

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

|                                      |   |                           |
|--------------------------------------|---|---------------------------|
| In the Matter of                     | ) |                           |
|                                      | ) |                           |
| ELECTRONIC FRONTIER                  | ) | FOIA Control No. 2010-485 |
| FOUNDATION                           | ) |                           |
|                                      | ) |                           |
| On Request for Inspection of Records | ) |                           |
|                                      | ) |                           |
| On Request for Expedited Processing  | ) |                           |

**MEMORANDUM OPINION AND ORDER**

**Adopted: September 29, 2011**

**Released: September 30, 2011**

By the Commission:

**I. INTRODUCTION**

1. By this Memorandum Opinion and Order, we deny an Application for Review (AFR) filed by Electronic Frontier Foundation (EFF)<sup>1</sup> seeking review of a decision of the Office of General Counsel (OGC)<sup>2</sup> that granted in part and denied in part its Freedom of Information Act (FOIA) request<sup>3</sup> for records reflecting discussions between FCC officials and representatives of telecommunications, cable, and Internet companies and organizations relating to potential broadband Internet legislation and regulation.<sup>4</sup> We find that OGC correctly determined that certain handwritten personal notes do not constitute agency records; that the agency records not disclosed are deliberative materials that fall within FOIA Exemption 5; and that there are no segregable portions of those records that could be released. We also find that EFF's AFR regarding expedited processing of the Request is moot.<sup>5</sup>

**II. BACKGROUND**

2. EFF's Request seeks all records from June 17, 2010 to July 6 or 7, 2010<sup>6</sup> that reflect discussions between FCC officials and representatives of telecommunications, cable, and Internet companies and organizations concerning (1) potential legislation on broadband Internet regulation, including but not limited to potential amendments to the Communications Act; (2) potential FCC reclassification of broadband Internet connectivity services as "telecommunications services" subject to regulation under

<sup>1</sup> See Review of Freedom of Information Action, filed September 15, 2010, by EFF (AFR).

<sup>2</sup> See Letter from Ann Bushmiller, Deputy Associate General Counsel to EFF (Aug. 18, 2010) (Decision).

<sup>3</sup> See E-mail from Marcia Hoffman – EFF to FOIA@fcc.gov (July 6, 2010) (Request).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> See E-mail from Marcia Hoffman – EFF to FOIA@fcc.gov (July 26, 2010) (Expedited Processing AFR); Letter from Joel Kaufman, Associate General Counsel to EFF (July 20, 2010) (Expedited Processing Decision).

<sup>6</sup> The Request, dated July 6, 2010, seeks all responsive records from June 17, 2010 "to the present." Request at 2. The Request was received on July 7, 2010 and the search was conducted for records dated from June 17, 2010 through July 7, 2010. Decision at 1. See 47 C.F.R. § 0.461(f)(6).

Title II of the Communications Act; and (3) the application of ex parte rules to any meetings between FCC officials and representatives of telecommunications, cable, and Internet companies and organizations.<sup>7</sup> EFF's Request included a request for expedited processing, arguing that there was an "urgency to inform the public about an actual or alleged Federal Government activity" and that the request is "made by a person primarily engaged in disseminating information."<sup>8</sup>

3. OGC denied the request for expedited processing on the grounds that the request failed to explain how there was an urgent need for the release of the requested records.<sup>9</sup> A search of the files of the FCC officials involved in the discussions referenced in the Request identified: (1) handwritten personal notes of FCC staff; (2) emails among FCC staff; and (3) various draft documents. OGC found that the handwritten notes of FCC staff were intended solely for the personal use of the staff members who created them and thus did not constitute "agency records" subject to the FOIA.<sup>10</sup> OGC determined that emails among FCC staff, portions of email chains that were communications among FCC staff, and draft documents concerning the subjects of EFF's Request are exempt from disclosure pursuant to the deliberative process privilege of FOIA Exemption 5.<sup>11</sup> As required by the FOIA, OGC reviewed the records subject to Exemption 5 to determine if segregable portions of those records could be released and determined that the release of a number of the emails (or portions thereof) would not harm any of the interests protected by FOIA Exemption 5.<sup>12</sup> Those records and others not falling into any of the three categories set out above were produced.<sup>13</sup>

### III. APPLICATIONS FOR REVIEW

4. EFF filed two AFRs. The first sought review of the denial of its request for expedited processing because, EFF argued, "expedited processing requests should be granted when documents are relevant to the debate on imminent or pending legislation."<sup>14</sup> In the second AFR, EFF questions whether handwritten notes were properly classified as non-agency records. EFF contends that even if documents are used solely for personal convenience, they may nonetheless be considered agency records subject to disclosure pursuant to the FOIA if they show "indicia of agency record-keeping."<sup>15</sup> EFF also states that it believes that OGC is applying Exemption 5 "too broadly" regarding predecisional materials. EFF argues that the Commission bears the burden of establishing that agency records are predecisional or deliberative,<sup>16</sup> and that each document should be reviewed to determine whether given its age, content and character it can be released without harming an interest protected by FOIA Exemption 5.<sup>17</sup> Finally, EFF questions whether

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<sup>7</sup> Request at 2.

<sup>8</sup> Request at 2 (citing 47 C.F.R. § 0.461(h)(3)(ii)).

<sup>9</sup> Expedited Processing Decision at 1.

<sup>10</sup> Decision at 1-2.

<sup>11</sup> *Id.* at 2-3.

<sup>12</sup> *Id.* at 2.

<sup>13</sup> Pursuant to FOIA Exemption 6, 5 U.S.C. § 552(b)(6), OGC redacted personal email addresses and telephone numbers from agency records (emails and *ex parte* letters) produced pursuant to the Request. Decision at 2.

<sup>14</sup> Expedited Processing AFR at 2.

<sup>15</sup> AFR at 2 (citing *Washington Post v. U.S. Dep't of State*, 632 F. Supp. 607, 616 (D.D.C. 1986)).

<sup>16</sup> AFR at 2 (citing *Arthur Anderson & Co. v. IRS*, 679 F.2d 254, 258 (D.C. Cir. 1982)).

<sup>17</sup> *Id.* at 3 (citing *OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines: Creating a New Era of Open Government* (Apr. 17, 2009)).

one draft document was properly withheld under FOIA Exemption 5, pointing to disclosed records that reference a document that “appears to have been shared” with a non-agency employee.<sup>18</sup>

#### IV. DISCUSSION

6. None of EFF’s arguments warrant a result different than that reached by OGC. We disagree with EFF’s contention that the handwritten notes located during the FOIA search are agency records subject to disclosure. The determination whether records are agency records subject to disclosure under the FOIA or are personal records physically maintained by agency employees but not subject to disclosure is to be based on “the totality of the circumstances surrounding the creation, maintenance and use of the [record].”<sup>19</sup> This is the test OGC used when it determined that the records were created by staff members for their personal use, were not distributed to other staff and were subject to disposal at the creator’s discretion.<sup>20</sup> EFF does not take issue with any of these factual determinations. OGC did not, as EFF suggests, find that the handwritten records were personal records because they are handwritten.

7. EFF argues that in some circumstances handwritten notes “may constitute agency records if they show ‘indicia of agency record-keeping.’”<sup>21</sup> The argument misses the mark in this instance because the handwritten notes at issue here bear no indicia of agency record-keeping. The documents in the *Washington Post* case, cited by EFF, were compiled by Department of State employees as part of daily work routine and placed into agency files accessible to members of the Secretary of State’s staff.<sup>22</sup> In fact, the court contrasted the records at issue in that case with “personal papers created solely for the personal use and convenience of the author [and which] are not encompassed by the FOIA.”<sup>23</sup> The handwritten notes EFF seeks fall in the latter category and we affirm OGC’s determination that those notes do not constitute agency records and therefore are not subject to disclosure under the FOIA.<sup>24</sup>

8. EFF contends that in determining which records were to be released in response to the Request the FCC applied FOIA Exemption 5 “too broadly”<sup>25</sup> to predecisional materials. We disagree. Exemption 5 encompasses a deliberative process privilege intended to “prevent injury to the quality of agency decisions.”<sup>26</sup> To fall within the scope of this privilege the agency records must meet two criteria – they

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<sup>18</sup> AFR at 2.

<sup>19</sup> *Bureau of Nat’l Affairs v. U.S. Dep’t of Justice*, 742 F.2d 1484, 1492-93 (D.C. Cir. 1984); see also *Consumer Fed’n of Am.*, 455 F.3d 283, 287-88 (D.C. Cir. 2006)

<sup>20</sup> Decision at 1.

<sup>21</sup> AFR at 2 (quoting *Washington Post*, 632 F. Supp. at 616).

<sup>22</sup> *Id.* at 613.

<sup>23</sup> *Id.* at 616.

<sup>24</sup> See *Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995) (“Even [agency] staff notes containing substantive information ordinarily need not be disclosed unless they are intended for distribution through normal agency channels or can be said to be within the ‘control or dominion’ of an agency”) (citing *American Fed’n of Gov’t Employees, Local 2782 v. U.S. Dep’t of Commerce*, 632 F.Supp. 1272, 1277 (D.D.C. 1986), *aff’d*, 907 F.2d 203 (D.C. Cir. 1990)); *Bloomberg L.P. v. SEC*, 357 F. Supp. 2d 156, 167 (D.D.C. 2004) (meeting notes created by SEC Chairman’s Chief of Staff were personal records not subject to disclosure under the FOIA).

<sup>25</sup> AFR at 3.

<sup>26</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975); see also *Judicial Watch, Inc. v. Dep’t of Energy*, 412 F.3d 125, 129 (D.C. Cir. 2005) (“[T]he quality of administrative decision-making would be seriously undermined if agencies were forced to ‘operate in a fishbowl’ because the full and frank exchange of ideas on legal or policy matters would be impossible”) (quoting *Tax Analysts v. IRS*, 117 F.3d 607, 617 (D.C. Cir. 1997)).

must be both predecisional and deliberative.<sup>27</sup> To be predecisional the record in question must have been generated before the adoption of an agency policy, and to be deliberative the record must “reflect the give-and-take of the consultative process.”<sup>28</sup> We have reviewed the records withheld by OGC under Exemption 5 and find that they were properly withheld. The records are predecisional because they were created in connection with staff discussions concerning the then-pending open Internet proceeding.<sup>29</sup> The records are deliberative in that they reflect ongoing staff discussions within the agency, which are the core of the consultative process. Finally, EFF points out that the deliberative process privilege will not apply if the documents in question have been adopted as the Commission position on an issue or used by the Commission in its dealings with the public.<sup>30</sup> Here, however, the withheld documents were not used in this fashion.

9. EFF also argues that one of the documents withheld under Exemption 5 should have been disclosed because it appears to have been shared with a non-agency employee not acting in a formal role on behalf of the agency and therefore ceased to be an intra-agency communication to which Exemption 5 is applicable.<sup>31</sup> The document at issue was sent by an agency employee to his FCC email account from the personal email account of his spouse to which he has access on a home computer, but the document was never released to his spouse. In contrast, the cases cited by EFF involve intentional releases by a federal agency to attorneys engaged in settlement negotiations with the agency<sup>32</sup> and to non-agency personnel attending a symposium.<sup>33</sup> In both of those cases the material was intentionally released by the agency to the recipient for use by the recipient in connection with agency business. Here, the spouse of the FCC employee was not a participant in the proceeding and, even if she theoretically could have accessed it, she would have had no reason to read it. In any event, inadvertent disclosure of material by an agency does not result in the waiver of a FOIA exemption.<sup>34</sup> Thus, even if the state of facts set forth above was construed as a disclosure to non-agency personnel, the disclosure under these circumstances was inadvertent and that Exemption 5 remains applicable.

10. As did OGC, we have examined the agency records at issue here to determine whether any additional portions could be segregated and released, or whether any of the records should be released in the exercise of our discretion under the FOIA.<sup>35</sup> We can discern no additional non-exempt material that can be reasonably segregated from the withheld records, beyond the material released by OGC in

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<sup>27</sup> See *Judicial Watch*, 412 F.3d at 129; *Senate of the Commonwealth of Puerto Rico v. U.S. Dep’t of Justice*, 823 F.2d 574, 585 (D.C. Cir. 1987).

<sup>28</sup> *Senate of the Commonwealth of Puerto Rico*, 823 F.2d at 585; see also *Coastal States Gas Corp. v. Dep’t of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980).

<sup>29</sup> See *Preserving the Open Internet et al.*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064 (2009).

<sup>30</sup> AFR at 2 (citing *Coastal States Gas Corp.*, 617 F.2d at 866).

<sup>31</sup> AFR at 2 (citing *Cnty of Madison v. U. S. Dep’t of Justice*, 641 F.2d 1036, 1040-41 (1st Cir. 1981)); *Leadership Conference on Civil Rights v. Gonzales*, 404 F. Supp. 2d 246, 255 (D.D.C. 2005).

<sup>32</sup> *Cnty of Madison*, 641 F.2d at 1040-41.

<sup>33</sup> *Leadership Conference*, 404 F.Supp.2d at 255.

<sup>34</sup> *Garside v. Webster*, 733 F. Supp.1142, 1147 (S.D. Ohio 1989); *Anderson v. U.S. Dep’t of Treasury*, No. 98-1112, 1999 WL 282784 at \*4 (W.D.Tenn. Mar. 24, 1999); see also, *Billington v. U.S. Dep’t of Justice*, 69 F.Supp. 2d 128, 137 (D.D.C. 1999); *Scott v. PPG Indus., Inc.*, 142 F.R.D. 291, 294 (N.D.W.Va. 1992).

<sup>35</sup> See *President’s Memorandum for the Heads of Executive Departments and Agencies, Freedom of Information Act*, 74 Fed.Reg. 4683 (2009); *Attorney General’s Memorandum for Heads of Executive Departments and Agencies Concerning the Freedom of Information Act* (Mar. 19, 2009) (available at <http://www.usdoj.gov/ag/foia-memo-march2009.pdf>).

response to the Request.<sup>36</sup> Pursuant to the discretion which the FOIA affords the Commission we have determined that the email header blocks (i.e. the “from,” “to” and “subject” lines) from exempt email records should be released to EFF. We exercise our discretion to release the email header blocks because withholding them is not necessary to “prevent injury to the quality of agency decisions.”<sup>37</sup> Release of additional exempt records (beyond the email address headers) would likely inhibit the full and frank exchange of ideas essential to robust agency decision making.<sup>38</sup>

11. Because all non-exempt records responsive to EFF’s Request have already been produced, EFF’s appeal of the denial of expedited processing of its Request is moot.<sup>39</sup>

## V. ORDERING CLAUSE

12. IT IS ORDERED that EFF’s Application for Review of Denial of Expedited Processing IS DISMISSED AS MOOT AND EFF’S Application for Review is GRANTED in part and DENIED in part. EFF may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).<sup>40</sup>

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

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>36</sup> See *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 260 (D.C. Cir. 1977).

<sup>37</sup> *NLRB v. Sears, Roebuck & Co.*, 421 U.S. at 151.

<sup>38</sup> See *Tax Analysts v. IRS*, 117 F.3d at 617.

<sup>39</sup> See *Landmark Legal Found. v. EPA*, 272 F.Supp. 2d 59, 62-63 (D.D.C. 2003); *Hornbostel v. U.S. Dep’t of Interior*, 305 F. Supp. 2d 21, 28 (D.D.C. 2004).

<sup>40</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 EFF’s right to pursue litigation. EFF 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.