

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

In the Matter of)	
)	
U.S. ELECTRONICS, INC.)	FOIA Control No. 2008-197
)	
On Request for Inspection of Records)	
)	
)	
KI RYUNG ELECTRONICS COMPANY, LTD.)	
)	
On Request for Confidential Treatment)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 2009

Released: September 30, 2009

By the Commission:

1. By this memorandum opinion and order, we deny an application for review filed by Ki Ryung Electronics Company Ltd. (KRI)¹ seeking review of a decision of the Enforcement Bureau (EB)² granting in part and denying in part a Freedom of Information Act (FOIA) request by U.S. Electronics, Inc. (USE).³

I. BACKGROUND

2. USE's FOIA request sought information about KRI "governing emission limitations for satellite radio receivers, including without limitation, those matters raised and considered in connection with File No. EB-06-SE-250."⁴ EB is investigating KRI's compliance

¹ Application for Review, filed April 3, 2008, by Ki Ryung Electronics Company Ltd. (AFR).

² Letter from Kathryn S. Berthot, Chief Spectrum Enforcement Division to Charles H. Helein, Esq. (March 21, 2008) (Decision).

³ Letter from Charles H. Helein to FOIA Public Liaison (January 28, 2008) (Request).

⁴ *Id.* at 2. The Request also sought records relating to Wistron Corporation. EB dealt with the Wistron records in a separate decision (*see* Decision at 1). Because the AFR does not address Wistron, those matters will not be addressed in this memorandum opinion and order.

with the Commission's rules regarding satellite radio receivers with built-in FM modulators.⁵ USE indicated that it believed the requested documents were relevant to the proposed merger between Sirius Satellite Radio, Inc. (Sirius), and XM Satellite Radio Holdings, Inc. (XM) (MB Docket No. 07-57).⁶

3. In response to USE's FOIA Request, EB stated that it had located documents responsive to USE's FOIA Request, including KRI's response to an EB letter of inquiry (LOI Response) and attachments thereto.⁷ EB agreed with KRI's contention⁸ that portions of the LOI Response should be withheld under FOIA Exemption 4,⁹ which applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." EB noted that under Exemption 4, material required to be submitted to an agency may be withheld if disclosure would cause competitive harm to the submitter or if disclosure would impair the government's ability to obtain necessary information in the future.¹⁰ EB also agreed with KRI that the release of certain portions of the LOI Response and attachments would likely result in substantial competitive harm to KRI and should be redacted, but that disclosing the remainder of the LOI Response would not cause competitive harm to KRI.¹¹ The Bureau further found that disclosure would not impair the government's ability to obtain information necessary to its investigations in the future.¹²

4. KRI asserts in its AFR that EB failed to redact certain competitively sensitive information. KRI describes the additional material that it believes is covered by Exemption 4 and should be redacted.¹³ KRI further asserts that disclosure of the material would impair the government's ability to obtain such information in the future.¹⁴ USE opposes the AFR, primarily

⁵ The existence of this and other investigations has been publicly known, since several companies have disclosed the pending investigations in their filings with the Securities and Exchange Commission. *See* Decision at 2 & n.8.

⁶ *See* Request at 1. The Commission approved the merger between Sirius and XM in *XM Satellite Radio Holdings, Inc.*, 23 FCC Rcd 12348, *appeal pending sub nom., Hartleib v. FCC*, No. 08-1289 (D.C. Cir. filed Sept. 3, 2008).

⁷ *See* Decision at 2.

⁸ Pursuant to 47 C.F.R. § 0.461(d)(3), EB sent a copy of USE's request to KRI to give it an opportunity to provide further support for its request for confidentiality of the documents requested. *See* Decision at 1.

⁹ 5 U.S.C. § 552(b)(4). EB rejected KRI's argument that the LOI response should be withheld in its entirety under FOIA Exemption 7(A), 5 U.S.C. § 552(b)(7)(A). *See* Decision at 2. KRI does not appeal EB's Decision in his regard.

¹⁰ *See* Decision at 2. *See also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878-79 (D.C. Cir. 1992) (discussing applicable standard), *cert. denied*, 507 U.S. 984 (1993); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (discussing applicable standard).

¹¹ *See* Decision at 3-4.

¹² *See id.* at 4.

¹³ AFR at 2 n.3 & 5-6.

¹⁴ *Id.*

asserting that the records it sought were “vital” to assessing the Sirius-XM merger.¹⁵

II. DISCUSSION

5. **Impairment.** KRI argues that disclosure of material in the LOI Response would impair the government’s ability to obtain such information in the future because public disclosure would result in the diminution of the reliability or quality of the information submitted by future LOI respondents.¹⁶ KRI further contends that its willingness to cooperate fully with EB’s investigation was based on its understanding that the material provided would be protected from disclosure. According to KRI, if materials of this type were made routinely available to the public, future Commission respondents would be less forthcoming.

6. We agree with EB’s finding that release of material in the LOI Response would not impair the government’s ability to obtain necessary information in the future. Impairment is not likely to occur where the production of information is or can be compelled, as opposed to being provided voluntarily.¹⁷ We recognize that there are circumstances in which disclosure may affect the reliability of data which is required to be produced.¹⁸ However, those circumstances do not obtain here, and we accept EB’s conclusion that KRI (or other) Commission authorization holders will provide adequate information in response to Commission letters of inquiries in the future even if their responses are subject to FOIA requests.¹⁹ Because EB is the entity generally authorized to conduct investigations on the Commission’s behalf²⁰ and therefore experienced in the kinds of responses filed, we credit its judgment that release of the LOI Response will not interfere with its efforts to obtain information in future investigations, over KRI’s insistence to the contrary. In this regard, we expect our regulatees to cooperate with staff-conducted investigations and note that the failure to do so constitutes serious misconduct.²¹ Finally, we note that private parties are not permitted to argue impairment on behalf of the government where the

¹⁵ Opposition to Application for Review (Apr. 4, 2008) (AFR Opp.). The potential use of these records in the Sirius-XM merger proceeding is not at issue here. In responding to a FOIA request, however, the identity of the requester and the requester’s need or intended use of the records is irrelevant. *See North v. Walsh*, 881 F.2d 1088, 1096 (D.C. Cir. 1989) (finding requester’s intent to use FOIA request as “adjunct discovery device” irrelevant).

¹⁶ *See* AFR at 6-7.

¹⁷ *See Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F.2d at 878 (indicating that governmental interest is unlikely to be implicated where the production of information is compelled).

¹⁸ *See id.* (recognizing circumstances in which disclosure could affect reliability). *See also Martha H. Platt*, 5 FCC Rcd 5742, 5742 (1990) (finding that confidentiality helped to ensure cooperation and avoid burdensome litigation in obtaining audit information, where carriers had opportunity for “very selective response.”)

¹⁹ *See* Decision at 4.

²⁰ *See* 47 C.F.R. § 0.111(a)(16) (EB authorized to conduct investigations, conduct external audits, and collect information, in connection with complaints, on its own initiative, or upon the request of another bureau or office).

²¹ *See James A. Kay, Jr.*, 17 FCC Rcd 1834, 1846 ¶ 40 (2002) (failure to provide information in response to Commission inquiry may violate the Commission’s rules or constitute lack of candor), *recon. granted in part and denied in part*, 17 FCC Rcd 8554 (2002), *aff’d*, 396 F.3d 1184 (D.C. Cir.), *cert. denied*, 546 U.S. 871 (2005).

government did not raise the issue.²²

7. **Competitive Harm.** KRI asserts that EB should have redacted additional competitively sensitive information from the LOI Response.²³ These proposed redactions fall into three categories. First, According to KRI, responses to LOI Question 2 and 4 reveal competitively sensitive information about KRI's distribution and marketing strategy in the United States.²⁴ Second, KRI asserts that information provided in response to LOI Questions 3, 5-7, and its conclusion details KRI's corporate strategy in responding to EB's investigation, and the results of KRI's own review of its compliance.²⁵ Third, KRI maintains that information in response to Question 8 could give KRI's competitors insight into the performance of KRI's products and public satisfaction with those products.²⁶ We have reviewed the material that KRI claims should be redacted. We agree with EB that KRI has not shown that release of this information would cause competitive harm to KRI.

8. Our review of KRI's response to LOI Question 2, the third sentence of its response to Question 3,²⁷ and the second sentence of its response to Question 4 indicates that this material consists of general information about the manufacture, importation, and distribution of certain radio receivers. Most importantly, the information contained in the this material does not appear to be substantially different from material contained in KRI's response to Question 1 that EB proposes to disclose, a determination that KRI does not challenge. Further, we do not see, and KRI does not explain, how disclosure of this general information would enable KRI's competitors to adjust their own market plans or target specific distributors. Nor do we see how the responses would allow USE, as a KRI distributor, to negotiate more favorable terms, as KRI claims.²⁸

9. We have also examined the third paragraph of KRI's response to Question 3, the third sentence of each of KRI's response to Question 5-7, and the second and third sentences of the Conclusion. This material describes in a very general way KRI's compliance and response to EB's investigation.²⁹ Especially because the public already knows that KRI is under investigation

²² See *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988).

²³ See AFR at 2 n.3; 5-6.

²⁴ See *id.* at 2 n.3, 5.

²⁵ See *id.*

²⁶ See *id.* at 2 n.3, 5-6.

²⁷ The third sentence to the response to LOI Question 3 is listed in AFR n.3 and contains information similar to the responses to Question 2 and 4.

²⁸ See AFR at 5. In particular, we find that the material in question does not contain the kind of detailed information that would reveal significant, otherwise unknown aspects of business plans and strategies, as was the case, for example, in *Timken Co. v. U.S. Customs Service*, 491 F. Supp. 557 (D.D.C. 1980). Similarly distinguishable is *National Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976), relied on by KRI, in which the court found that the disclosure of detailed financial information about national parks concession operators to their competitors would cause substantial harm.

²⁹ We note, however, that the third paragraph of KRI's response to LOI Question 3 does not appear to address KRI's strategy in replying to the LOI or the results of KRI's compliance review.

for possible noncompliance, we do not see how such general information could have a substantial competitive impact on KRI. We do not find any detailed internal information about KRI that KRI's competitors could use to gain a competitive advantage.

10. Finally, KRI's response to Question 8 (asking whether KRI has received any complaints or reports that the XTR 3 radio is causing interference) contains a highly general statement about the degree of consumer satisfaction with KRI's products to the extent that it addresses the issue at all. We find in it no detailed explanation by KRI of how its competitors could use this information to gain a competitive advantage or to cause it competitive harm.³⁰ Accordingly, we do not believe that Exemption 4 protects this material from disclosure.

11. **Discretionary Release and Segregability.** We have examined the records at issue here to determine whether any additional 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.³¹ We have reviewed the records responsive to USE's request to determine whether any additional portions may be segregated and released, and have found none. Accordingly, with the 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. Moreover, 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,"³² we decline to exercise our discretion to do so here. We do not discern any overriding public interest in releasing the records that we have determined are exempt from disclosure under FOIA Exemption 4 given the substantial commercial confidentiality interest attendant to those records.³³

III. ORDERING CLAUSE

12. ACCORDINGLY, IT IS ORDERED that Ki Ryung Electronics Company, Ltd.'s application for review IS DENIED. If KRI does not seek a judicial stay within ten (10) working days of the date of release of this memorandum opinion and order, the redacted records will be produced to USE, as specified in the Enforcement Bureau's decision, and as discussed herein. See 47 C.F.R. § 0.461(i)(4).

³⁰ USE filed an opposition to the AFR in which it set forth additional arguments for disclosure. See Opposition to Application for Review, filed April 4, 2008, by USE. Because we agree with EB's decision, we will not address USE's additional arguments.

³¹ 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).

³² *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*.

³³ 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).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary