

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

In the Matter of	)	
	)	
JOSH WEIN, WARREN	)	FOIA Control No. 2008-151
COMMUNICATIONS NEWS	)	
	)	
On Request for Inspection of Records	)	
	)	
	)	
COX COMMUNICATIONS, INC.	)	
	)	
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 grant in part and deny in part an application for review filed by Cox Communications, Inc. (Cox)<sup>1</sup> seeking review of a decision of the Enforcement Bureau (EB)<sup>2</sup> granting in part and denying in part a Freedom of Information Act (FOIA) request by Josh Wein (Wein) of Warren Communications News.<sup>3</sup> As indicated below, we modify EB's decision to provide that certain material should be withheld from disclosure as confidential.

**I. BACKGROUND**

2. Wein's FOIA request sought records regarding EB's investigation (File No. EB-07-SE-351) of Cox's deployment of switched digital video (SDV) technology,<sup>4</sup> including Cox's

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<sup>1</sup> Application for Review, filed April 7, 2008, by Cox Communications, Inc. (AFR).

<sup>2</sup> Letter from Kathryn S. Berthot, Chief Spectrum Enforcement Division to Mr. Josh Wein (March 24, 2008) (Decision).

<sup>3</sup> E-mail from Josh Wein to FCC FOIA (January 14, 2008) (Request). Wein is an editor of the publication Communications Daily.

<sup>4</sup> Switched digital video is a method of delivering selected digital broadcast programming only to subscribers who are actively requesting that programming, as opposed to delivering all programming feeds to all subscribers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 12229, 12241 n.43 (2006). The subject matter of the investigation is described in EB's letter of inquiry (LOI), Letter from Kathryn S. Berthot, Chief Spectrum Enforcement Division, EB to James A. Hatcher, Esq. (Nov. 8, 2007), which was disclosed as indicated, *infra* n.12.

compliance with Section 629(a) of the Communications Act,<sup>5</sup> and rules regarding service charges<sup>6</sup> and customer notification of service changes.<sup>7</sup> Wein requested a copy of EB's LOI, Cox's response to the LOI (LOI Response), and any other responses or pertinent documents resulting from the LOI.<sup>8</sup> EB notified Cox of Wein's FOIA request, and Cox opposed release of the requested records.<sup>9</sup>

3. EB found that the LOI should be released<sup>10</sup> and that the LOI response should be released with certain information redacted. EB rejected Cox's argument that the requested documents should be withheld under FOIA Exemption 7(A).<sup>11</sup> EB found that because Cox, the subject of the investigation, already had possession of the documents in question, their release would not likely interfere with any pending or future investigations.<sup>12</sup> EB further rejected Cox's contention that the LOI Response should be withheld in its entirety under FOIA Exemption 4,<sup>13</sup> 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.<sup>14</sup> EB found no basis for withholding the entire LOI Response because the document did not consist entirely of commercial and financial information, and because the LOI Response contained much material that was already publicly available, such as press releases and news

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<sup>5</sup> See 47 U.S.C. § 549(a). Section 629(a) requires the operators of multichannel video programming systems, such as cable systems, to make their systems accessible to "navigation devices" (such as set top boxes, remote control units, and other equipment) that are commercially available from sources other than the system operator. See *Commission Adopts "Navigation Devices" Rules Creating Consumer Market for Set Top Boxes and Other Equipment Used With Video Programming Systems*, Rep. No. CS 98-11 (Jun. 11, 1998), reported at 1998 WL 306795; 47 C.F.R. § 1.1204 (implementing regulation). Additionally, 47 C.F.R. § 76.640 requires cable systems to support unidirectional (*i.e.*, non-SDV) cable products. EB is investigating whether Cox's deployment of SDV made certain channels inaccessible without a Cox set top receiver and thus inaccessible by non-Cox unidirectional products such as CableCARD.

<sup>6</sup> These include 47 C.F.R. § 1.1206, which requires separate charges for services and equipment, and the more general requirements regarding customer charges set forth in 47 C.F.R. §§ 76.980 and 76.984.

<sup>7</sup> See 47 C.F.R. § 76.1603 (requiring written notice of service changes).

<sup>8</sup> See Request at 1. Wein had obtained a copy of a supplemental response to the LOI when that document was mistakenly made publicly available. See Wein, *FCC Investigation of Switched Digital Video Began in November*, Comm. Daily (Apr. 7, 2008) (Wein Article) at 7.

<sup>9</sup> See Letter from Gary S. Lutzker, Cox Communications, Inc., to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, EB (Feb. 15, 2008).

<sup>10</sup> It appears that EB released the LOI to Wein prior to the expiration of the time for filing an AFR under 47 C.F.R. § 0.461(i). See Wein Article at 6.

<sup>11</sup> See Decision at 3-4, citing 5 U.S.C. § 552(b)(7)(A) (exempting from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information (A) could reasonably be expected to interfere with enforcement proceedings").

<sup>12</sup> See *id.* citing *Wireless Consumers Alliance*, 20 FCC Rcd 3874, 3881-82 (2005).

<sup>13</sup> 5 U.S.C. § 552(b)(4).

<sup>14</sup> See Decision at 2. See *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878-79 (D.C. Cir. 1992) (discussing applicable factors), *cert. denied*, 507 U.S. 984 (1993); *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974) (discussing applicable factors).

articles.<sup>15</sup> EB indicated that it would redact portions of the LOI Response that contained information such as investment costs and sales statistics.<sup>16</sup> Additionally, EB found that disclosure of the LOI response would not impair the Commission's ability to obtain such information in the future, since Commission licensees, such as Cox, can be required to provide it.<sup>17</sup>

4. In its AFR, Cox argues that the LOI Response should be withheld in its entirety under both Exemption 7(A) and Exemption 4.<sup>18</sup> Cox further argues that, if the LOI Response is released, additional redactions, beyond those proposed by EB, should be made.<sup>19</sup> Wein was served with the AFR, but we have received no filing by Wein in response.

## II. DISCUSSION

### A. Procedural Matters

5. Cox's AFR complains that the Bureau "fail[ed] to protect the Requested Documents from public disclosure"<sup>20</sup> by prematurely disclosing the LOI,<sup>21</sup> since the Bureau released the LOI to Wein prior to the expiration of the time for Cox to seek review of the Decision.<sup>22</sup> We have been unable to discover why the LOI was released prior to the deadline for filing the AFR. Even though the Bureau properly determined that the LOI should be released to Wein,<sup>23</sup> the Bureau should not have released that record until it was clear that Wein was not seeking our review of that part of the Bureau's decision. We direct the Bureau to take care in the future that no such early releases of records occur.

6. Cox faults EB for ignoring what it terms Wein's failure to comply with the "threshold procedural requirements" of the Commission's FOIA rules when he filed his FOIA request.<sup>24</sup> According to Cox, Wein failed to include in his FOIA Request a "persuasive showing as to the reasons for the inspection," as required by 47 C.F.R. §§ 0.461(c) and 0.457(d)(2). These rules, however, require such a showing only if the material sought is of the kind listed under 47 C.F.R. § 0.457 or subject to a claim of confidentiality under 47 C.F.R. § 0.459. Neither of these regulations applies to the LOI Response, which was filed without a request for confidential treatment. Thus, no persuasive showing was required to be made by Wein.

### B. Exemption 7(A)

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<sup>15</sup> See Decision at 2-3.

<sup>16</sup> See *id.* at 3.

<sup>17</sup> See *id.* at 2.

<sup>18</sup> AFR at 4-8.

<sup>19</sup> AFR at 8-9.

<sup>20</sup> AFR at 2.

<sup>21</sup> See AFR at 1 ("Requested Documents" includes the LOI).

<sup>22</sup> The Wein Article describing the LOI appeared in Communications Daily on April 7, 2008 (*see n. 12, supra*). The Bureau's decision was issued March 24, 2008, allowing Cox 10 working days to seek review. Decision at 4. Cox timely filed its AFR on April 7, 2008.

<sup>23</sup> See paras. 7-8, *infra* affirming EB's determination not to apply Exemption 7(A) to the records requested here.

<sup>24</sup> See AFR at 2 n.5, 6.

7. Invoking Exemption 7(A),<sup>25</sup> Cox asserts that EB erred in concluding that release of the documents would not interfere with other pending or future investigations. According to Cox, if the subjects of investigations expected that information they provided would likely be made available to the public and to the media, they would be less cooperative and would be inclined to withhold information from the Commission. Cox contends that, as a result, the quality and depth of information provided to the Commission would be impaired.<sup>26</sup>

8. We agree with EB that there is no reason to withhold the LOI or the LOI Response under Exemption 7(A). As EB correctly noted,<sup>27</sup> the release of information already known to the subject of an investigation would not typically result in interference with that investigation.<sup>28</sup> Moreover, EB does not believe that release of the LOI or the LOI Response will result in any interference with similar pending or future investigations.<sup>29</sup> EB is the entity generally authorized to conduct investigations on the Commission's behalf,<sup>30</sup> and we credit its judgment that release of the LOI and the LOI Response will not interfere with its efforts to conduct other investigations over Cox's insistence that it will. We therefore affirm EB's finding in this regard and further note that it is for the government, not a private party to determine whether release of information will impair a government investigation.<sup>31</sup>

#### C. Exemption 4.

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<sup>25</sup> 5 U.S.C. § 552(b)(7)(A) (exempting from disclosure under the FOIA "records or information compiled for law enforcement purposes . . . to the extent that the production of such law enforcement records of information could reasonably be expected to interfere with enforcement proceedings").

<sup>26</sup> See AFR at 5-6. Cox also faults EB's finding that "Cox, as a Commission licensee, was required to provide this information in response to the LOI, and can be required to do so in the future." *Id.* at 5, quoting Decision at 2. EB, however, made that finding in the context of discussing Exemption 4, not Exemption 7(A), and we will therefore discuss the finding in the context of Exemption 4 at paragraph 12, *infra*. In any event, as explained in paragraph 8, *infra*, we credit EB's conclusion that disclosure will not impair its investigations.

<sup>27</sup> See Decision at 3.

<sup>28</sup> See *Wireless Consumer Alliance*, 20 FCC Rcd at 3881, citing *Lion Raisins, Inc. v. U.S. Dep't of Agriculture*, 354 F.3d 1072, 1085 (9th Cir. 2003) and *Wright v. OSHA*, 822 F.2d 642, 646 (7th Cir. 1987).

<sup>29</sup> See Decision at 3-4. This case is therefore readily distinguishable from cases relied on by Cox. In *Patrick Linstruth*, 16 FCC Rcd 17409, 17410-11 (2001), EB made specific findings that disclosure would interfere with an investigation by revealing the scope, direction, and nature of the investigation and chilling the testimony of potential witnesses. Similarly, in *Evening Star*, 24 FCC 2d 766 (Exec. Director 1970), *rev. denied*, 24 FCC 2d 767 (1970), the Commission's Executive Director made a specific finding that disclosure of information about preliminary allegations would prejudice the conduct of any further investigation or enforcement proceedings. Here, EB could not discern how release of the LOI would have such an effect on the SDV investigation.

<sup>30</sup> 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).

<sup>31</sup> See *McMorgan & Co. v. First California Mortgage Co.*, 931 F. Supp. 703, 710 (N.D. Cal. 1996) (court concludes that private party has not demonstrated that it has "standing" to assert that disclosure of documents would compromise a government investigation).

9. Next, invoking Exemption 4,<sup>32</sup> Cox contends that contrary to EB's finding, disclosure of the LOI Response would give's Cox's competitors an unfair advantage in the Northern Virginia market for multichannel video.<sup>33</sup> Cox explains that "release of the Requested Documents, regardless of redaction, would cause Cox competitive harm by exposing it to unsubstantiated and inaccurate public charges of wrongdoing by its competitors"<sup>34</sup> Cox also contends that the disclosure of preliminary investigatory information "will impair the quality of the information the Bureau will receive by creating a compelling incentive to provide only the most limited and perfunctory co-operation with Bureau inquiries."<sup>35</sup>

10. Further, Cox maintains that EB's efforts to redact confidential financial and commercial information are flawed.<sup>36</sup> EB's redactions respond to Cox's claim that portions of the LOI Response contain "confidential and competitively sensitive system-specific sales statistics, financial, and technical information that Cox protects from disclosure with all necessary precautions."<sup>37</sup> Cox had also indicated that "[i]n addition to business sales statistics, technical information, and SDV implementation costs . . . Cox's [LOI Response] included detailed explanations of how Cox selected the specific video services to be delivered using SDV technology, why SDV is critical to Cox's competitive position, and how Cox addressed potential customer service issues that might arise in connection with SDV deployment."<sup>38</sup> In Cox's view, the redactions proposed by EB are incomplete, because EB failed to redact all such material from the LOI Response.<sup>39</sup>

11. We see no justification for withholding the LOI Response in its entirety under Exemption 4. Cox overstates the scope of the protection afforded by that exemption. In the context of Exemption 4, competitive harm refers to the "harm flowing from the affirmative use of proprietary information by *competitors*."<sup>40</sup> Cox claims it would be harmed by its potential exposure to unfair allegations of wrongdoing,<sup>41</sup> but Exemption 4 does not include, for example, customer or employee disgruntlement or embarrassing publicity that might result from

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<sup>32</sup> 5 U.S.C. § 552(b)(4) (exempting from disclosure under the FOIA "trade secrets and commercial or financial information obtained from a person and privileged and confidential").

<sup>33</sup> See AFR at 6-7.

<sup>34</sup> See *id.* at 7 (footnote omitted).

<sup>35</sup> See *id.*

<sup>36</sup> EB provided Cox with a copy of the LOI Response indicating the proposed redactions. See Decision at 4.

<sup>37</sup> See Letter from Gary S. Lutzker to Ms. Kathryn S. Berthot, Chief, Spectrum Enforcement Division (February 15, 2008), Appendix at 8 n.35. The quoted statement is contained in a "Confidential Appendix" attached to the referenced letter. EB found that other than designating the Appendix "Confidential," Cox had failed to show that it warranted confidential treatment and that it contained no confidential information, but simply set forth the basis of Cox's arguments. See Decision at 1-2. Cox does not appeal EB's determination in that regard.

<sup>38</sup> *Id.*, Appendix at 7.

<sup>39</sup> See AFR at 8-9.

<sup>40</sup> *Public Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983) (emphasis in original).

<sup>41</sup> AFR at 7.

disclosure.<sup>42</sup>

12. Moreover, we agree with EB that disclosure would not impair the government's ability to obtain necessary information in the future.<sup>43</sup> Impairment is not likely to occur where the production of information is compelled, as opposed to being provided voluntarily.<sup>44</sup> We recognize that there are circumstances not present here in which disclosure may affect the reliability of such data which is required to be produced.<sup>45</sup> As we held with respect to Exemption 7(A),<sup>46</sup> however, we credit EB's judgment that disclosure under the circumstances of this case will not impair its ability to obtain required information in its investigatory efforts. In this regard, we expect our regulatees to cooperate with staff-conducted investigations, and note that the failure to do so constitutes serious misconduct.<sup>47</sup> Finally, we note that private parties are not permitted to argue impairment on behalf of the government where the government did not raise the issue.<sup>48</sup>

13. We agree with EB that certain redactions are necessary to prevent the disclosure to Cox's competitors of information in the LOI Response that would cause competitive harm to Cox, specifically information relating to Cox's business operations and plans. Disclosure of this type of information to Cox's competitors could damage Cox's competitive position by giving the competitors insight into Cox's business methods and strategies.<sup>49</sup> Cox maintains that additional redactions should have been made by EB.<sup>50</sup> We have reviewed the material proposed by Cox to be redacted and agree with Cox that in some instances EB redacted certain competitively sensitive information but did not redact the same or similar information elsewhere in Cox's Response. EB indicated that it would redact "investment costs and sales statistics pursuant to Exemption 4."<sup>51</sup> Cox highlights two instances in which EB redacted such information in one

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<sup>42</sup> *Public Citizen*, 704 F.2d at 1291 n.30. See also *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1154 (D.C. Cir. 1987) (anticipated displeasure of employees and adverse public reaction are unrelated to the policy behind Exemption 4). For this reason, we find no prejudice in EB's premature disclosure of the LOI, which does not contain competitively sensitive financial, commercial, or technical data or indeed any information provided by Cox.

<sup>43</sup> See Decision at 2.

<sup>44</sup> 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).

<sup>45</sup> See *id.* (recognizing circumstances in which disclosure could affect reliability). See also *Martha H. Platt*, 5 FCC Rcd 5742, 5742 ¶ 5 (1990) (finding that confidentiality helped to ensure cooperation and avoid burdensome litigation in obtaining audit information, where carriers had opportunity for "very selective response.")

<sup>46</sup> See para. 8, *supra*.

<sup>47</sup> See *James A. Kay, Jr.*, 17 FCC Rcd 1834, 1846 ¶ 40 (2002), *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).

<sup>48</sup> See *Hercules, Inc. v. Marsh*, 839 F.2d 1027, 1030 (4th Cir. 1988).

<sup>49</sup> See, e.g., *John E. Wall, Jr.*, 22 FCC Rcd 2561, 2562 ¶ 3 & n.16 (2007) (withholding information regarding revenues and demand for services), *citing Nat'l Parks and Conservation Ass'n v. Kleppe*, 547 F.2d 673, 684 (D.C. Cir. 1976) (insight into business strategies recognized as competitive harm).

<sup>50</sup> AFR at 8-9.

<sup>51</sup> See Decision at 3.

place,<sup>52</sup> but did not redact the same or similar information in another.<sup>53</sup> Competitively sensitive information of this kind should be redacted consistently, and Cox's suggested redactions should be made, as described in Cox's AFR. Cox also notes that in some instances EB redacted discussion of Cox's competitive rationale for introducing SDV in the Northern Virginia market and its implementation strategy for SDV.<sup>54</sup> We agree that this information is competitively sensitive and that similar discussion should be redacted elsewhere, as described in Cox's AFR.<sup>55</sup> EB is directed to perform the additional redactions sought by Cox on this subject.<sup>56</sup> Finally, Exhibit 1 to the LOI Response is a copy of a consumer complaint against Cox. EB redacted the complainant's name from the complaint.<sup>57</sup> EB did not, however, redact the complainant's name from the cover sheet to Exhibit 1.<sup>58</sup> We agree with Cox that it should do so.<sup>59</sup> This redaction is made to protect the privacy of the complainant pursuant to Exemptions 6 and 7(C).<sup>60</sup>

#### D. Discretionary Release and Segregability

14. 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.<sup>61</sup> We have reviewed the records responsive to Wein'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 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,"<sup>62</sup> we decline to exercise our discretion to do so here. We do not discern any overriding

<sup>52</sup> See LOI Response at 3 n.7 (investment costs); *id.* at 10 (sales statistics).

<sup>53</sup> See *id.*, Exhibit 5, "Switched Digital Video" at 2 (investment costs); *id.* at 4 (sales statistics).

<sup>54</sup> See *id.* at 5; *id.*, Declaration of Darryl Ladd at 4.

<sup>55</sup> See *id.* at 3; *id.*, Declaration of Steve Necessary at ¶ 4; *id.*, Exhibit 5, "Switched Digital Video" at 4.

<sup>56</sup> We take this opportunity to note that under section 12 of the OPEN Government Act of 2007, Pub. L. 110-175 (Dec. 31, 2007), amending 5 U.S.C. § 552(b), when portions of records are redacted, we are required to indicate at the location of the redaction how much information is being redacted and the FOIA exemption upon which we rely in making the redaction. Accordingly, EB must follow the requirements of this amendment to the FOIA.

<sup>57</sup> See Decision at 4.

<sup>58</sup> See LOI Response, Exhibit 1.

<sup>59</sup> See AFR at 9.

<sup>60</sup> 5 U.S.C. §§ 552(b)(6) and 552(b)(7)(C). See *Wichlacz v. U.S. Dep't of Interior*, 938 F. Supp. 325, 333 (E.D. Va. 1996) ("Law enforcement officers, interviewees, suspects, witnesses, and other individuals named in investigatory files all have substantial privacy interests" because revelation could result in "embarrassment or harassment").

<sup>61</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>62</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*.

public interest in releasing the records that we have determined are exempt from disclosure under FOIA Exemption 4 and 6 given the substantial commercial confidentiality or personal privacy interests attendant to those records.<sup>63</sup>

### III. ORDERING CLAUSE

15. IT IS ORDERED that Cox Communications, Inc.'s application for review IS GRANTED to the extent indicated above and is otherwise DENIED. If Cox 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 Wein, as specified in the Enforcement Bureau's decision and as modified above. *See* 47 C.F.R. § 0.461(i)(4).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>63</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).