

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

In the Matter of )
JOSEPH I. MARCHESE )
On Request for Inspection of Records ) FOIA Control No. 2011-445

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 2011

Released: September 26, 2011

By the Commission:

1. We have before us an Application for Review (AFR) filed by Joseph I. Marchese of Bursor & Fisher, P.A. (Marchese)1 seeking review of the decision of the Wireless Telecommunications Bureau (WTB)2 denying his Freedom of Information Act (FOIA) request3 for an unredacted copy of the declaration of Colin B. Weir filed in WT Docket No. 11-65 (the Weir Declaration).4 Two oppositions to the Marchese AFR were filed.5 For the reasons discussed below, Mr. Marchese’s AFR is dismissed as untimely filed.

2. On July 19, 2011, WTB denied Marchese’s FOIA request for the Weir Declaration because it determined that the declaration contained confidential commercial information that should be withheld under FOIA Exemption 4, 5 U.S.C. § 552(b)(4).6 Pursuant to the Commission’s rules, Marchese had 30 calendar days from the date of the Denial Letter (i.e., until August 18, 2011) to file an AFR.7

1 Letter from Joseph I. Marchese, Bursor & Fisher, P.A. to Office of the General Counsel (Sept. 9, 2011) (Marchese AFR).

2 Letter from Nese B. Guendelsberger, Chief, Spectrum & Competition Policy Division, WTB, to Joseph I. Marchese (July 19, 2011) (Denial Decision).

3 Email from Joseph I. Marchese to FOIA@FCC.gov (June 20, 2011) (Request).

4 Applications of AT&T Inc. and Deutsche Telekom AG for Consent To Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65.

5 AT&T’s Opposition to Bursor & Fisher, P.A.’s Application for Review (Sept. 22, 2011); letter from Nancy J. Victory, Wiley Rein LLP, to Austin Schlick, General Counsel (Sept. 22, 2011) (opposition of Deutsche Telekom AG and T-Mobile USA, Inc.).

6 Denial Decision at 1.

7 The FOIA provides a right of administrative appeal from initial FOIA decisions. See 5 U.S.C. § 552(a)(6)(A)(i) (initial FOIA determinations must notify requester of the right to appeal that determination). Our rules require that such appeals (AFRs) must be filed within 30 days. 47 C.F.R. § 0.461(j) (“The application [for review] shall be filed within 30 calendar days after the date of the written ruling by the custodian of records.”). The Denial Decision specifically notified Mr. Marchese of this requirement. See Denial Decision at 2.

On August 5, 2011, Mr. Marchese's law firm, Bursor & Fisher, P.A., filed a complaint in the United States District Court for the Southern District of New York seeking release of the Weir Declaration.<sup>8</sup> On September 8, 2011, the court denied Bursor & Fisher's motion for a preliminary injunction.<sup>9</sup> The next day, September 9, 2011, Mr. Marchese filed his AFR with the Commission.

3. We dismiss the Marchese AFR as untimely filed. Mr. Marchese filed his AFR 53 days after WTB issued its Denial Letter, 23 days after the deadline set by our rules and noted in the Denial Letter. Mr. Marchese intentionally bypassed administrative review, choosing instead to seek judicial relief in the name of his law firm, even though he had failed to exhaust his administrative remedies. It was only after the District Court denied preliminary relief, following expiration of the time for submitting an AFR, that Mr. Marchese filed his AFR with the Commission. The AFR does not seek a waiver of the 30-day filing deadline contained in our regulations. Consistent with our rules and precedent, we dismiss the late-filed Marchese AFR as untimely.<sup>10</sup>

4. Accordingly, **IT IS ORDERED** that the Application for Review filed September 9, 2011 by Joseph I. Marchese IS DISMISSED.<sup>11</sup>

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>8</sup> *Bursor & Fisher, P.A. v. FCC*, Civ. Action No. 11-cv-5457-LAK (S.D.N.Y. filed Aug. 5, 2011). The complaint was served on the United States Attorney for the Southern District of New York, who represents the Commission in the *Bursor* action, on August 19, 2011.

<sup>9</sup> Transcript of oral argument in *Bursor & Fisher v. FCC* (Sept. 8, 2011). The court repeatedly noted Mr. Marchese's failure to file an administrative appeal of the Denial Decision. *Id.* at 19, 28, 30, 35, 37, and 38. Specifically, the court observed:

The FCC denied the Freedom of Information Act request on July 19, 20[1]1. It advised the plaintiff's law firm of its right to appeal the FOIA denial within the FCC in accordance with 47 C.F.R. section 0.461. The plaintiff did not avail itself of its right to appeal within the FCC. For a month it did nothing relevant at all. It let that month just slide by.

*Id.* at 28.

<sup>10</sup> *Capital Reporting Co.*, 24 FCC Rcd 12355, 12356 (2009); *David A. Larson*, 22 FCC Rcd 5281 (2007); *Jeffrey W. Hanson*, 16 FCC Rcd 16497, 16499 (2001); *Robin Hardin*, 14 FCC Rcd 18265 (1999); *Michael C. Olson*, 13 FCC Rcd 20593 (1998). This matter is not like those in which we have excused the late filing of an AFR. See *Digital Control Corp.*, 18 FCC Rcd 15076 at n.3 (2003) (AFR treated as timely where mailing of bureau's FOIA response was delayed); *Gordon R. Lyford*, 17 FCC Rcd 19902 at n.3 (2002) (AFR received over two months after mailing treated as timely due to anthrax threats delaying mail).

<sup>11</sup> We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Mr. Marchese's right to pursue litigation. Mr. Marchese may contact OGIS in any of the following ways: Office of Government Information Services, National Archives and Records Administration, Room 2510, 8601 Adelphi Road, College Park, MD 20740-6001; by e-mail at [ogis@nara.gov](mailto:ogis@nara.gov); by telephone at 301-837-1996 or toll-free at 1-877-684-6448; or by facsimile at 301-837-0348.