FOIA Control No. 2007-235

2. NAB filed a FOIA request for the Sirius and XM Letters of Inquiry ("LOIs") concerning those companies' compliance with the Commission's rules governing FM modulators/transmitters used in connection with Satellite Digital Audio Radio Service ("SDARS") radios and terrestrial repeaters, any follow-up letters from the Commission, and responses to such letters. Because both the responses of XM and Sirius to the Bureau's LOIs were filed with requests for confidential treatment, the Bureau notified the companies of NAB's FOIA request. Both XM and Sirius submitted supplemental confidentiality

1 We have consolidated the two proceedings on our own motion for administrative convenience because of the similarity of issues raised by the two FOIA requests. See paragraph 9, infra.
2 Letter from David H. Solomon, Esq., Wilkinson Barker Knauer LLP, to Anthony J. Dale, Managing Director (Mar. 22, 2007) (NAB 2007-235 FOIA Request).
3 Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau to Robert L. Pettit, Esq., Wiley Rein LLP (Sirius) (Apr. 9, 2007); letter from Kathryn S. Berthot, Chief, Spectrum Enforcement (continued....)

requests;<sup>4</sup> NAB replied to these responses;<sup>5</sup> and Sirius and XM responded to NAB.<sup>6</sup>

3. The Bureau granted in part and denied in part NAB's FOIA request, and granted in part and denied in part the requests for confidentiality of XM and Sirius.<sup>7</sup> The Bureau released the two LOIs sent to XM and the two LOIs sent to Sirius, and confidentiality requests of Sirius and XM.<sup>8</sup> As to the Sirius responses to the LOIs, the Bureau located over 3,500 pages of records, the vast majority of which the Bureau withheld as confidential commercial information pursuant to FOIA Exemption 4,<sup>9</sup> or under the settlement privilege of FOIA Exemption 5.<sup>10</sup> For the same reasons, 94 pages involving presentations to Commission staff regarding proposed modification to Sirius' radios with FM modulators,<sup>11</sup> and consent decree proposals, were withheld pursuant to the settlement exemption of FOIA Exemption 5.<sup>12</sup> However, the Bureau rejected Sirius' argument that an additional 126 pages of records were entitled to confidential treatment under FOIA Exemption 4.<sup>13</sup> It also rejected Sirius' claim that the names and titles of executive and senior-level Sirius employees involved in this matter should be redacted from any records released,<sup>14</sup> and its claim that FOIA Exemption 7(A), which exempts from disclosure information that "could reasonably be expected to interfere with enforcement proceedings,"<sup>15</sup> protects all of Sirius' LOI responses from release.<sup>16</sup> The Bureau located over 2,700 pages of XM records responsive to the LOIs.<sup>17</sup> As with the Sirius records, the Bureau determined that most of the records should be withheld under FOIA Exemption 4,<sup>18</sup> but also that parts of the responses were not entitled to confidential treatment,<sup>19</sup> and that the names and titles of XM's employees should not be redacted.<sup>20</sup> Again, as with Sirius, the Bureau withheld materials concerning presentations to Commission staff under the settlement privilege of FOIA

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Division, Enforcement Bureau to James S. Blitz, Esq., Vice President and Regulatory Counsel, XM Radio, Inc. (Apr. 9, 2007). See 47 C.F.R. § 0.461(d)(3).

<sup>4</sup> Letter from Robert L. Pettit to Kathryn Berthot (Apr. 20, 2007) (Sirius); letter from James S. Blitz to Kathryn S. Berthot (Apr. 20, 2007) (XM).

<sup>5</sup> Letter from David H. Solomon to Kathryn S. Berthot (May 23, 2007).

<sup>6</sup> Letter from Scott Blake Harris, Esq., Harris, Wiltshire & Grannis LLP, to Kathryn S. Berthot (May 31, 2007) (XM); letter from Robert L. Pettit to Kathryn S. Berthot (May 30, 2007) (Sirius).

<sup>7</sup> The Bureau issued two separate decisions, one addressing the XM documents and one addressing the Sirius documents. See Letters to David H. Solomon from Kathryn S. Berthot (June 18, 2007) (*XM FOIA 2007-235 Decision* and *Sirius FOIA 2007-235 Decision*).

<sup>8</sup> *XM FOIA 2007-235 Decision* at 2, 5; *Sirius FOIA 2007-235 Decision* at 2, 5.

<sup>9</sup> 5 U.S.C. § 552(b)(4).

<sup>10</sup> 5 U.S.C. § 552(b)(5); see generally *Sirius FOIA 2007-235 Decision* at 2-4.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> *Id.* at 6.

<sup>13</sup> *Id.* at 4-5.

<sup>14</sup> *Id.* at 4-5.

<sup>15</sup> 5 U.S.C. § 552(b)(7)(A).

<sup>16</sup> *Id.* at 2.

<sup>17</sup> *XM FOIA 2007-235 Decision* at 2.

<sup>18</sup> *Id.* at 2-4.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 4-5.

Exemption 5.<sup>21</sup> A total of over 2,250 pages were withheld. The Bureau located 22 pages of records concerning XM's response to the LOI concerning terrestrial repeaters,<sup>22</sup> and rejected XM's claims that these responses (and an appended declaration) were confidential commercial information under FOIA Exemption 4, or that the names and titles of employees should be protected from release under FOIA Exemption 6.<sup>23</sup> Finally, with respect to both XM and Sirius records, the Bureau rejected NAB's contention that even if the records were covered by a FOIA exemption, they should be released as a matter of discretion because there is a compelling public interest in disclosing information regarding potential rule violations by XM and/or Sirius.<sup>24</sup>

4. Five applications for review of the *XM FOIA Decision* and the *Sirius FOIA Decision* were filed by: (1) XM,<sup>25</sup> (2) Four Employees of XM,<sup>26</sup> (3) Three Employees of XM,<sup>27</sup> (4) Sirius,<sup>28</sup> and (5) John Does 1 and 2, employees of Sirius.<sup>29</sup> XM and Sirius each sought to have additional portions of their LOI responses withheld from the FOIA requesters. The XM and Sirius employees sought to have their names withheld from release. NAB submitted an opposition to all five AFRs,<sup>30</sup> to which Sirius, XM, the Four XM Employees, and the Three XM Employees replied.<sup>31</sup>

## B. FOIA Control No. 2008-190

5. USE filed a FOIA request for, *inter alia*, records concerning Sirius' and XM's compliance with equipment authorization rules governing emission limitations for satellite radio receivers, and compliance with authorizations for terrestrial repeaters.<sup>32</sup> Because the responses of both XM and Sirius to the Bureau's LOIs were filed with requests for confidential treatment, the Bureau notified the companies of USE's FOIA request.<sup>33</sup> Both XM and Sirius submitted supplemental

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<sup>21</sup> *Id.* at 6.

<sup>22</sup> *Id.* at 6. The Bureau did not locate any such responsive documents filed by Sirius. *Sirius FOIA 2007-235 Decision* at 6.

<sup>23</sup> 5 U.S.C. § 552(b)(6); *XM FOIA 2007-235 Decision* at 6-8.

<sup>24</sup> *Id.* at 8-9; *Sirius FOIA 2007-235 Decision* at 6-7.

<sup>25</sup> Application for Review (July 2, 2007) (XM 2007-235 AFR).

<sup>26</sup> Application for Review filed by Four Employees of XM Radio, Inc. (July 2, 2007) (Four XM Employees 2007-235 AFR).

<sup>27</sup> Application for Review of Freedom of Information Act Filed by Three Employees of XM Radio, Inc. (July 2, 2007) (Three XM Employees 2007-235 AFR).

<sup>28</sup> Application for Review of Freedom of Information Action (July 5, 2007) (Sirius 2007-235 AFR).

<sup>29</sup> Application for Review of Freedom of Information Action (July 5, 2007) (John Doe Sirius Employees 2007-235 AFR).

<sup>30</sup> Opposition of the National Association of Broadcasters to Applications for Review (July 17, 2007) (NAB 2007-235 AFRs Opp.).

<sup>31</sup> Reply in Support of Sirius Satellite Radio Inc.'s Application for Review of Freedom of Information Action (July 27, 2007) (Sirius 2007-235 Reply); Reply in Support of Application for Review (July 27, 2007) (XM 2007-235 Reply); Reply by Four Employees of XM Radio Inc. (July 27, 2007) (Four XM Employees 2007-235 Reply); and Reply of Three Unnamed Employees of XM Radio Inc. (Aug. 1, 2007) (Three XM Employees 2007-235 Reply).

<sup>32</sup> Letter from Charles H. Helein, Helein & Marshlian, LLC, to FOIA Public Liaison (Jan. 25, 2008) (USE 2008-190 FOIA Request).

<sup>33</sup> Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau to Robert L. Pettit, Esq., Wiley Rein LLP (Sirius) (Feb. 14, 2008); letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau to James S. Blitz, Esq., Vice President and Regulatory Counsel, XM Radio, Inc. (Feb. 14, 2008). See 47 C.F.R. § 0.461(d)(3).

confidentiality requests.<sup>34</sup> The Bureau also received confidentiality requests from two groups of unnamed employees of XM.<sup>35</sup> USE replied to these responses,<sup>36</sup> and XM responded to USE.<sup>37</sup>

6. The Bureau granted in part and denied in part USE's FOIA request, and granted in part and denied in part the requests for confidentiality of XM, the unnamed XM employees, and Sirius.<sup>38</sup> Six applications for review were filed by (1) USE,<sup>39</sup> (2) XM,<sup>40</sup> (3) Sirius,<sup>41</sup> (4) and (5) the unnamed XM employees,<sup>42</sup> and (6) two unnamed employees of Sirius.<sup>43</sup> USE sought the release of additional portions of the records located by the Bureau, and asserted that the Bureau had failed to locate additional responsive records. The XM and Sirius employees sought to have their names protected from disclosure. XM and Sirius also responded in opposition to USE's AFR,<sup>44</sup> and USE opposed the Sirius, XM, and unnamed Sirius employees' application for review.<sup>45</sup> XM filed a reply to USE's opposition to its AFR.<sup>46</sup>

### C. Subsequent Developments

7. Three pertinent events occurred after the completion of filings in the proceedings involving FOIA 2007-235 and 2008-190. First, USE filed a complaint in the United States District Court for the District of Columbia on May 14, 2008 seeking release of the records withheld in part under the Bureau's two decisions.<sup>47</sup> XM, Sirius, and the unnamed XM and Sirius employees each intervened in that

<sup>34</sup> Letter from Robert L. Pettit to Kathryn Berthot (Feb. 29, 2008) (Sirius); letter from Scott Blake Harris, Esq., Harris, Wiltshire & Grannis LLP, to Kathryn S. Berthot (Feb. 29, 2008) (XM).

<sup>35</sup> Letter from Lanny L. Breuer, Esq., Covington & Burling, L.L.P., to Karen Mercer, Spectrum Enforcement Division, Enforcement Bureau (Feb. 29, 2008) (on behalf of three unnamed XM employees); letter from Lori J. Searcy, Esq., to Karen Mercer (Feb. 29, 2008) (on behalf of four unnamed XM employees).

<sup>36</sup> Letters from Charles Helein to Karen Mercer (Mar. 5 and Mar. 7, 2008) (USE responses to XM, Sirius, and the unnamed XM employees).

<sup>37</sup> Letter from Robert L. Pettit to Kathryn S. Berthot (Mar. 12, 2008).

<sup>38</sup> As in FOIA 2007-235, the Bureau issued two separate decisions, one addressing the XM documents and one addressing the Sirius documents. See Letters to Charles H. Helein from Kathryn S. Berthot (Mar. 21, 2008) (*XM 2008-190 FOIA Decision* and *Sirius 2008-190 FOIA Decision*). See ¶ 3 (describing the Bureau's results in FOIA 2008-190).

<sup>39</sup> U.S. Electronics, Inc. Application for Review (Mar. 31, 2008) (USE 2008-190 AFR).

<sup>40</sup> XM Radio, Inc. Application for Review (Apr. 4, 2008) (XM 2008-190 AFR).

<sup>41</sup> Sirius Satellite Radio, Inc., Application for Review (Apr. 4, 2008) (Sirius 2008-190 AFR).

<sup>42</sup> Review of Freedom of Information Action – Memorandum on Behalf of Three Unnamed Employees of XM Radio, Inc. in Support of Application for Review by XM Radio, Inc. (Apr. 11, 2008) (Three XM Employees 2008-190 AFR); Application for Review Filed by Four Employees of XM Radio, Inc. (Apr. 4, 2008) (Four XM Employees 2008-190 AFR).

<sup>43</sup> Application for Review of Freedom of Information Action (Apr. 4, 2008) (John Does 1 and 2 Sirius Employees 2008-190 AFR).

<sup>44</sup> Sirius' Response in Opposition to U.S. Electronics' Application for Review of Freedom of Information Action (Apr. 14, 2008) (Sirius 2008-190 Opp.); XM's Opposition to Application for Review (Apr. 14, 2008) (XM 2008-190 Opp.).

<sup>45</sup> Opposition to Application for Review (Apr. 8, 2008) (USE 2008-190 XM Opposition); Opposition to Application for Review (Apr. 15, 2008) (USE 2008-190 Sirius Opposition); Opposition to Application for Review (Apr. 15, 2008) (USE 2008-190 John Does 1 and 2 Sirius Employees Opposition).

<sup>46</sup> Reply in Support of Application for Review (Apr. 18, 2008) (XM Reply). USE then filed a motion to strike XM's Reply (Apr. 22, 2008) (USE Motion).

<sup>47</sup> *U.S. Electronics, Inc. v. FCC*, 1:08-cv-00835 (D.D.C. filed May 14, 2008).

proceeding. USE subsequently moved to dismiss its complaint without prejudice, and the court granted its motion.<sup>48</sup> Second, the Commission entered into consent decrees with XM and Sirius concerning the alleged rule violations to which the FOIA requests relate.<sup>49</sup> Finally, the Commission approved the XM/Sirius transfer of control application.<sup>50</sup>

### III. DISCUSSION

8. At the outset, it is important to stress that the only question before us is whether these records should be disclosed publicly pursuant to FOIA requests.<sup>51</sup> With that in mind, we first will address procedural issues raised by USE's complaint in District Court, and by various parties' pleadings. We then turn to the question whether the names and titles of employees of Sirius and XM should have been redacted by the Bureau pursuant to FOIA Exemptions 4, 6, 7(A) or 7(C).<sup>52</sup> We also address the impact of the Privacy Act<sup>53</sup> on whether these redactions should be made. Next, we consider the claims by XM and Sirius that the Bureau should have withheld additional portions of their LOI responses pursuant to FOIA Exemption 4. Finally, we turn to the question whether any records we determine can be withheld under a FOIA exemption should nonetheless be released as a matter of discretion because of an overriding public interest or whether any additional segregable portions of the records should be released.

#### A. Procedural Issues

9. We initially consider three procedural issues. First, as the issues raised in FOIA 2008-190 are the same as or related to those raised in FOIA 2007-235, we will consolidate the two FOIAs for disposition here.<sup>54</sup>

10. Second, although none of the XM or Sirius employees who have filed AFRs involving FOIA 2007-235 participated in the Bureau's proceeding leading to its initial FOIA decisions, and the unnamed Sirius employees did not participate in the initial determination in FOIA 2008-190 but did file an AFR,<sup>55</sup> we conclude that they are permitted to seek review of the Bureau's decision pursuant to section 1.115(a) of our rules, which provides that "[a]ny person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission."<sup>56</sup> Under this rule, when a person who has not previously participated in a proceeding files an application for review, the person "shall include with his [or her] application a statement describing with particularity the manner in which he [or she] is aggrieved by the action taken and showing good reason why it was not

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<sup>48</sup> *U.S. Electronics, Inc. v. FCC*, 1:08-cv-00835 (D.D.C. Oct. 16, 2008).

<sup>49</sup> *XM Radio, Inc.*, 23 FCC Rcd 12325 (2008) (*XM Consent Decree*); *Sirius Satellite Radio, Inc.*, 23 FCC Rcd 12301 (2008) (*Sirius Consent Decree*).

<sup>50</sup> *Applications for Consent to the Transfer of Control of Licenses XM Satellite Radio Holdings Inc., Transferor to Sirius Satellite Radio Inc., Transferee*, 23 FCC Rcd 12348 (2008) (*XM-Sirius Order*).

<sup>51</sup> Thus, we do not consider here USE's comments concerning the merits of the transfer of control application. See USE 2008-190 AFR at 5.

<sup>52</sup> 5 U.S.C. §§ 552(b)(4), (6), (7)(A), and 7(C).

<sup>53</sup> 5 U.S.C. § 552a.

<sup>54</sup> See footnote 1, *supra*. We note that unlike USE in FOIA 2008-190, NAB did not in FOIA 2007-235 seek review of the Bureau's decisions in its FOIA.

<sup>55</sup> The two unnamed Sirius employees do not explain why they did not participate in the Bureau's consideration of FOIA 2008-190, as did the unnamed XM employees. See John Doe Sirius Employees 2008-190 AFR.

<sup>56</sup> 47 C.F.R. § 1.115(a). See also John Doe Sirius Employees AFRs (FOIA 2007-235 and FOIA 2008-190) at 1 n.1, citing 5 U.S.C. § 702 and *Chrysler Corp. v. Brown*, 441 U.S. 281, 318 (1979).

possible for him [or her] to participate in the earlier stages of the proceeding.” The Four XM Employees,<sup>57</sup> the Three XM Employees,<sup>58</sup> and the John Doe Sirius Employees<sup>59</sup> have each made this showing.

11. Third, Sirius contends that our rules do not contemplate the filing of replies to the AFRs by NAB.<sup>60</sup> USE makes a similar argument in its Motion to Strike XM’s Reply in FOIA 2008-190.<sup>61</sup> The general rule concerning applications for review is applicable to FOIA applications for review, and that rule permits the filing of a response to an AFR and a reply thereto.<sup>62</sup> We therefore reject Sirius’ and USE’s argument and will take into consideration the respective responsive filings.

## B. Identities and Titles of Sirius and XM Employees

12. The Bureau decided that the names and titles of XM and Sirius employees should not be redacted from any materials released to NAB because the “employees in question are executive and senior-level employees whose names and titles are publicly known.”<sup>63</sup> Sirius, XM, and their unnamed employees strongly object to this determination, relying on FOIA Exemptions 4, 6, 7(A), and 7(C). For the reasons discussed below, we conclude that the Bureau should redact the names and titles of the XM and Sirius employees from the records it determined should be released to NAB.

13. **Exemptions 6 and 7(C).** The parties assert<sup>64</sup> that the names and titles of the individuals should be withheld pursuant to the privacy protections of FOIA Exemptions 6 and 7(C).<sup>65</sup> The parties

<sup>57</sup> Four XM Employees 2007-235 AFR at 2 (explaining that “[i]t was not possible for the employee applicants to have participated in earlier stages of these proceedings because they did not know that their names were going to be disclosed by the Bureau and did not learn that the Bureau had decided to disclose their names to the general public until after June 18, 2008” and they were filing the AFR “[i]n light of the serious and substantial privacy interests at stake here”).

<sup>58</sup> Three XM Employees 2007-235 AFR at 1 (“The privacy concerns are especially grave in this case, where the individual employees had no opportunity to review or comment upon the accuracy of XM’s submissions to the FCC”).

<sup>59</sup> John Doe Sirius Employees 2007-235 AFR at 3 (explaining they “never had the opportunity to be heard” when Sirius was responding to the LOI, that “a number of them were never informed that Sirius identified them in its submissions to the Enforcement Bureau,” that “none of the individuals have had the opportunity to consult,” and that “[i]t would be fundamentally unfair publicly to associate these employees with unlawful behavior”). These employees repeat these assertions in the John Doe Sirius Employees 2008-190 AFR at 3.

<sup>60</sup> Sirius 2007-235 Reply at 1, 2.

<sup>61</sup> Motion to Strike (Apr. 22, 2008).

<sup>62</sup> See 47 C.F.R. § 1.115(d) (oppositions to AFRs must be filed within 15 days, and replies thereto within 10 days). USE cites *Communications Satellite Corp.*, 6 FCC Rcd 4979 n.1 (CCB 1991), as an example of the Commission’s use of its authority to strike an unauthorized pleading. That case is inapposite as it involved a petition to suspend or investigate a tariff, where the applicable rule (47 C.F.R. § 1.773(b)), unlike the AFR rule applicable here, specifically prohibited the pleading the Deputy Bureau Chief ordered stricken.

<sup>63</sup> *Sirius FOIA 2007-235 Decision* at 4; *XM FOIA 2007-235 Decision* at 4; *Sirius FOIA 2008-190 Decision* at 3; *XM FOIA 2008-190 Decision* at 3.

<sup>64</sup> XM 2007-235 AFR at 1-2, 14-15; Four XM Employees 2007-235 AFR at 6-11; Three XM Employees 2007-235 AFR at 4-10; Sirius 2007-235 AFR at 7-9; John Doe Sirius Employees 2007-235 AFR at 3-10; Four XM Employees 2007-235 Reply at 3-4; Three XM Employees 2007-235 Reply at 1-3; Four XM Employees 2007-235 Reply at 1-5; XM 2008-190 AFR at 4, 10-13; Four XM Employees 2008-190 AFR at 6-11 Three XM Employees 2008-190 AFR at 3; Sirius 2008-190 AFR at 7-10; John Doe Sirius Employees 2008-190 AFR at 4-10.

<sup>65</sup> 5 U.S.C. § 552(b)(6) (permitting the withholding of information about individuals in “personnel and medical and similar files” when the disclosure of such information “would constitute a clearly unwarranted invasion of personal

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explain that the individuals have a privacy interest in preventing their names from being associated with potential violations of Commission regulations,<sup>66</sup> and that not all of the names are, as the Bureau determined, of high-level and well-known employees.<sup>67</sup> They argue that release of their names is not consistent with the core purpose of the FOIA, which is to allow the public to learn about the operations of the government.<sup>68</sup> We agree. Our analysis is guided by the U.S. Supreme Court's discussion of privacy in *Reporters Committee*.<sup>69</sup> In that case, the Supreme Court held that in applying Exemption 7(C), the agency must weigh the personal privacy interest in the material requested against the public interest in disclosure, specifically "the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny."<sup>70</sup> As we have observed in the context of Exemption 6, we go "to great lengths to ensure that all personal information is redacted from the materials to be released . . . to protect the identities of the individuals to the extent they have any expectation of privacy."<sup>71</sup>

14. Contrary to NAB's assertion, the XM and Sirius employees' personal privacy interests here are substantial.<sup>72</sup> As the employees note, release of their names and titles could associate them with alleged legal wrongdoing, even to the extent they acted merely as witnesses and committed no wrongdoing themselves. This is precisely the type of personal privacy interest the courts have recognized in applying Exemption 7(C).<sup>73</sup>

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privacy") and 5 U.S.C. § 552(b)(7)(C) (providing for protection of personal information in law enforcement records where disclosure "could reasonably be expected to constitute an unwarranted invasion of personal privacy").

<sup>66</sup> Sirius observes that their employees (some of whom are no longer employed by the companies) often did not know that their names were being mentioned in the LOI responses. Sirius 2007-235 AFR at 5, 6-7; Sirius 2008-190 at 5, 7-8.

<sup>67</sup> Four XM Employees 2007-235 AFR at 4; Four XM Employees 2008-190 AFR at 4.

<sup>68</sup> *U.S. Dep't of Defense v. FLRA*, 510 U.S. 487, 495 (1994) (*FLRA*) (referring to "the citizens' right to be informed about what their government is up to"), quoting *U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 773 (1989) (*Reporters Committee*).

<sup>69</sup> See 489 U.S. at 773. *Reporters Committee* dealt with FOIA Exemption 7(C), which covers "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy," rather than Exemption 6. Although the coverage of Exemption 6 is somewhat narrower than that of Exemption 7(C) ("would constitute a clearly unwarranted invasion" versus "could reasonably be expected to constitute an unwarranted invasion"), the Supreme Court has explained that for purposes of the *Reporters Committee* analysis, the distinction is "of little import." See *FLRA*, 510 U.S. at 496 n.6.

<sup>70</sup> *Reporters Committee*, 489 U.S. at 772 (internal quotation marks omitted). See also *Appleton v. FDA*, 451 F. Supp. 2d 129, 145 (D.D.C. 2006), quoting *Reporters' Committee*, 489 U.S. at 773 ("The purposes of FOIA are 'not fostered,' however, 'by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct.'").

<sup>71</sup> *William McConnell, Broadcasting & Cable*, 18 FCC Rcd 26371, 26372 (2003).

<sup>72</sup> NAB AFRs Opp. at 4 n.12.

<sup>73</sup> See *Appleton*, 451 F. Supp. 2d at 145 (identity of interviewee created during criminal investigation of pharmaceutical companies); *Stolt-Nielsen Transp. Group, Ltd. v. United States*, 480 F. Supp. 2d 166, 180 (D.D.C. 2007); see also *Citizens for Responsibility and Ethics in Washington v. Nat'l Indian Gaming Comm'n*, 467 F. Supp. 2d 40, 53 (D.D.C. 2006) (suggesting NIGC properly redacted under FOIA Exemptions 7(C) and 6 names of "third parties who provided information to NIGC"); *Safecard Svcs, Inc. v. SEC*, 926 F.2d 1197, 1205-06 (D.C. Cir. 1991) (finding "substantial privacy interest" in identity of targets of law enforcement investigations and upholding Exemption 7(C) redaction of third parties mentioned in witness interviews). We note that many parties have cited

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15. Against this personal privacy interest we must weigh the public interest in the disclosure of the names and titles of the employees, which we measure by “the citizens’ right to be informed about what their government is up to.”<sup>74</sup> NAB asserts only that release of the names of employees is in the public interest because the information must be “properly considered and evaluated in the context of the proposed XM/Sirius merger.”<sup>75</sup> NAB’s argument fails for two reasons. First, as we noted above, substantive issues pertaining to the merger (*e.g.*, whether the documents should be entered into the record of and considered in the merger proceeding, where they may be subject to protective orders) are not relevant in this proceeding, where our task is merely to decide whether certain documents should be released to the public at large.<sup>76</sup> Second, disclosing this information would not serve the FOIA’s core purpose of “contribut[ing] significantly to public understanding of the operations or activities of the government.”<sup>77</sup> Rather, release of the names at issue would contribute primarily to an understanding of the operations and activities of XM and Sirius. We therefore direct that the names and titles of Sirius and XM employees be redacted from any records released to NAB.

16. **Exemption 7(A).** XM also contends on review that we should withhold pursuant to FOIA Exemption 7(A) the “names of voluntary witnesses” (presumably XM’s employees) in the LOI responses because release of this information “would make both those witnesses and other potential witnesses less likely to voluntarily and fully cooperate in the future.”<sup>78</sup> XM’s employees who have sought review of the Bureau’s decision likewise have indicated that they would not have cooperated with the investigations if they had known that their names would be released.<sup>79</sup> XM made these arguments while the EB investigation was still ongoing. FOIA Exemption 7(A) does not “endlessly protect material simply because it is in an investigatory file.”<sup>80</sup> It does not apply to investigations that have been completed such as the XM and Sirius enforcement proceedings.<sup>81</sup> Exemption 7(A) may be invoked to withhold records from completed investigations only in limited circumstances, such as where the records

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*Stern v. FBI*, 737 F.2d 84 (D.C. Cir. 1984), in support of their argument that the names of these employees of XM and Sirius should be redacted. *Stern* is indeed instructive for the proposition that “individuals have a strong interest in not being associated with alleged criminal activity . . . [T]he 7(C) exemption recognizes the stigma potentially associated with law enforcement investigations and affords broader privacy rights to suspects, witnesses, and investigators.” *Id.* at 91-92 (citation omitted).

<sup>74</sup> *FLRA*, 510 U.S. at 497.

<sup>75</sup> NAB 2007-235 AFRs Opp. at 2, citing *Applications of XM Satellite Radio Holdings, Inc., Transferor, and Sirius Satellite Radio Inc., Transferee, Consolidated Applications for Authority to Transfer Control of XM Radio and Sirius Radio Inc.*, MB Docket No. 07-57 (Mar. 20, 2007).

<sup>76</sup> *NARA v. Favish*, 541 U.S. 157, 174 (2004) (“It must be remembered that once there is disclosure, the information belongs to the general public.”).

<sup>77</sup> *FLRA*, 510 U.S. at 495 (emphasis in original). See also *Safecard*, 926 F.2d at 1206 (“unless access to the names and addresses of private individuals appearing in files within the ambit of Exemption 7(C) is necessary in order to confirm or refute compelling evidence that the agency is engaged in illegal activity, such information is exempt from disclosure.”).

<sup>78</sup> XM 2007-235 AFR at 12-13, citing 5 U.S.C. § 552(b)(7)(A) (authorizing the withholding of records compiled for law enforcement purposes, but only to the extent that production of such law enforcement records of information . . . could reasonably be expected to interfere with enforcement proceedings”); XM 2008-190 AFR at 14.

<sup>79</sup> Four XM Employees 2007-235 AFR at 3; Four XM Employees 2008-190 AFR at 3; see XM 2007-235 AFR at 6-7, 8; XM 2008-190 AFR at 15.

<sup>80</sup> *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978).

<sup>81</sup> See *Wireless Consumer Alliance*, 20 FCC Rcd 3874, 3880-81 (2005) (Exemption 7(A) does not apply to investigations that have been completed).



would be relevant to additional prospective investigations.<sup>82</sup> We conclude that the now completed XM and Sirius enforcement proceedings do not involve the type of circumstances that would permit us to invoke FOIA Exemption 7(A). Accordingly, Exemption 7(A) is inapplicable to the records from the now-completed investigations. However, as we noted in paragraph 15, the names and titles of the employees are protected under FOIA Exemption 6 and 7(C).

17. **Exemption 4.** XM and Sirius assert that the names and titles of their employees are exempt under FOIA Exemption 4 because this information would give competitors insights into the companies' internal business processes.<sup>83</sup> We need not reach this argument in light of our decision to redact the names and titles of the employees pursuant to FOIA Exemptions 6 and 7(C).

18. **Privacy Act.** The Four XM Employees assert that the Privacy Act bars release of their names because the records are part of a system of records under the Privacy Act and, even if no FOIA exemption applies, the records cannot be released.<sup>84</sup> We need not reach this issue as we determine that the names and titles of these individuals should be withheld under the FOIA exemptions discussed above.

### C. Other Exemption 4 Redactions from Sirius and XM Records

19. Sirius asserts that the Bureau erred in not redacting pursuant to FOIA Exemption 4 the identities of distributors, details of communications with its distributors,<sup>85</sup> and the narrative in its LOI responses concerning how it internally dealt with the FM modulator issue.<sup>86</sup> Sirius provided explicit, line-by-line identification of the additional parts of its LOI responses that it claimed should have been redacted.<sup>87</sup> Sirius explains that it has never publicly identified the distributors as having been involved in the Bureau's investigation, and that the nature of its communications with the vendors and distributors should be protected because release "could harm Sirius' ability to work with these entities as well as other distributors in the future, and would provide Sirius' competitors with an understanding of the methods and procedures Sirius employs for making changes to its products in response to regulatory concerns and for communication with its distributors."<sup>88</sup> Under FOIA Exemption 4, agencies may withhold documents obtained from a person that contain trade secrets and commercial and financial information that are

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<sup>82</sup> See, e.g., *Solar Sources, Inc. v. United States*, 142 F.3d 1033, 1040 (7th Cir. 1998) (records were relevant to another ongoing investigation); *New Eng. Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 386 (1st Cir. 1976) (records relevant to a related ongoing investigation); *ABC Home Health Servs. v. HHS*, 548 F. Supp. 555, 556, 559 (N.D. Ga. 1982) (records relevant to possible subsequent reevaluation of a consent order); *Zeller v. United States*, 467 F. Supp. 487, 501 (E.D.N.Y. 1979) (records relevant to a determination of future compliance with a consent order).

<sup>83</sup> XM 2007-235 AFR at 8; Sirius 2007-235 AFR at 10; XM 2008-190 AFR at 7; Sirius 2008-190 AFR at 10-11. Sirius' employees also make this assertion. John Doe Sirius Employees 2007-235 AFR at 10. We need not resolve whether the employees have standing to raise their employer's commercial interests, given that the latter has made similar arguments.

<sup>84</sup> Four Unnamed XM Employees 2007-235 AFR at 11; Four Unnamed XM Employees 2007-235 Reply at 4; Four Unnamed XM Employees 2008-190 AFR at 11.

<sup>85</sup> Sirius 2007-235 AFR at 2, 3-5 (seeking redaction of the response after the phrase "Distributors were notified as follows" in Question 1 on page 3 of its August 14, 2006 LOI response); Sirius 2008-190 AFR at 2, 4-5 (same).

<sup>86</sup> Sirius 2007-235 AFR at 3, 11-13 (seeking redaction of the response to Question 9 on pages 6-8 of its July 12, 2006 LOI Response); Sirius 2008-190 AFR at 2, 12-14 (same).

<sup>87</sup> Sirius 2007-235 AFR at 4 (indicating it sought "redaction of the response after the phrase "Distributors were notified as follows."); *id.* at 11 (indicating it sought redaction of "the response to Question 9 on pages 6-8 of the July 12, 2006 Letter"); Sirius 2008-190 AFR at 4, 12 (same).

<sup>88</sup> Sirius 2007-235 AFR at 4-5; Sirius 2008-190 AFR at 5-6 (same).

privileged or confidential.<sup>89</sup> The exemption affords protection to submitters who are required to furnish commercial or financial information to the government by safeguarding them from the competitive disadvantages that could result from disclosure. After review of the LOI Response, we agree that release of the parts of the response identified by Sirius would cause the company competitive harm by identifying distributors, Sirius' relationship with them, and Sirius' internal business processes, and that they should be redacted pursuant to FOIA Exemption 4.<sup>90</sup>

20. Sirius also seeks redaction of its answer to Question 9 in the July 16 LOI Response dealing with its response to alleged rule violations. (Sirius agrees that the first paragraph is already public.) It explains that the response "gives a direct view into Sirius' corporate structure and processes, revealing detailed information about specific Sirius products as well as Sirius' relations with its customers, its internal procedures for assuring regulatory compliance, and its methods and procedures for responding to customer complaints."<sup>91</sup> This response also, in the view of Sirius, reveals its method of dealing with customer satisfaction issues and product development.<sup>92</sup> The Bureau found that disclosure of other portions of the LOI Response involving Sirius product development and business strategies would result in competitive harm to Sirius,<sup>93</sup> and our review of the document indicates that the Bureau should also have redacted this part of the LOI Response because of the competitive harm that would result from release of this part of the record.

21. XM also requests that four of its documents provided to the Bureau in response to the LOIs be treated as confidential and withheld.<sup>94</sup> XM explains that its responses provide insights into "[its] organization processes, how it became aware of the potential non-compliance, how it reacted, and how the potential non-compliance affected its business processes and strategy."<sup>95</sup> However, XM's general statements fail to provide a detailed description of precisely what portions of the four documents constitute material the disclosure of which would cause competitive harm.<sup>96</sup> Unlike Sirius, which provided very specific indications of what sections and lines of their LOI Responses should have been treated as confidential and redacted by the Bureau, XM did not do so. Without greater specificity, we are unable to determine which language XM believes would cause competitive harm if disclosed. For this reason, we deny XM's AFR insofar as it seeks confidential treatment of the records the Bureau indicated would be released.

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<sup>89</sup> 5 U.S.C. § 552(b)(4) (authorizing the withholding of "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential").

<sup>90</sup> *Cf. National Parks*, 547 F.2d at 684; *Timken v. U.S. Customs Serv.*, 491 F. Supp. 557, 559-60 (D.D.C. 1980) (both holding business strategies and marketing plans exempt from disclosure under FOIA Exemption 4); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171, 1174 (D.D.C. 1973) (sales information withheld under FOIA Exemption 4); *International Satellite Inc.*, 57 RR 2d 460, 462-63 (1984) (withholding business marketing plans under FOIA Exemption 4).

<sup>91</sup> Sirius 2007-235 AFR at 11; Sirius 2008-190 AFR at 12.

<sup>92</sup> Sirius 2007-235 AFR at 12; Sirius 2008-190 AFR at 13 (same).

<sup>93</sup> *Sirius FOIA 2007-235 Decision* at 3; *Sirius FOIA 2008-190 Decision* at 4.

<sup>94</sup> *See* XM 2007-235 AFR at 2-3 & n.2 (referring to the entirety of XM's four letters to the Bureau and attached declarations), 8 (referring to disclosure of its LOI Responses); XM 2008-190 AFR at 1-2 & n.6 (same).

<sup>95</sup> XM 2007-235 AFR at 8; XM 2008-190 AFR at 9-10 (same).

<sup>96</sup> *See* 47 C.F.R. §§ 0.459(b)(1) (persons seeking confidential treatment must "identify[] the specific information for which confidential treatment is sought") and 0.459(b)(9) (persons seeking confidential treatment should provide any other information they believe useful in assessing the request for confidentiality). *See also Qwest Comm. Int'l, Inc.*, 18 FCC Rcd 22980, 22981 (EB 2003); *Kimberly Clark Corp.*, 22 FCC Rcd 3703, 3704 (SED/EB 2007) ("Kimberly Clark did not identify the specific information for which confidential treatment is sought.").

#### D. No Responsive Records

22. USE finds it “disconcerting” that the Bureau failed to locate any records responsive to four categories of records it sought in its FOIA request.<sup>97</sup> USE’s FOIA request sought for all four categories only records that were “non-privileged” and “non-exempt,”<sup>98</sup> substantially narrowing the universe of records it sought. As the Bureau noted, USE had access to the records that were privileged or exempt from disclosure pursuant to protective orders.<sup>99</sup> In these circumstances we find that the Bureau’s response to USE’s request for these four categories of records was sufficient.

#### E. Discretionary Release and Segregability

23. 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>100</sup> We have reviewed the records responsive to NAB’s and USE’s requests 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 FOIA and Attorney General Holder’s FOIA Memo to release segregable portions of the records. NAB also maintains that “there is a compelling public interest in the release of this information so that it can be properly considered and evaluated in the context of the proposed XM/Sirius merger.”<sup>101</sup> While it is true that “[e]ven when particular information falls within the scope of a FOIA exemption, federal agencies generally are afforded the discretion to release the information on public interest grounds,”<sup>102</sup> we decline to exercise our discretion to do so here. As to the identities of the employees and their titles, we have already explained why the public interest in disclosure does not outweigh the privacy interests of the employees.<sup>103</sup> Nor do we discern an overriding public interest in releasing the records that we have determined are exempt from disclosure under FOIA Exemption 4 given the substantial commercial confidentiality attendant to those records.<sup>104</sup>

### IV. ORDERING CLAUSES

24. The applications for review in FOIA 2007-235 and FOIA 2008-190 of Sirius Satellite Radio, Inc., Four Employees of XM Radio, Inc., Three Employees of XM Radio, Inc., and John Doe 1 and John Doe 2 Employees of Sirius Satellite Radio, Inc., ARE GRANTED. The applications for review

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<sup>97</sup> USE 2008-190 AFR at 4-5.

<sup>98</sup> USE 2008-190 AFR at 2. USE referred to “MB Docket 07-57” which was the XM-Sirius transfer of control docket, to SDARS certifications, and to the company Interoperable Technologies LLC.

<sup>99</sup> *XM 2008-190 FOIA Decision* at 3 nn. 12-13; *Sirius 2008-190 FOIA Decision* at 2 nn. 7-9.

<sup>100</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).

<sup>101</sup> NAB 2007-235 AFRs Opp. at 1-2. USE makes similar arguments. See USE 2008-190 AFR at 3-4.

<sup>102</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816, 24818 (1998), citing *Chrysler Corp.*, 441 U.S. at 292-93. See also Attorney General Holder’s FOIA Memo, *supra*.

<sup>103</sup> See paragraph 15, *supra*. See also XM 2008-190 Opp. at 3-4; Sirius 2008-190 Opp. at 5-7.

<sup>104</sup> See U.S. Department of Justice, Office of Information Policy, FOIA Post, *President Obama’s FOIA Memorandum and Attorney General Holder’s FOIA Guidelines Creating a “New Era of Open Government”* (2009), available at <<http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>> (recognizing that discretionary release of records is less likely when the requirements of Exemption 4 are met for withholding records).

of XM Radio, Inc., in FOIA 2007-235 and FOIA 2008-190 ARE GRANTED IN PART AND DENIED IN PART. The application for review of U.S. Electronics, Inc., IS DENIED. Copies of the redacted versions of the records will be provided to the applicants for review upon release of this decision. If no party seeks a judicial stay within 10 working days, the redacted records will be released to the National Association of Broadcasters and U.S. Electronics, Inc.

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary