

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

In the Matter of)	
)	
Peter J. Pratt, StimulatingBroadband.com)	FOIA Control No. 2011-084
)	
On Request for Inspection of Records)	

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 2011

Released: September 27, 2011

By the Commission:

I. INTRODUCTION

1. The Commission has before it an application for review (AFR) filed by Peter J. Pratt seeking review of a decision of the Office of General Counsel (OGC) denying his Freedom of Information Act (FOIA) request.¹ Pratt's request sought a draft of the Commission's Open Internet order that FCC staff circulated to the Commissioners on either Tuesday, November 30, 2010, or Wednesday, December 1, 2010. We agree with OGC that the draft order is quintessentially the type of deliberative document properly withheld under FOIA Exemption 5.² We therefore deny the application for review.

II. BACKGROUND

2. On December 3, 2010, Pratt filed a FOIA request seeking the draft of the Open Internet decision then on circulation to the Commission.³ He noted the Chairman's discussion of the proposal on circulation in a speech, and the strong public interest in the subject of the then-pending proposal.⁴ On January 4, 2011, twelve days after the Commission released the *Open Internet Order*,⁵ OGC denied Pratt's FOIA request based on the deliberative process privilege of FOIA Exemption 5.⁶

3. On review, Pratt makes several arguments. He contends that FOIA Exemption 5 is not a perpetual bar to the release of the circulated draft and that any deliberative process privilege the agency may have had for the initial draft expired on December 21, 2010, when the Commission adopted the rulemaking order.⁷ He asserts the draft initially circulated to the Commissioners is not privileged

¹ Letter from Peter J. Pratt, StimulatingBroadband.com to FOIA Officer, FCC (Feb. 3, 2011) (AFR).

² 5 U.S.C. § 552(b)(5).

³ FOIA Request of Peter J. Pratt, StimulatingBroadband.com (Dec. 3, 2010) (Request).

⁴ *Id.*

⁵ *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010) (*Open Internet Order*).

⁶ Letter from Joel Kaufman, Associate General Counsel and Chief, Administrative Law Division, Office of General Counsel to Peter J. Pratt, StimulatingBroadband.com (Jan. 4, 2011) (Decision).

⁷ AFR at 2. Pratt sought the first circulated draft only, not the various iterations of changes to the original draft while the item was on circulation. *Id.* at 1.

because the Commission did not deliberate prior to its circulation.⁸ He also asserts that withholding of the initial draft violates the policy of transparency embodied in President Obama's Memorandum on the Freedom of Information Act.⁹ In addition, Pratt claims that "favored media outlets" were aware of the content of portions of the draft and the Commission would be acting in an "invidious manner" if it continues to withhold the draft.¹⁰ Finally, Pratt asserts that the process that resulted in the *Open Internet Order* could not have been deliberative given that the final version of the decision was circulated shortly before it was voted at the December 10, 2010 meeting.¹¹ On this basis, Pratt contends that all drafts, including the initially circulated draft, are ineligible for Exemption 5 protection.

III. DISCUSSION

4. Discussion: We affirm OGC's decision to withhold the first draft of the *Open Internet Order* circulated on December 1, 2010.¹² The scope of FOIA Exemption 5 is well established. As OGC stated, Exemption 5:

permits the withholding of "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." Incorporated within FOIA Exemption 5 is the deliberative process privilege, which is meant to prevent injury to the quality of agency decisions. This privilege may be invoked for reasons that include encouraging open, frank discussions on matters of policy between subordinates and superiors; protecting against premature disclosure of proposed policies before they are actually adopted; and preventing the public confusion that might result from an agency's release of reasons and rationales that were not in fact ultimately the grounds for an agency's action.¹³

5. We agree with OGC's explanation of why the circulated draft should be withheld under FOIA Exemption 5:

The FCC Commissioners rely upon the expert advice of the agency's attorneys, economists, and other career staff to supplement their own review of the law and the public record. Draft Commission decisions go through many revisions and layers of review before they become final. It is a collaborative process during which the Commissioners, their personal advisors, and other agency staff converse frankly about the general concepts in a draft decision as well as the details of its language. To release draft decisions would impinge upon the open, frank discussions of policy needed for the Commission to do its work and create confusion in the minds of the public by suggesting rationales

⁸ AFR at 3.

⁹ AFR at 2, referring to *Freedom of Information Act*, 74 Fed. Reg. 4683 (Jan. 21, 2009) (*FOIA Memorandum*).

¹⁰ AFR at 2.

¹¹ Pratt relies, without citation, on the supposedly "widely quoted" remarks of former Commissioner Baker, who dissented from the *Open Internet Order*, that she had insufficient time to deliberate on the final draft before the vote.

¹² Decision, *supra*.

¹³ *Id.* at 1, citing *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975), and *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

that were not adopted by the Commission. Draft decisions are therefore withheld under FOIA Exemption 5. This practice is consistent with longstanding Commission policy The Commission's final decisions are the only authoritative statements of agency position, and they are available to the public.¹⁴

6. Pratt's arguments do not cast doubt on OGC's reasoning. First, the underlying objective of the deliberative process exemption, protecting the quality of agency decision-making, remains relevant even after the Commission's December 21, 2010 vote to adopt the *Open Internet Order*.¹⁵ Withholding the initial draft protects the integrity of the decision-making process by ensuring that the Commissioners are judged by what they decided, not by the deliberative path they followed in the course of making up their minds.¹⁶ Further, withholding the draft decision even after a final decision is made is necessary to ensure that Commission staff will continue to feel free to give the Commissioners their best and most candid advice, without fear that their personal views will later face public scrutiny. Because Exemption 5 protects staff advice, Pratt's argument that the deliberative process exemption does not apply to the first draft received by the Commissioners is erroneous and all drafts circulated to the Commissioners qualify as pre-decisional, deliberative material eligible to be withheld pursuant to the deliberative process exemption regardless of how long a particular draft remains on circulation.¹⁷

7. OGC's decision is not, as Pratt claims, contrary to President Obama's *FOIA Memorandum*.¹⁸ While the *FOIA Memorandum* provides that all agencies "should adopt a presumption in favor of disclosure," it expressly "does not create any right or benefit, substantive or procedural, enforceable at law or equity by any party."¹⁹ OGC considered discretionary release of the draft,²⁰ and determined that discretionary release would cause the harms described above. The *FOIA Memorandum* requires no more.

8. Finally, Pratt's suggestion that Commission staff leaked portions of the draft to selected media outlets is entirely unsupported. The record of this proceeding contains no evidence indicating that such release of pre-decisional drafts of the *Open Internet Order* actually occurred, much less ones

¹⁴ Decision at 1-2, citing *John Dunbar, The Associate Press*, 23 FCC Rcd 9850 (2008); *Bill McConnell*, 16 FCC Rcd 17412 (2001); *Norcom Communications, Inc.*, 14 FCC Rcd 8055 (1999); and *Arthur Firstenberg*, FOIA Control No. 98-67, FCC 98-287 (Nov. 4, 1998).

¹⁵ See, e.g., *Coastal States*, 617 F.2d at 866 (a record does not lose Exemption 5 protection once the deliberative process is at an end unless the materials have been expressly adopted or incorporated into a decision).

¹⁶ *Jordan v. U.S. Dep't of Justice*, 591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc); *The Shinnecock Indian Nation v. Kempthorne*, 652 F.Supp. 2d 345, 360 (D. N.Y. 2009).

¹⁷ Given that Pratt's FOIA request "is limited to the first draft, and is not intended as a request for other drafts or iterations," AFR at 1, he fails to explain how the opportunity that individual Commissioners ultimately had to deliberate over the final draft would affect the eligibility of the first draft (or any previously circulated version) for the deliberative process exemption.

¹⁸ 74 Fed. Reg. 4683 ("All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open government.").

¹⁹ *Id.* at 4683; see *Yonemoto v. Dep't of Veteran's Affairs*, Civ. No. 06-00378 BMK (D. Haw. 2009), at *8 (2009 WL 5033597) (no enforceable rights created by the *FOIA Memorandum*); see also *Kahn v. Federal Motor Carrier Safety Administration*, 648 F.Supp.2d 31, 37-38 (D.D.C. 2009) (rejecting the argument that Obama's FOIA policy alters the application of a federal statute).

²⁰ Decision at 2.

authorized by the Commission. Pratt's bare allegations thus cannot serve to overcome the deliberative process privilege.²¹

9. IT IS ORDERED that the application for review filed on February 3, 2011, by Peter J. Pratt IS DENIED. Pratt may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).²²

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²¹ *Maximum Service Television, Inc.*, 25 FCC Rcd 11098, 11102 n.43 (2010) (FOIA proceeding is not the appropriate venue to raise issue of misconduct); *Warren Havens*, 24 FCC Rcd 12308, 12312 & n.37 (2009) ("Havens's unsubstantiated allegations of misconduct or mistreatment by Commission staff provide no basis to avoid application of Exemption 5.").

²² 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 Pratt's right to pursue litigation. Pratt 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
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448