

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

In the Matter of)
)
COUNCIL TREE INVESTORS, INC.) FOIA Control No. 2009-413
)
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: July 28, 2010

Released: August 2, 2010

By the Commission:

I. INTRODUCTION

1. The Commission has before it an application for review (AFR) filed by Council Tree Investors, Inc. (Council Tree)¹ of the decision by the Associate General Counsel granting its Freedom of Information Act (FOIA) request for certain records concerning the rules for eligibility for designated entity benefits. Council Tree questions the scope of the search performed for the records it sought, and the redaction of certain notations by advisors to Commissioners on two pages released by the Associate General Counsel. We affirm the decision of Associate General Counsel because on review we have confirmed that a complete search was performed. We also affirm the Associate General Counsel's redactions under FOIA Exemption 5² because the Associate General Counsel properly withheld portions of records that, if released, would inhibit the free and frank exchange of ideas as part of the deliberative process.

2. On May 22, 2009, Council Tree filed a FOIA request for "all documents" dated between June 13, 2005 and June 30, 2006 relating to two 2006 rulemaking items regarding the participation of designated entities (DEs) in spectrum auctions, except documents publicly available or documents routinely unavailable for public inspection pursuant to 47 C.F.R. § 0.457.³ Council Tree later limited the scope of its request to records of five named senior Commission staff.⁴ Those employees searched their records and located a total of five pages responsive to Council Tree's request. Council Tree was provided with copies of these pages, with handwritten notes on two pages redacted pursuant to FOIA Exemption 5.⁵ Council Tree seeks review of the FOIA Decision "to establish the completeness of the scope of the FOIA response."⁶

¹ Council Tree changed its corporate name from Council Tree Communications, Inc. to Council Tree Investors, Inc. Application for Review (AFR) (Oct. 11, 2009) at 1 n.1.

² 5 U.S.C. § 552(b)(5).

³ Section 0.457 lists records the Commission that are routinely not available for public inspection under the FOIA exemptions set forth in 5 U.S.C. § 552(b).

⁴ Email from Dennis P. Corbett, Esq. (counsel for Council Tree) to Margaret Weiner, Chief, Auctions and Spectrum Analysis Division, Wireless Telecommunications Bureau (WTB) (June 26, 2009) (specifying that Council Tree sought a search of the files of Fred Campbell, Barry Ohlson, Bruce Gottlieb, Angela Giancarlo, and Cathy Seidel).

⁵ Letter from Joel Kaufman, Associate General Counsel, to S. Jenell Trigg, Esq. and Dennis P. Corbett, Esq. (Sept. 15, 2009) (FOIA Decision), *citing* 5 U.S.C. § 552(b)(5), *Rob Evans*, 17 FCC Rcd 15146 (2002) and *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 867 (D.C. Cir. 1980) (*Coastal States*).

⁶ AFR at 2.

3. Specifically, Council Tree questions the search performed for the records because the FOIA Decision “contains no declaration that the Commission had completed its review of all of its files relevant to the FOIA request and no representation that the five partially redacted pages which were provided comprise the entire universe of documents responsive to the FOIA request.”⁷ Here, Council Tree’s FOIA request was limited to five senior Commission employees. At the time of the initial search coordinated by the Office of General Counsel (OGC), the three named employees who are still Commission employees⁸ were contacted and instructed to search their records. The files of the remaining two employees who had left the Commission⁹ had been transferred to the Office of Managing Director, Performance Evaluation and Records Management Branch (OMD/PERM). An FCC employee in OMD/PERM responsible for records was also contacted and instructed to search the files of the former employees. The three FCC employees and the custodian of the records of the former employees searched the records. The three named employees responded that they did not locate any records.¹⁰ The OMD/PERM employee located the five pages¹¹ that were ultimately produced to Council Tree.¹² OGC reviewed the five pages, determined that portions of the pages should be redacted pursuant to FOIA Exemption 5, and on that basis the Associate General Counsel issued his determination.

4. Council Tree also disputes the Associate General Counsel’s invocation of FOIA Exemption 5 to redact portions of the records released.¹³ The Associate General Counsel explained that he was “redact[ing] from two pages handwritten notes” that “provide advice to the Commissioner” and thus fall within the deliberative process privilege of Exemption 5.¹⁴ Advice to an FCC Commissioner by his or her staff is quintessentially the type of advice that may be withheld pursuant to FOIA Exemption 5. As the Commission explained in *Rob Evans*,¹⁵ a decision affirming an OGC decision to withhold portions of a briefing sheet prepared for a Commissioner by her staff and cited in this matter by the Associate General Counsel:

FOIA Exemption 5 permits the withholding of materials in order to encourage open, frank discussions on matters of policy between subordinates and superiors. Documents commonly encompassed by the deliberative process privilege include recommendations that, if released, would likely “stifle honest and frank communication within the agency.”

⁷ *Id.*

⁸ Bruce Gottlieb, Angela Giancarlo, and Cathy Seidel.

⁹ Fred Campbell and Barry Ohlson.

¹⁰ Email from Bruce Gottlieb to Laurence Schecker (Sept. 9, 2009); email from Angela Giancarlo to Laurence Schecker (Aug. 12, 2009); email from Cathy Seidel to Laurence Schecker (Sept. 14, 2009).

¹¹ The OMD/PERM employee provided the pages to the attorney in the Wireless Telecommunications Bureau (WTB) who was originally assigned to handle this FOIA request. He forwarded the pages to OGC. Email from William Huber to Laurence Schecker (Sept. 9, 2009).

¹² Council Tree questions why, if all documents were produced, the FOIA Decision (at 2) gave them appeal rights under the FOIA. AFR at 3 n.2. As the FOIA Decision withheld pursuant to FOIA Exemption 5 portions of the records released, it was appropriate to inform Council Tree of its right to seek review of the FOIA Decision. In addition, a FOIA requester may always seek review if it believes all of the records that exist responsive to its request have not been located. Accordingly, the Commission routinely includes a paragraph about appeal rights in initial FOIA decisions.

¹³ AFR at 3.

¹⁴ FOIA Decision at 1.

¹⁵ 17 FCC Rcd at 14156 (footnotes omitted) (*quoting Coastal States and citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 n.18 (1975); and *Access Reports v. Department of Justice*, 926 F.2d 1192, 1196 (D.C. Cir. 1996)).

To fall under the protection of Exemption 5, a document must be predecisional and must be a direct part of the deliberative process. The predecisional character of records does not hinge on a specific agency final decision; rather, the record must simply have been part of the deliberative process.

Like the briefing sheet in *Rob Evans*, the notations redacted from two pages of the records released to Council Tree meet these criteria. The handwritten notations provided advice to the Commissioners concerning the proposed meetings that were the subject of the emails. The advice enabled the Commissioners to decide how to proceed with the meeting requests.¹⁶ To release the advice of staff to FCC Commissioners would chill the free, frank discussion between advisors and Commissioners, harming their relationship.¹⁷ The Associate General Counsel properly redacted those portions of the email pages containing the staff advice. He thus acted consistently with the FOIA requirement that records be reviewed to determine if any segregable portions can be released¹⁸ and our responsibility to withhold only those parts of records that would result in foreseeable harm to an interest protected by FOIA Exemption 5.¹⁹

5. IT IS ORDERED that the application for review filed by Council Tree Investors, Inc., IS DENIED. Council Tree may seek review may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(b).

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹⁶ See *Rob Evans*, 17 FCC Rcd at 14157 (the briefing sheet “enabled the Commissioner to discuss her upcoming meeting with staff to decide what issues should be discussed or might be raised”).

¹⁷ E.g., *Coastal States*, 617 F.2d at 866; *Rob Evans*, 17 FCC Rcd at 15147.

¹⁸ 5 U.S.C. § 552(b) (sentence immediately following exemptions).

¹⁹ See *Memorandum to Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 FR 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).